

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nealway, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9-A of the Tax Law :
for the Periods Begun January 1, 1981 through :
January 1, 1983 and Periods Ended December 31, :
1980 through December 31, 1982. :
_____ :

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 7th day of October, 1986, he/she served the within notice of Decision by certified mail upon Nealway, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nealway, Inc.
South Street
Red Creek, NY 13143

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
7th day of October, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nealway, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9-A of the Tax Law :
for the Periods Begun January 1, 1981 through :
January 1, 1983 and Periods Ended December 31, :
1980 through December 31, 1982. :
_____ :

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 7th day of October, 1986, he served the within notice of Decision by certified mail upon Sheldon G. Kall, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sheldon G. Kall
3522 James Street
Syracuse, NY 13206

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
7th day of October, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

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

October 7, 1986

Nealway, Inc.
South Street
Red Creek, NY 13143

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Sheldon G. Kall
3522 James Street
Syracuse, NY 13206

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
NEALWAY, INC. : DECISION
for Redetermination of a Deficiency or for :
Refund of Corporation Franchise Tax under :
Article 9 of the Tax Law for the Periods :
Begun January 1, 1981 through January 1, 1983 :
and the Periods Ended December 31, 1980 :
through December 31, 1982.

Petitioner, Nealway, Inc., South Street, Red Creek, New York 13143 filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9 of the Tax Law for the periods begun January 1, 1981 through January 1, 1983 and the periods ended December 31, 1980 through December 31, 1982 (File No. 53802).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York on December 4, 1985 at 1:15 P.M. with all documents to be submitted by February 18, 1986. Petitioner appeared by Sheldon G. Kall, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

- I. Whether it was necessary for the Audit Division to conduct a field audit before issuing notices of deficiency.
- II. Whether petitioner is subject to tax as a transportation corporation under sections 183 and 184 of the Tax Law.
- III. Whether petitioner is entitled to allocate its gross earnings to sources within and without New York State.

FINDINGS OF FACT

1. Petitioner filed New York State Corporation Franchise Tax Reports under Article 9A of the Tax Law throughout the periods in issue on the basis of a fiscal year ended July 31.

2. On April 27, 1984 the Audit Division issued six notices of deficiency pursuant to Article 9 of the Tax Law to petitioner, Nealway, Inc. Three of the notices were issued under section 183 of the Tax law for the periods begun January 1, 1981 through January 1, 1983 and three were issued under section 184 of the Tax Law for the periods ended December 31, 1980 through December 31, 1982 in amounts as follows:

<u>Section 183</u>				
<u>Period Begun</u>	<u>Tax</u>	<u>Interest</u>	<u>Credit</u>	<u>Amount Due</u>
1/1/81	\$ 75.00	\$-0-	\$ 75.00	\$-0-
1/1/82	75.00	24.14		99.14
1/1/83	75.00	10.53		85.53
Total	<u>\$225.00</u>	<u>\$ 34.67</u>	<u>\$ 75.00</u>	<u>\$184.67</u>

<u>Section 184</u>				
<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Credit</u>	<u>Amount Due</u>
12/31/80	\$ 887.96	\$-0-	\$ 887.96	\$ -0-
12/31/81	2,329.38	85.54	2,063.60	351.32
12/31/82	2,845.01	278.56	860.90	2,262.67
	<u>\$6,062.35</u>	<u>\$364.10</u>	<u>\$3,812.46</u>	<u>\$2,613.99</u>

3. The issuance of the foregoing notices of deficiency were premised upon the Audit Division's position that petitioner was subject to tax under sections 183 and 184 of the Tax Law as a transportation corporation. The amount of tax asserted to be due under section 183 of the Tax Law was the minimum amount. The amount of tax asserted to be due under section 184 of the Tax Law was based on the corporation franchise tax reports filed by petitioner for the respective years in issue. Since petitioner reported its income on a fiscal year ending

July 31 and a transportation corporation is required to report income on a calendar year basis, the Audit Division pro rated petitioner's income, on a monthly basis, to the respective years in issue.

