

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

BOUCHARD TRANSPORTATION CO., INC.

DECISION

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9 of the Tax Law for the Year 1981.

Petitioner, Bouchard Transportation Co., Inc., 25 West Barclay Street,
Hicksville, New York 11801 filed a petition for redetermination of a deficiency
or for refund **of** corporation franchise tax under Article 9 of the Tax Law for
the year 1981 (File No. 53316).

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 August 8, 1985 at 10:45 A.M., with all briefs to be submitted by
October 23, 1985. Petitioners appeared by Jones, Day, Reavis & Pogue, Esqs.
(Raymond J. Wiacek, Esq., of counsel). The Audit Division appeared by John P.
Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether the exchange of common stock for preferred stock of petitioner
corporation by one of its stockholders constituted a stock dividend within the
meaning and intent of section 183 of the Tax Law.

FINDINGS OF FACT

1. On March 7, 1984, the Audit Division issued a Notice of Deficiency
against petitioner, Bouchard Transportation Co., Inc., for corporation franchise
tax due in the amount of \$210,678.12 plus interest of \$63,382.51 less a credit

of \$23,010.74 for a total due of \$251,049.89 for the tax year ended December 31, 1981.

2. A Statement of Audit Adjustment issued along with the notice explained as follows:

"Under section 183, the franchise tax required to be paid is the highest tax computed by the following three methods: (1) Allocated value of issued capital stock times the tax rate of 1.5 mills (.0015), (3) Allocated value of issued capital stock times dividend rate in excess of 6%, (3) minimum tax of \$75.00.

Dividends for purposes of section 183 include a stock dividends [sic] that is a charge **to surplus** accompanied by the issuance of additional shares of stock. Therefore, the exchange of common stock for preferred stock, in addition to the \$583,100.00 dividends paid on preferred stock are taxable dividends under section 183. Accordingly, the highest tax paid is on dividends. ..".

Petitioner had computed its tax based on the first of the aforementioned methods.

3. In 1981, petitioner engaged in a recapitalization transaction in order to change the stockholders' control structure. One stockholder exchanged with petitioner 95.9341 shares of voting common stock with a par value of \$100.00 per share for 5,831 shares of newly authorized and issued nonvoting preferred stock with a par value of \$1,000.00 per share. The number and par value of the preferred shares were based on the fair market value of the common stock at the time of the exchange. The other two shareholders of petitioner, who owned collectively 50.5192 shares of voting common stock, did not participate in the exchange and did not receive any cash, property, stock or other consideration in connection with the transaction.

4. To reflect the exchange transaction on its books, petitioner debited the common stock account \$9,593.41, debited the earned surplus account \$5,821,406.

5. Prior to commencing the transaction in issue, petitioner obtained a letter ruling from the Internal Revenue Service that the exchange did not result in a taxable dividend for Federal income tax purposes to any of the shareholders of petitioner under either section 301 or section 305 of the Internal Revenue Code. In addition, the ruling held that the effect of the transaction was not substantially the same as the receipt of a taxable stock dividend under section 306 of the Internal Revenue Code.

6. Along with its brief, petitioner submitted proposed findings of fact all of which have been incorporated herein.

CONCLUSIONS OF LAW

A. That section 183 of the Tax Law imposes a franchise tax on transportation and transmission companies at the rate of one and five-tenths mills per dollar of net value (not less than \$5.00 per share) of issued capital stock allocated to New York or \$75.00, whichever is greater.

"But if the dividends paid on the par value of any kind of capital stock during any year ending with the thirty-first day of December amount to six per centum or more, the tax upon such kind of capital stock shall be **at** the rate of three-eighths of a mill for each one per centum of dividends paid and shall be computed upon the par value of such capital stock, unless such a tax be less than the minimum tax hereinbefore provided in this section...". Section 183.3 of the Tax Law.

B. That the term "dividends" as used in section 183 includes stock dividends. P.J. Garvey Carting & Storage, Inc. v. State Tax Commission, 27 A.D.2d 337. However, in the instant case no stock dividend was either declared or paid. A stock dividend is a dividend payable in stock rather than cash, distributed pro rata to the shareholders in conjunction with the contemporaneous transfer of surplus earnings or profits to the capital fund of the corporation.

See Matter of Fosdick, 4 N.Y.2d 646; Matter of Danaher, 31 N.Y.2d 111.

contracts provide otherwise, dividends must be general upon all the stock, so that each stockholder will receive his proportionate share, and dividends among stockholders of the same class must always be pro rata, equal, and without preference.... A stockholder in a corporation which has declared a stock dividend has a right to receive the new shares on equal terms with other holders of the original stock in such number as will maintain his former proportional interest in the corporation and **in** its control...". 19 **Am** Jur.2d Corporations 5851.

C. That with respect to the exchange of stock which occurred in the instant case, there was no pro rata distribution to all the shareholders; in fact only one shareholder was involved and the proportional interests of the shareholders in the corporation and in its control were completely restructured. The result, therefore, was a recapitalization of petitioner with no issuance of a stock dividend and petitioner properly computed its tax based on allocated issued capital stock rather than on a dividend rate in excess of six percent.

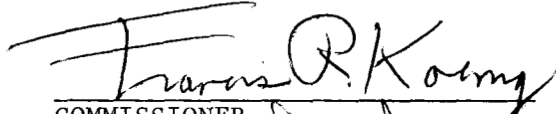
D. That the petition of Bouchard Transportation Co., Inc. is granted and the Notice of Deficiency issued March 7, 1984 is cancelled.

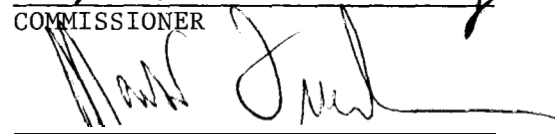
DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER