

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Di-Al Trucking Corp. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article(s) 9 of the Tax Law :
for the Period 12/31/80-1/31/83.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, 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 15th day of April, 1986, he/she served the within notice of Decision by certified mail upon Di-Al Trucking Corp. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Di-Al Trucking Corp.
112 E. 11th St.
Huntington Station, NY 11746

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
15th day of April, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Di-A1 Trucking Corp. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article(s) 9 of the Tax Law :
for the Period 12/31/80-1/31/83.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, 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 15th day of April, 1986, he served the within notice of Decision by certified mail upon Herbert H. Bentley, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert H. Bentley
789 Walt Whitman Rd.
Melville, NY 11747

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
15th day of April, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

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

April 15, 1986

DI-A1 Trucking Corp.
112 E. 11th St.
Huntington Station, NY 11746

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: Taxing Bureau's Representative

Petitioner's Representative:
Herbert H. Bentley
789 Walt Whitman Rd.
Melville, NY 11747

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	<u>\$370.00</u>	<u>\$81.84</u>	<u>\$451.84</u>

<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	<u>\$2,122.00</u>	<u>\$528.70</u>	<u>\$2,650.70</u>

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 §184).

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 §§ 183, 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.

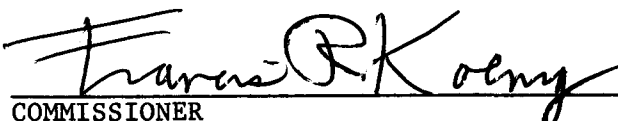
G. That the petition of Di-Al Trucking Corp. is denied and the notices of deficiency issued on February 17, 1984 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER