

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-94 (12) C
Corporation Tax
July 22, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C940426B

On April 26, 1994, a Petition for Advisory Opinion was received from S&S Westchester Shipping Co., Ltd., and S&S Westchester Trading Co., Ltd., P.O. Box 419, Bedford, New York 10506.

The issues raised by Petitioners, S&S Westchester Shipping Co., Ltd. and S&S Westchester Trading Co., Ltd., are (1) whether Petitioners are subject to franchise tax under sections 183 and 184 of Article 9 of the Tax Law, or whether they are subject to franchise tax under Article 9-A of the Tax Law; and (2) if Petitioners are subject to tax under sections 183 and 184 of Article 9 of the Tax Law what allocation method is used under each section of the Tax Law.

Petitioners activities consist of three separate components. In the first component, Petitioners enter into agreements with vendors seeking to ship merchandise to customers overseas. Petitioners arrange for the transportation of such merchandise by chartering the appropriate vessel to transport the merchandise overseas. Petitioners also arrange (either by agreement with the vessel owner or with a separate transportation entity) for the merchandise to be delivered from the vendor's premises to the vessel at the point of embarkment, and from the vessel to the premises of the customer once the vessel reaches its point of destination.

In the first component, Petitioners never obtain title to or take possession of the merchandise. Petitioners do not own any of the vehicles or vessels used, or utilize Petitioners own employees, in transporting the merchandise from the vendor to the customer. Pursuant to its agreement with the vendor, Petitioners assume the risk of loss of the vendor's merchandise at all times. Petitioners must look to the vessel owner or other transportation entity for potential loss indemnification. The profit derived by Petitioners is the difference between the fees charged by Petitioners to the vendors and the costs incurred by Petitioners in arranging for the delivery of the merchandise.

In the second component, Petitioners act strictly in the capacity of an agent in arranging for the shipment of vendors' merchandise to customers overseas. In this regard, a vendor may contact Petitioners seeking information on how to best ship merchandise to the customer. Petitioner then places the vendor in contact with the appropriate entity that can transport the vendor's merchandise. Petitioners receive a commission from the vendor as compensation for this service. Petitioners do not obtain title to or take possession of the merchandise, nor do Petitioners assume the risk of loss of the merchandise.

TSB-A-94 (12) C
Corporation Tax
July 22, 1994

TP-9 (9/88)

In the third component, Petitioners enter into agreements with vessel owners who are shipping merchandise from vendors to customers overseas. Once a vessel has reached its point of destination, Petitioners arrange for the merchandise to be delivered from the vessel to the premises of the customer or to the point of delivery/discharge (i.e., shipping port) by engaging a separate transportation entity.

In the third component, Petitioners never obtain title to or take possession of the merchandise being transported. Petitioners do not own any of the vehicles used, or utilize Petitioners own employees, in transporting the merchandise from the vessel to the premises of the customer or point of delivery/discharge. Pursuant to its agreement with the vessel owner, Petitioners assume the risk of loss of the vendor's merchandise during the delivery from the vessel to the premises of the customer or point of delivery/discharge. Petitioners must look to the engaged transportation entity for potential loss indemnification. The profit derived by Petitioners is the difference between the fees charged by Petitioners to the vessel owners and the costs incurred by Petitioners in arranging for the delivery of the merchandise.

The first and second components described above together comprise approximately one-third of Petitioners' gross earnings. The third component described above comprises approximately two-thirds of Petitioners' gross earnings. Petitioners maintain one office, located in New York State, to conduct Petitioners' activities.

Section 209.4 of the Tax Law states that "[c]orporations liable to tax under sections one hundred eighty-three to one hundred eighty-six, inclusive ... shall not be subject to tax under this article."

Sections 183 and 184 of the Tax Law impose franchise taxes on transportation corporations "formed for or principally engaged in the conduct of ... trucking

To determine the classification and proper taxability of a corporation under either Article 9 or Article 9-A of the Tax Law, an examination of the nature of the corporation's activities is necessary, regardless of the purposes for which the corporation was organized. See Matter of McAllister Bros., Inc. v Bates, 272 App Div 511, 517 (3d Dept. 1947). Ordinarily, a corporation is deemed to be principally engaged in the activity from which more than 50 percent of its receipts are derived. See, e.g. Joseph Bucciero Contracting Inc., Adv Op St Tax Comm, July 23, 1981, TSB-A-81(5)C.

A freight forwarder may, depending upon the nature of its activities, be considered a "transportation corporation" for purposes of section 183 and 184 of the Tax Law. In People ex rel N.Y. & A.L. Co. v Cantor, 239 NY 64, a corporation engaged in a general lighterage and forwarding business without engaging in the transportation of freight as a common carrier was classified as a transportation corporation within the meaning and intent of section 184 of the Tax Law. The Court thus construed the statute to include as a transportation corporation taxable under sections 183 and

184 of the Tax Law not only a corporation owning and managing the means of transportation but also a corporation which provides services directly connected with such transportation.

The relationship between the freight forwarder and the shipper must be examined in determining whether a forwarder is subject to sections 183 and 184 of the Tax Law as a "transportation corporation" or subject to Article 9-A of the Tax Law as a general business corporation.

A freight forwarder acting as principal in the transportation of property assumes control of and full responsibility for the property being shipped. The forwarder issues the bill of lading and pays all transportation charges made by the carriers. Its activities are similar to those of a common carrier except that it does not own the means used to transport the property. This type of freight forwarder is a transportation corporation subject to tax under sections 183 and 184 of the Tax Law. Preferred Air Freight, Inc., Adv Op St Tax Comm, October 8, 1985, TSB-A-85(19)C.

Conversely, a freight forwarder acting as an agent of the shipper assumes no responsibility for the property being shipped. The shipper issues the bill of lading and pays the transportation charges made by the carriers. The forwarder is paid only to perform the service of arranging for the transportation of the property. A forwarder acting as an agent is subject to tax under Article 9-A of the Tax Law. Preferred Air Freight, Inc., supra.

Herein, the activities of Petitioners described in the first and third components constitute those of a freight forwarder acting as a principal. The activities described in the second component are those of a freight forwarder acting as an agent. Therefore, since over two-thirds of Petitioners' activities constitute those of a freight forwarder acting as a principal, Petitioners are principally engaged in such activity and are subject to tax under sections 183 and 184 of the Tax Law. Petitioners are not subject to tax under Article 9-A of the Tax Law.

The franchise tax imposed under section 183 of the Tax Law is based on the net value of issued capital stock, less treasury stock, employed in New York State, and is the largest tax computed by the following three methods of stock valuation: (1) the net value per share of stock outstanding at the end of the year, but not less than five dollars per share; (2) the average selling price at which stock is sold during the year multiplied by the number of shares of stock issued and outstanding at the end of the reporting period; and (3) the difference between the corporation's assets and liabilities at the end of the year (i.e., net worth). For general transportation corporations, the net value of issued capital stock may be allocated within and without New York State by a percentage computed by dividing gross assets employed in New York by gross assets everywhere. Cash and U.S. obligations are excluded from both the numerator and the denominator.

The franchise tax imposed under section 184 of the Tax Law is based on the gross earnings received from business conducted and property held in New York State during the year. "Gross earnings" means all receipts arising from or growing out of the employment of capital, whether the capital is employed in transportation or transmission or otherwise.

Section 184.4(a) of the Tax Law provides that generally, a transportation corporation determines its gross earnings from transportation services within New York State by multiplying its gross earnings from transportation within and without New York State by a fraction, the numerator of which is the taxpayer's mileage within New York State and the denominator of which is the taxpayer's mileage within and without New York State during the period covered by the report. However, section 184.4(e) of the Tax Law provides that where the Commissioner of Taxation and Finance decides that with respect to a certain corporation the method prescribed above does not fairly and equitably reflect gross earnings from all sources within New York State, the Commissioner shall prescribe methods of allocation or apportionment which fairly and equitably reflect gross earnings from all sources within New York State.

Pursuant to section 184.4(e) of the Tax Law, the following formula should be applied for purposes of allocating the gross receipts from transportation services of a freight forwarder acting as principal. Multiply the gross receipts from transportation services where the actual transportation is performed by another carrier by the average of the following three factors:

1. Property Factor. This factor is the percentage that owned and rented real and tangible personal property within New York State bears to owned and rented real and tangible personal property everywhere. (The value of rented real and tangible personal property is determined by multiplying the rental amount by 8.)
2. Wage Factor. This factor is the percentage that wages of employees for services performed within New York State bears to wages of employees for services performed everywhere. Wages of executive officers are excluded from this factor.
3. Pick-ups and Deliveries Factor. This factor is the percentage that pickups and deliveries within New York State bears to pickups and deliveries everywhere. This factor includes pickups and deliveries done by the taxpayer or agent of the taxpayer.

The gross receipts from services of a freight forwarder acting as agent should be allocated to New York State if the services for which the commissions were paid were performed in New York State. If a lump sum is received in payment of services performed within and without New York State, the portion allocable to New York State should be determined by multiplying the sum received by the ratio of the values of services performed or time spent within New York State over the total value of the services performed or time spent performing the services within and without New York State.

Gross receipts from other sources must also be allocated. For example, interest and dividends received from investments in other corporations and/or interest-bearing cash accounts should be allocated to the domiciliary office of the taxpayer where the item is held, managed and controlled. Also, capital gains from the sale or exchange of securities where the situs is within New York State is allocated to the domiciliary office of the taxpayer. Capital gains from the sale or

exchange of property within New York State is allocated where the property is located or used.

Petitioners, should use the methods described herein, to allocate (1) the net value of Petitioners' issued capital stock within and without New York State under section 183 of the Tax Law and (2) Petitioners' gross receipts under section 184 of the Tax Law.

DATED: July 22, 1994

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.