STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

RVA TRUCKING, INC.

DECISION

for Redetermination of a Deficiency or for Refund of Franchise Tax on Transportation and Transmission Corporations under Article 9 of the Tax Law for the Years 1977 through 1982.

Petitioner, RVA Trucking, Inc., 575 Lyell Avenue, Rochester, New York 14606, filed petitions for redetermination of a deficiency or for refund of franchise tax on transportation and transmission corporations under Article 9 of the Tax Law for the years 1977 through 1982 (File Nos. 32892 and 52584).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on January 29, 1986 at 1:15 P.M. Petitioner appeared by Richard D. Morris, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner is principally engaged in a transportation or transmission business and therefore subject to tax under Article 9 of the Tax Law.

FINDINGS OF FACT

1. On March 11, 1980, petitioner, RVA Trucking, Inc., filed a claim for refund of corporation tax paid for the fiscal years ended March 31, 1977, March 31, 1978 and March 31, 1979. Petitioner had filed New York State franchise tax reports under Article 9 of the Tax Law for the calendar years 1977 and 1978. In its claim for refund, petitioner took the position that it should properly

have filed its franchise tax reports under Article 9-A of the Tax Law for the 1977-1978 period. The claimed refund was based upon the difference between petitioner's franchise tax liability under Article 9 and petitioner's proposed liability under Article 9-A of the Tax Law. Petitioner also requested reclassification as a corporation under Article 9-A.

2. By letter dated January 23, 1981, the Audit Division denied petitioner's refund claim, having determined that petitioner was "properly classified under Article 9." On March 4, 1981, petitioner filed a petition dated February 27, 1981 protesting the denial of its refund claim.

3. Notwithstanding the Audit Division's denial of its claim, petitioner filed corporation franchise tax reports under Article 9-A of the Tax Law for its fiscal years ended March 31, 1980, March 31, 1981 and March 31, 1982.

4. On June 1, 1983, the Audit Division issued six notices of deficiency pursuant to Article 9 of the Tax Law against petitioner, RVA Trucking, Inc. Three notices were issued under section 183 of the Tax Law for the years begun January 1, 1980 through January 1, 1982 and three were issued under section 184 of the Tax Law for the years ended December 31, 1979 through December 31, 1981 in amounts as follows:

Section 183

Period Begun	Tax	Interest	Total Due
1/1/80	$396.00	$163.79	$559.79
1/1/81	275.00	90.37	365.37
1/1/82	281.00	54.29	335.29

Section 184

Period Ended	Tax	Interest	Total Due
12/31/79	$9,909.40	$4,098.53	$14,007.93
12/31/80	9,507.00	3,124.00	12,631.00
12/31/81	8,601.00	1,661.71	10,262.71

5. On June 1, 1983, the Audit Division also issued to petitioner six statements of audit adjustment with respect to the notices of deficiency set forth above. Each of the statements of audit adjustment gave the following explanation for the deficiencies:

> "Estimated deficiency for failure to file the proper report under Section 183 [184] of the Tax Law."

6. Petitioner subsequently filed a petition, dated July 13, 1983, to protest the issuance of said notices of deficiency and this proceeding ensued to determine petitioner's rights both with respect to the notices of deficiency and with respect to petitioner's aforementioned refund claim.

7. Petitioner was incorporated in New York in 1957. During the periods at issue, petitioner was primarily engaged in subcontracting work on road construction sites and other major construction sites providing services in connection with excavation work at such sites. Approximately 85 percent of petitioner's gross revenues were derived from such subcontracting work during the periods at issue. Typically, petitioner loaded dirt, rock or other material onto its trucks and hauled this material to a designated location as directed by the general contractor. Often the material was hauled from one area of the construction site to another location on the same site where it was dumped. On certain jobs, material was hauled to an off-site location and dumped, the objecti generally being to deposit the material in the nearest low-lying area. On other jobs, petitioner loaded material such as asphalt or gravel onto its trucks at an off-site location and hauled it to the site where it was dumped.

8. During the periods at issue, petitioner owned and operated approximately 20 dump trucks for use in its work. Petitioner also owned and operated front-end

loaders which were used to load material onto the trucks. Petitioner's employees operated these vehicles at all times.

9. The remainder (approximately 15 percent) of petitioner's revenues were derived from subcontracting work with smaller contractors and snow plowing services. In its work with smaller contractors, petitioner provided essentially the same services as described in Findings of Fact "7" and "8".

10. Petitioner took the position that it was primarily an earth-moving contractor providing essentially the same services as could be provided by earth-moving equipment such as a bulldozer or pan, and that it was therefore primarily involved in construction work rather than transportation. Petitioner argued that, as a result, it was not a transportation or transmission corporation within the meaning and intent of sections *183* and *184* of the Tax Law.

CONCLUSIONS OF LAW

A. That for the privilege of exercising its corporate franchise, of doing business, of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state, every domestic or foreign corporation (except those corporations subject to tax under sections **183** through 186 and such other corporations as are specified in section *209.4)* must pay an annual franchise tax to this state (Tax Law § 209.1). Sections *183* and *184* of Article 9 impose a franchise tax and an additional franchise tax, respectively, upon corporations and associations formed for or principally engaged in the conduct of aviation, railroad, canal, steamboat, ferry, express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car business or formed for or principally engaged in the conduct of two or more of

such businesses, and other domestic corporations or associations principally engaged in the conduct of a transportation or transmission business.

B. That whether a 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 (see Matter of McAllister Bros., Inc. v. Bates, 272 App. Div. 511 [3rd Dept. 19471).

C. That inasmuch as the relevant statutes set forth no definition of transportation for purposes of Articles 9 or 9-A, the nature of petitioner's principal business activities must be determined by deciding whether such activities constituted transportation within the plain and ordinary sense of that word (see Matter of Newton Creek Towing Co. v. Law, 205 App. Div. 209, 211 [3rd Dept. 19231).

D. That "[i]n its ordinary sense, 'transportation' comprehends any real carrying about or from one place to another. It implies the taking up of persons or property at some point and putting them down at another, and signifies at least a movement of some sort between termini or places." 87 C.J.S. Transportation.

E. That it is undisputed that petitioner's principal business activity consisted of loading, hauling and dumping material in connection with major construction work. Petitioner was therefore principally engaged in the conduct of a transportation business within the ordinary meaning of that term and within the meaning of Article 9 of the Tax Law. That petitioner often "confines its transporting to a limited area is of no consequence since it is not necessary that 'transportation' be between two definite points and, if there is forward movement, distance is not important (citations omitted)." Matter of Joseph A. Pitts Trucking, Inc., State Tax Commission, July 18, 1984. Further, that

petitioner's business primarily serves the construction industry is likewise of no consequence for the statute draws no distinctions whatever among transportatio corporations serving particular industries.

F. That the petitions of RVA Trucking, Inc., dated February 27, 1981 and July 13, 1983, respectively, are denied and the denial of refund issued on January 23, 1981 and the notices of deficiency issued on June 1, 1983 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 12 1986

PRESIDENT

Francis R Koenig

COMMISSIONER

COMMISSIONER