

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

IMPERIAL AIR FREIGHT SERVICE, INC.

DECISION

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9 of the Tax Law for the Years 1979
through 1982.

Petitioner, Imperial Air Freight Service, Inc., 474 Wilson Avenue, Newark, New Jersey 07105, 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 1979 through 1982 (File No. 49129).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 28, 1986 at 1:30 P.M., with all briefs to be submitted by April 18, 1986. Petitioner appeared by Greenberg, Margolis, Ziegler, Schwartz, Dratch & Fishman, P.C. (Steven N. Dratch, Esq. and Thomas W. Ackermann, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether section 1113 of the Federal Aviation Act, which prohibits State taxes **on** the sale of air transportation or on the gross receipts derived therefrom, prohibits the imposition, under section 184.1 of the Tax Law, of tax on petitioner's gross receipts derived from the transportation of air freight.

11. Whether multiplying petitioner's gross receipts by its business allocation percentage reported on form CT-3 for the applicable year fairly and equitably reflects petitioner's gross receipts derived from New York.

FINDINGS OF FACT

1. Petitioner, Imperial Air Freight Service, Inc., filed New York corporation franchise tax reports as a business corporation, under Article 9-A of the Tax Law for the fiscal years ended June 30, 1980, June 30, 1981 and June 30, 1982 and paid tax based on its allocated net income for each year.

2. By letter dated June 17, 1982, the Audit Division advised petitioner that it was subject to tax as a transportation corporation, under sections 183 and 184 of Article 9 of the Tax Law. Copies of form CT-183/184 for 1979, 1980 and 1981 and instructions were enclosed. (Article 9 returns are filed on a calendar year basis.) Follow-up requests were made on October 26, 1982, February 1, 1983 and June 10, 1983.

3. On November 30, 1983, the Audit Division issued the following notices of deficiency to petitioner for taxes due under section 184 of Article 9 of the Tax Law:

<u>Period Ended</u>	<u>Tax Deficiency</u>
12/31/79	\$27,564.83
12/31/80	53,998.37
12/31/81	53,721.56
12/31/82	54,190.92

The Statement of Audit Adjustment which accompanied the notices of deficiency stated that the deficiencies had been estimated as the "reports requested in our correspondence dated 2/1/83 and 6/10/83 were not received." The Audit Division determined petitioner's gross receipts within New York for purposes of section 184 by multiplying petitioner's gross earnings by the business allocation

percentage reported for each of the respective years for which petitioner had filed as a business corporation under Article 9-A.

4. Also on November 30, 1983, the Audit Division issued the following notices of deficiency to petitioner for taxes due under section 183 of Article 9 of the Tax Law:

<u>Period Begun</u>	<u>Tax Deficiency</u>
1/1/80	\$1,665.09
1/1/81	2,621.64
1/1/82	3,934.08
1/1/83	5,153.00

These deficiencies were also stated to have been estimated for the same reasons that the section 184 deficiencies had been estimated, i.e., that the requested reports had not been received by the Audit Division.

5. Petitioner is an air freight forwarder and has had its headquarters in New Jersey for all of its 28 years in business.

6. Petitioner operates in the following manner: Petitioner is called by a customer to pick up freight and deliver it by truck and air to a specified destination. A truck dispatched by petitioner, either its **own** vehicle or that of an outside trucking firm, picks up the freight. The driver receives from the customer a standard airway bill (non-negotiable) completed by the customer on one of petitioner's forms. One copy serves as a receipt for the customer. The truck brings the freight to petitioner's terminal in Newark, New Jersey, to be sorted and consolidated with other freight headed for the same area. The freight is then trucked to an airport (usually Newark Airport, see Finding of Fact "8", infra) where it is delivered to an air carrier for air transport to the delivery area. After the flight, a truck designated by petitioner picks up the freight and takes it to petitioner's (or petitioner's agent's) terminal and

are then delivered to their various destinations. Pick-up and delivery generally take place within a 24-hour time period.

7. Petitioner contracts with, and is billed directly by, the air carrier. Petitioner also pays 5 percent federal tax to the air carrier.

8. Measured by weight, approximately 90 percent of petitioner's freight from the New York metropolitan area is shipped domestically. Most of the domestic freight is shipped through Newark Airport, in New Jersey, and the balance through John F. Kennedy International ("JFK") and LaGuardia Airports in New York. Petitioner's international freight, which constitutes 10 percent of petitioner's shipments by weight and 15 percent by dollar volume, is shipped, for the most part, through JFK.

9. Prior to deregulation pursuant to the Airline Deregulation Act of 1978, petitioner was required to have its rates and the rules and regulations under which it operated published in tariffs filed with the Civil Aeronautics Board ("**CAB**") and to adhere to those tariffs. After deregulation, the CAB granted petitioner and other similar carriers an exemption from the duty of filing tariffs. Petitioner, however, still keeps all tariffs up to date.

10. Petitioner ordinarily acts as principal in the solicitation of air freight from members of the shipping public and in routing such shipments to the final destination by truck and air carrier. In some instances, petitioner acts as agent of an air carrier and receives a commission from the carrier for this service.

