

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DI-AL TRUCKING CORP.

DECISION

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9 of the Tax Law for the Period
December 31, 1980 through January 31, 1983.

Petitioner, Di-Al Trucking Corp., 112 East 11th Street, Huntington Station,
New York 11746, filed a petition for redetermination of a deficiency or for
refund of corporation franchise tax under Article 9 of the Tax Law for the
period December 31, 1980 through January 31, 1983 (File No. 50376).

On January 3, 1986, petitioner executed a waiver of hearing and requested
that a decision be rendered by the State Tax Commission based upon the Department
of Taxation and Finance file, together with briefs to be submitted on or before
January 6, 1986. After due consideration, the State Tax Commission hereby
renders the following decision.

ISSUE

Whether, for the period at issue, petitioner **is** taxable as a transportation
corporation under Article 9 of the Tax Law.

FINDINGS OF FACT

1. On November 29, 1983, the Audit Division issued to Di-Al Trucking
Corp. (hereinafter "petitioner") six statements of audit adjustment relating to
deficiencies under Article 9 of the Tax Law. Three of these statements were
issued under section 183 of the Tax Law for the years beginning January 1, 1981
through January 1, 1983 and three were issued for the years beginning January 1, 1983 through January 1, 1984.

for the years ended December 31, 1980 through December 31, 1982. Each Statement of Audit Adjustment stated that the tax deficiency asserted thereon was an estimated deficiency and each further stated, "The estimated deficiency is being issued for the failure to send the tax forms requested in our correspondence of 6/9/82, 1/5/83 and 4/15/83."

2. On February 17, 1984, the Audit Division issued six notices of deficiency corresponding to the aforesaid statements of audit adjustment in the following amounts:

| | <u>Section 183</u> | | |
|-------------------------|--------------------|-----------------|-------------------|
| <u>Period Beginning</u> | <u>Tax</u> | <u>Interest</u> | <u>Amount Due</u> |
| 1/1/81 | \$ 75.00 | \$33.10 | \$108.10 |
| 1/1/82 | 75.00 | 22.35 | 97.35 |
| 1/1/83 | <u>220.00</u> | <u>26.39</u> | <u>246.39</u> |
| Total | \$370.00 | \$81.84 | \$451.84 |

| | <u>Section 184</u> | | |
|----------------------|--------------------|-----------------|-------------------|
| <u>Period Ending</u> | <u>Tax</u> | <u>Interest</u> | <u>Amount Due</u> |
| 12/31/80 | \$ 433.00 | \$191.12 | \$ 624.12 |
| 12/31/81 | 758.00 | 225.95 | 983.95 |
| 12/31/82 | <u>931.00</u> | <u>111.63</u> | <u>1,042.63</u> |
| Total | \$2,122.00 | \$528.70 | \$2,650.70 |

3. On September 13, 1977, petitioner entered into a written contract with Manor Fuel Co., Inc. (hereinafter "Manor"), the initial term of which was to expire on September 15, 1981. This contract was extended to March, 1983. Pursuant to the terms of this contract, petitioner was to deliver fuel oil to Manor's residential customers. Among other things, the following are specific terms of the contract:

a. Petitioner is responsible for erroneous deliveries of fuel oil to Manor's customers and must make good for all costs incurred;

b. Petitioner must turn in daily work forms filled out to Manor's specifications;

c. Petitioner is responsible for collecting C.O.D. deliveries and must turn in all monies each day;

d. Petitioner is responsible for spills and damage to customers' property;

e. Petitioner is responsible for attempting to prime a customer's burner if so requested;

f. Petitioner must provide Manor with proof of specific automobile, general liability and workmen's compensation policies;

g. Manor shall designate the color which petitioner must paint its trucks;

h. Petitioner must be available for work whenever needed Monday through Friday during the term of the contract;

i. Petitioner is responsible for all late deliveries and lost tickets; and

j. Petitioner is to provide the trucks for delivery, but should it become necessary to use Manor's trucks, petitioner's delivery charge of 2.3¢ per gallon shall be reduced by 1¢ per gallon.

4. For the period at issue, petitioner filed corporation franchise tax reports as a general business corporation under Article 9-A of the Tax Law.

5. The Audit Division determined that, for the period at issue, petitioner was engaged in the conduct of a trucking business and was, therefore, subject to tax under sections 183 and 184 of Article 9 of the Tax Law as a transportation corporation.

6. Petitioner contends that it was not in the business of transporting fuel oil in its bulk form from one point to another, but rather was in the service dispensing business of fuel delivery. It **is** petitioner's position that the contractual restrictions, the duties which petitioner performed in dispensing the fuel oil into a customer's tank and the low mileage on its trucks indicate that petitioner was engaged in a fuel oil delivery service rather than a transportation business and should, therefore be subject to tax **as** a general business corporation under Article 9-A of the Tax Law.

CONCLUSIONS OF LAW

A. That section 209.1 of the Tax Law imposes the corporation franchise tax on all domestic corporations, and all foreign corporations doing business, or employing capital, or owning or leasing property, or maintaining an office in New York, unless specifically exempted or subject to other New York franchise taxes.

B. That transportation and transmission companies are subject to an annual franchise tax for the privilege of exercising a corporate franchise or holding property in the state, based upon capital stock in the state during the preceding year (Tax Law §183), and **to** an additional annual franchise tax based upon gross earnings in the state during such year (Tax Law 5184).

C. That the basic and additional franchise taxes imposed on transportation and transmission companies apply to every domestic corporation which is formed for or principally engaged in the conduct of:

"aviation, railroad, canal, steamboat, ferry (except a ferry company operating between any of the boroughs of the city **of** New York under a lease granted by the city), express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car business..." (Tax Law §§ 18.3, 184).

D. That Webster's New International Dictionary, 2nd Edition defines "trucking" as the "process or business of carting goods on trucks" and defines the verb "transport" as "[t]o convey; esp., to carry or convey from one place or station to another, as by boat or rail; to transfer...".

E. That in Matter of McAllister Bros. v. Bates, 272 App. Div. 511, 517 (1947), the Court stated that "...it has been firmly established that classification for franchise tax purposes is to be determined by the nature of its business and that the purposes for which the corporation was organized are immaterial."


F. That petitioner did not manufacture or produce the product which it delivered and made its profits solely from the number of gallons of fuel oil which it transported from Manor to the tanks of Manor's customers. Although petitioner performed services in conjunction with the fuel oil deliveries, contracted to assume responsibility for certain damages and errors and operated under some degree of control by Manor, it is clear that petitioner's function and primary business was to transport goods (in this case, fuel oil) by truck. For the period at issue, petitioner was, therefore, subject to tax as a transportation corporation under sections 183 and 184 of Article 9 of the Tax Law.

G. That the petition of Di-Al Trucking Corp. is denied and the notices of deficiency issued on February 17, 1984 are sustained.

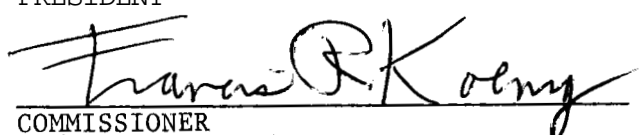
DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1986



PRESIDENT



COMMISSIONER

W N A M