4. Prior to the issuance of the notices of deficiency, the Audit Division engaged in correspondence with petitioner's representative. In the course of this correspondence it was disclosed that petitioner was an agricultural hauler and that it was petitioner's practice to bring its trucks to the fields of a farmer, load the crop onto the truck and deliver the crop to the first processor. Petitioner also transported fertilizer from a fertilizer company to a farmer and, in many instances, spread the fertilizer on the fields. Petitioner also disclosed that its gross receipts were the same amount as the gross income reported on its New York State corporate franchise tax reports.

5. Petitioner's records do not allocate the income received to its various activities. However, petitioner maintained that an allocation could have been developed if it had been asked to do so.

6. All of the income earned by petitioner for the fiscal year ended July 31, 1981 was earned in New York. During its fiscal years ended July 31, 1982 and July 31, 1983, petitioner commenced its activities in Florida and continued north to New York. Accordingly, petitioner maintained that its corporation franchise tax reports for the fiscal years ended July 31, 1982 and July 31, 1983 were in error inasmuch as an allocation of income had not been claimed.

7. At the hearing, petitioner submitted an allocation schedule which purported to compute the taxes due under Article 9 of the Tax Law. In order to complete this schedule, petitioner allocated fifty percent of its tangible personal property to New York and the balance of its tangible personal property

to Florida since petitioner's representative had no records of where the trucks actually were. Since petitioner had bank accounts in Red Creek, New York and in Fort Myers, Florida, petitioner's accountant allocated the receipt and wage factors, respectively, by the bank where the deposit or withdrawal was made.

8. Petitioner is not organized to do business under the New York State Transportation Law.

9. No evidence was presented as to the yearly mileage incurred on petitioner's vehicles.

CONCLUSIONS OF LAW

A. That the issuance of a Notice of Deficiency must be premised upon a factual basis (Matter of A & Victor Manufacturing Co., Inc., State Tax Commission, July 18, 1984). In this instance, the correspondence between petitioner's representative and the Audit Division clearly establishes that the Audit Division had a factual basis for issuing the notices of deficiency. There is no requirement that the Audit Division conduct a field audit when it relies on dollar amounts supplied by the taxpayer.

B. That whether a corporation is properly classified and held subject to taxation under Article 9 or under Article 9-A is to be determined from an examination of the nature of its business activities (see Matter of McAllister Bros., Inc. v. Bates, 272 App Div 511 lv denied 297 NY 1037).

C. That "[i]n its ordinary sense, 'transportation' comprehends any real carrying about or from one place to another... It implies the taking up of persons or property at some point and putting them down at another, and signifies at least a movement of some sort between termini or places." 87 C.J.S. Transportation.

D. That it is undisputed that petitioner's principal business activity consisted of transporting crops and fertilizer and spreading fertilizer on fields in connection with farming. Petitioner was therefore principally engaged in the conduct of a transportation business within the ordinary meaning of that term and within the meaning of Article 9 of the Tax Law. That petitioner often "confines its transporting to a limited area is of no consequence since it is not necessary that 'transportation' be between two definite points and, if there is forward movement, distance is not important (citations omitted)." Matter of Joseph A. Pitts Trucking, Inc., State Tax Commission, July 18, 1984. Furthermore, the fact that petitioner's business primarily serves agriculture is of no consequence, for the statute draws no distinction among transportation corporations serving particular industries.

E. That since minimum tax was asserted to be due pursuant to section 183 of the Tax law, any discussion of an allocation of income with respect to the notices of deficiency issued pursuant to section 183 of the Tax Law is irrelevant.

F. That an allocation of gross earnings pursuant to section 184 of the Tax Law is premised upon mileage within and without New York State. Since petitioner has not presented any information as to its mileage, petitioner has not established that it is entitled to an allocation of its gross earnings.

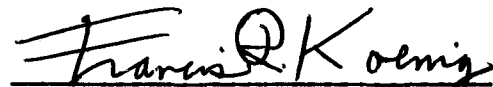
G. That the petition of Nealway, Inc. is denied and the notices of deficiency are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 07 1986


PRESIDENT


COMMISSIONER


COMMISSIONER