11. When petitioner **acts** as principal, it is **a** common carrier and bears the risk of **loss**.

12. Petitioner's charge to its customers is based on three factors: a) pick up and delivery cost, which is covered in one specific tariff; b) cost of air freight, based on another tariff; and c) declared value and insurance.

CONCLUSIONS OF LAW

A. That section 184.1 of the Tax Law provides, in pertinent part, as follows:

"Every corporation...formed for or principally engaged in the conduct of aviation, surface railroad, whether or not operated by steam, subway railroad, elevated 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 every other corporation...formed for or principally engaged in the conduct of a transportation or transmission business not liable to taxation under section one hundred eighty-six or article thirty-two of this chapter, for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or maintaining an office in this state, shall pay a franchise tax which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state..."

B. That section 1113 of the Federal Aviation Act (49 U.S.C. section 1513) provides, in pertinent part, as follows:

"(a) No State...shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom... (b) Nothing in this section shall prohibit a State... from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes and sales or use taxes on the sale of goods or services."

C. That New York courts have held that "subdivision 1 of section 184 of the Tax Law is pre-empted by the subject federal statute (section 1113 of the Federal Aviation Act) insofar as gross earnings are measured by gross receipts from air carriage." Air Transport Association of America v. New York State

Department of Taxation and Finance, 91 A.D.2d 169, 172, 3d Dep't., aff'd. mem. 59 N.Y.2d 917, cert. denied 464 U.S. 960 (1983).

D. That the Supreme Court of the United States has agreed with the New York courts and has held that section 1113 "proscribes the imposition of state and local taxes on gross receipts derived from air transportation or the carriage **of** persons in air commerce." Aloha Airlines, Inc., v. Dir. of Taxation of Hawaii, 464 U.S. 7, 14-15, 104 S. Ct. 291, 295 (1983).

E. That petitioner is a transportation corporation within the meaning of section 184.1 of the Tax Law. As an air freight forwarder, it is not itself engaged in the conduct of aviation. It is clearly engaged in the conduct of a trucking business and its principal activities are essentially those of an express or transfer company. Petitioner's customers ultimately, although apparently indirectly, pay the 5 percent federal tax on the air freight portion of petitioner's charges. Correspondingly, the State is precluded from taxing the air carrier upon which petitioner ships the cargo on a gross receipts basis under section 184.1 of the Tax Law, by virtue of section 1113 of the Federal Aviation Act. This protection, however, does not extend to petitioner. See: Salem Transportation Company of New Jersey, Inc., et al. v. Port Authority of New York and New Jersey, 611 F.Supp. 254 (D.C. N.Y. 1985).

F. That section 184.4 of the Tax Law provides for an allocation of gross earnings for transportation and transmission services. Section 184.4(f) provides, in pertinent part, that with respect to corporations other than aviation corporations, corporations engaged in the operation of vessels, or telephone and telegraph corporations, or where the Tax Commission decides that with respect to a certain corporation the method prescribed does not fairly and equitably reflect gross earnings from all sources within New York, the Tax

Commission shall prescribe methods of allocation or apportionment which fairly and equitably reflect gross earnings from all sources within New York. This section is applicable to taxable years beginning on or after January 1, 1981.

G. That the deficiencies were properly estimated based on the information which was available. However, in view of the fact that section 184.4(f) of the Tax Law was in effect for only the latter half of the periods in issue, and since petitioner requested at the hearing an opportunity to file under Article 9 of the Tax Law in the event of an adverse determination on the first issue herein, the hearing may be reopened, at petitioner's request made within 30 days of the issuance of this decision, to permit petitioner to offer in evidence reports on gross earnings under section 184.


H. That section 183 of Article 9 of the Tax Law provides for an annual tax, payable by transportation and transmission corporations in advance, to be computed on the basis of the corporation's capital stock in New York State. Petitioner has not contested liability under section 183 on any specific basis, but has requested that if it is required to file under Article 9, that the deficiencies under section 183 be recomputed upon such filing. As noted in Conclusion of Law "G", petitioner shall have the opportunity to submit into evidence at the reconvened hearing reports on capital stock under section 183.

I. That except as noted in Conclusions of Law "G" and "H", the petition of Imperial Air Freight Service, Inc. is denied, and the matter is remanded to the Tax Appeals Bureau for proceedings consistent herewith.

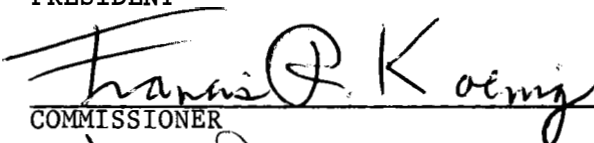
DATED: Albany, New York

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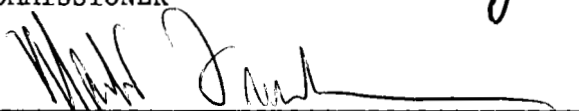
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PRESIDENT



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