

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
HYGRADE FURNITURE TRANSPORT, INC.	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9 of the Tax Law for the Years Ended	:	
December 31, 1979 through December 31, 1981	:	
and the Years Beginning January 1, 1980 through	:	
January 1, 1982.	:	

Petitioner, Hygrade Furniture Transport, Inc., 225 Varick Street, New York, New York 10014, 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 ended December 31, 1979 through December 31, 1981 and the years beginning January 1, 1980 through January 1, 1982 (File No. 51955).

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 December 5, 1985 at 1:15 P.M., with all briefs to be submitted by January 20, 1986. Petitioner appeared by Adler & Topal, P.C. (Jack Topal, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

- I. Whether petitioner's activities as a freight forwarder subject it to tax as a transportation corporation under sections 183 and 184 of the Tax Law.
- II. Whether petitioner may allocate the income it receives from its customers between itself and the independent truckers it hires to provide

FINDINGS OF FACT

1. On November 10, 1983, the Audit Division issued six notices of **deficiency** pursuant to Article 9 of the Tax Law against petitioner, Hygrade Furniture Transport, Inc. Three notices were issued under section 183 of the Tax Law for the years ended December 31, 1979 through December 31, 1981 and three were issued under section 184 of the Tax Law for the years beginning January 1, 1980 through January 1, 1982 in amounts as follows:

Section 183

<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Credit</u>	<u>Amount Due</u>
12/31/79	\$1,668.33	\$ 797.70	\$ -0-	\$2,466.03
12/31/80	\$5,192.73	\$1,704.73	\$ 834.00	\$6,063.46
12/31/81	\$3,712.14	\$ 614.96	\$1,279.56	\$3,047.54

Section 184

<u>Period Beginning</u>	<u>Tax</u>	<u>Interest</u>	<u>Amount Due</u>
1/1/80	\$75.00	\$35.86	\$110.86
1/1/81	\$75.00	\$29.33	\$104.33
1/1/82	\$75.00	\$18.96	\$ 93.96

2. Petitioner filed corporation franchise tax reports as a general business corporation under Article 9-A of the Tax Law for the fiscal years ended August 31, 1980 and August 31, 1981. On its tax reports, petitioner reported its principal business activity as "Freight Forwarder Acting as Agent."

3. Petitioner contracts with furniture and department stores to provide transportation of furniture to the stores' customers. Petitioner then enters into contracts with independent truckers to obtain trucks and drivers to provide the transportation services to the stores. Petitioner does not **own** any trucks or employ its own drivers. The truckers pay all of their own expenses

for the service and petitioner in turn pays the truckers. Generally, petitioner pays the truckers 70 percent of the fee it receives from the stores. For accounting purposes, the entire fee received is placed in petitioner's revenue account. Within five days, petitioner pays the truckers the commissions. The payments to the truckers are included as part of the cost of goods sold.

4. According to representative contracts with furniture stores submitted into evidence by petitioner, petitioner "is in the business of providing delivery services for retail furniture stores...". Petitioner agreed to "supply, at its sole cost and expense, sufficient vehicles and personnel necessary to meet the delivery obligations" of the stores. Petitioner also agreed to maintain cargo insurance and to pay for loss or damage to furniture "caused solely by [petitioner's] employees." One contract submitted by petitioner made no mention of the fact that petitioner hired independent truckers to provide trucks and drivers. A second contract provided by petitioner contained the following clauses:

"16. Conduct, hiring and payment of workers of HYGWE:

All persons utilized in HYGRADE'S operations shall be hired by HYGRADE and shall be construed to be independent contractors of HYGRADE. HYGRADE shall promulgate its own rules for employees and conduct, standard of performance and dress which shall be consistent with [the store's] rules; in the event [the store] is not satisfied with the performance of any worker or contractor of HYGWE, [the store] shall notify HYGRADE in writing as described above and HYGRADE shall discharge that worker or contractor.

16.1 HYGRADE shall determine for its employees, all such employees' salaries, wages, commissions, fringe benefits, workmen's compensation insurance, social security and unemployment taxes, and shall make all payments therefor and such other payments as are, or may be, required by law."

5. Petitioner argues that it does not provide a transportation service but that it is a broker arranging for such services between furniture stores

service. Alternatively, petitioner argues that, if it is a transportation company, only 30 percent of its receipts should be included in its gross earnings since the remaining 70 percent is paid to the truckers.

CONCLUSIONS OF LAW

A. 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 5183, and to an additional annual franchise tax based upon gross earnings in the state during such year. Tax Law 0184.

B. 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...and every other domestic corporation...principally engaged in **the** conduct of a transportation or transmission business...". Tax Law §§183 & 184.

C. That a carrier "**is** one who undertakes to transport persons or property from place to place." 17 N.Y. Jur.2d Carriers 51. "A common carrier is one who, engaged in a business necessarily involving a public interest, agrees for a specified compensation to transport persons or property from one place to another, offering his services to the public generally." Id. 52. Where a forwarder selects the means and agency of transportation and routing, the fact that such forwarder does not own the means **of** transportation does not necessarily release him from liability as a common carrier. Wald-Green Food Corp. v. Acme Fast Freight, Inc., 200 Misc. 679, 683. "Where persons calling themselves

forwarders are so conducting their business as to be held liable as common

that they are carriers and are employed as carriers to ship goods without any knowledge of their true character, the liability of the carrier will attach to them." Slutzkin v. Gerhard & Hey, Inc., 199 A.D. 5, 14.

D. That inasmuch as petitioner's entire business activities consist of the provision of transportation and petitioner holds itself out to the public as a provider of such services, it is subject to tax under sections 183 and 184 of the Tax Law. Petitioner does not merely act as a conduit through which furniture stores may enter into contracts with independent truckers. Petitioner enters into the contracts and agrees that it will provide the service and accept responsibility for any damages it may cause. Petitioner then employs the truckers to perform the work. The truckers are employed by petitioner, not the furniture stores and, therefore, it is petitioner who is providing the transportation service.


E. That, with respect to the fees received by petitioner from the stores, such amounts constitute its gross earnings for purposes of section 184 of the Tax Law. The commissions paid by petitioner to the truckers are expenses of doing business and as such not excludible from gross earnings.

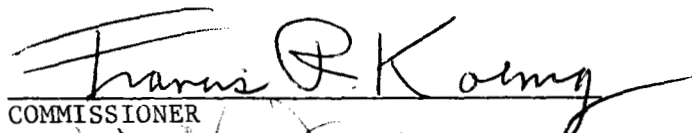
F. That the petition of Hygrade Furniture Transport, Inc. is denied and the notices of deficiency issued November 10, 1983 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER