

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Bouchard Transportation Co., Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation Tax :
under Article 9 of the Tax Law for the Year 1982. :
AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck/Connie Hagelund, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 28th day of January, 1986, he/she served the within notice of Decision by certified mail upon Bouchard Transportation Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bouchard Transportation Co., Inc.
25 W. Barclay St.
Hicksville, NY 11801

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
28th day of January, 1986.

David Parchuck

Connie A. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

Bonnie A. Agell
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

January 28, 1986

Bouchard Transportation Co., Inc.
25 W. Barclay St.
Hicksville, NY 11801

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Raymond J. Wialek
Jones, Day, Reavis & Pogue
655 Fifteenth St. N.W.
Washington, DC 200055701
Taxing Bureau's Representative

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 \$5,821,406.59 and credited the preferred stock account a total of \$5,831,000.00.

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 Parsley, 21 Misc.2d 461; Matter of Reed, 173 Misc.2d 314. "As a general rule, except where the statutes or

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 §851.

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.

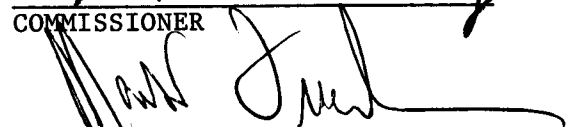
DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER