

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

TSB-A-89(14)C
Corporation Tax
December 14, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C890724A

On July 24, 1989, a Petition for Advisory Opinion was received from Paul Carucci & Company, 9 Scott Drive, New City, New York 10956.

The issue raised by Petitioner, Paul Carucci & Company, is which items are considered transportation and are to be included in the calculation to determine if a corporation is principally engaged in a transportation business and thereby subject to tax under section 184 of Article 9 of the Tax Law under the facts hereinafter set forth.

A corporation buys stone and gravel, sells it to its customer, and transports it to the job site. The sales and billing procedure are of the following three types:

1. The customer purchases the material at a quarry, pays for it and has the corporation deliver it. The corporation bills the customer for delivery charges only.
2. The corporation purchases the material at a quarry and delivers it to its customer. The corporation bills its customer for the material and delivery separately.
3. The corporation purchases the material at a quarry and delivers it to its customer. The corporation bills its customer on a lump sum basis. This is done for municipalities that will only accept lump sum bids. The value of the material is usually in excess of 85% of the total bid price.

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax on domestic or foreign corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office, in New York State. Section 209.4 of the Tax Law, provides that corporations liable to tax under sections 183 and 184 of Article 9 of the Tax Law are not subject to tax under Article 9-A.

Sections 183 and 184 of Article 9 of the Tax Law impose franchise taxes, on a domestic or foreign corporation formed for or principally engaged in the conduct of a transportation business, for the privilege of exercising its corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office, in New York State.

In RVA Trucking Inc. v State of New York State Tax Commission, 135 AD2d 938, affirming State Tax Commission decision in Matter of RVA Trucking Inc., Dec St Tax Comm, June 12, 1986, TSB-H-86(24)C, the Court stated that the State Tax Commission "quite reasonably defined 'transportation' as comprehending 'any real carrying about or from one place to another' and

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'trucking' as generally involving 'the process or business of carting goods on trucks' (Matter of Joseph A. Pitts Trucking, Dec St Tax Comm, July 18, 1984, TSB-H-84(34)C; see, Newton Creek Towing Co. v Law, 205 App Div 209, 211, affd 237 NY 578)."

The determination of whether Petitioner is subject to tax under Article 9-A or Article 9, depends on what activity the taxpayer is principally engaged in. Ordinarily, a corporation is deemed to be principally engaged in the activity from which more than 50% of its receipts are derived. See, e.g. Re Joseph Bucciero Contracting Inc., Advisory Op St Tax Comm, July 23, 1981, TSB-A-81(5)C.

Herein, in situation 1, the corporation is hired to deliver stone and gravel that its customer owns. The receipt is from a transportation business, an Article 9 activity. In situation 2, the corporation is selling stone and gravel and delivering the material to its customer. The separate receipt from the delivery of the material is from a transportation business, an Article 9 activity. In situation 3, the corporation sells and delivers stone and gravel pursuant to a lump sum bid. The portion of the receipt attributable to the delivery of the material is from a transportation business, an Article 9 activity.

If more than 50% of the corporation's receipts are from the delivery business it will be considered a transportation corporation subject to tax under sections 183 and 184 of Article 9 of the Tax Law. Otherwise, the corporation will be subject to tax under Article 9-A of the Tax Law.

DATED: December 14, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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