STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **HOWGEN TRANSPORT CO., INC.** for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9 of the Tax Law for the Years 1979, 1980 and 1981.	DECISION DTA #800729

Petitioner, Howgen Transport Co., Inc., Olean Road - Route 16, Holland, New York 14080, filed an exception to the determination of the Administrative Law Judge issued on February 4, 1988 with respect to its petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9 of the Tax Law for the years 1979, 1980 and 1981 (File No. 800729). Petitioner appeared by Albrecht, Maguire, Heffern & Gregg, P.C. (George M. Zimmerman, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioner filed a brief on exception. The Division did not submit a brief. Oral argument was held, at the request of the petitioner, on July 12, 1988.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly included as part of petitioner's "gross earnings" under Tax Law section 184 amounts paid by petitioner for the cost of materials and trucks hired by petitioner and furnished to its customers.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. Such facts may be summarized as follows.

Petitioner, Howgen Transport Co., Inc., is engaged in a "dump truck operation". It is and was during the period at issue in the business of hauling sand, gravel, blacktop, salt and slag to contractors. Petitioner also furnished other materials to contractors, blacktop plants and concrete plants. This work was primarily done during the construction season. In the off-season, petitioner hauled road salt and road grit.

On July 7, 1983, the Division of Taxation issued to petitioner, Howgen Transport Co., Inc., three notices of deficiency for additional corporation franchise tax due under Article 9 of the Tax Law, plus interest, as follows:

Year	Deficiency
1979	$11,216.52
1980	12,084.87
1981	17,661.50

The deficiencies herein were, in part, premised upon the Division's disallowance of certain deductions claimed by petitioner in its calculation of gross earnings pursuant to Tax Law section 184(1) for each of the years at issue.

Petitioner's business was not limited to hauling. Frequently the contractors which it served requested petitioner to purchase materials and deliver them to the contractor. In such cases, petitioner, in order to perform its contract, bought sand, gravel or whatever was requested, and then delivered it to the job in accordance with the contractor's order. The charge made by petitioner to the contractor included the cost of the material as well as the charge for its hauling. In the years in

question, petitioner made purchases from Lancaster Stone Products Corp., Buffalo Slag Corp. and Buffalo Crushed Stone, Inc. Petitioner's costs for the materials were as follows:

Company	1979	1980	1981
Lancaster Stone Products Corp.	$41,133.75	$1,285,233.03	$252,916.13
Buffalo Slag Corporation	2,318.74	1,067.92	1,945.58
Buffalo Crushed Stone, Inc.	1,968.48	302.19	-0-
	$45,420.97	$1,286,603.14	$254,861.71

All of this material was delivered to contractors in accordance with their orders. The price which petitioner charged to the contractors included these costs as well as the charge for hauling. The amounts paid by the contractors were included in petitioner's gross income, and out of these amounts, petitioner paid its suppliers for the materials.

During the years in question, petitioner had 26 to 28 trucks of its own, all of them dump trucks. During the construction season, petitioner sometimes needed more trucks for its operations. In those cases, petitioner hired "a lot of other trucks". They were hired for specific deliveries. The renter of a truck supplied the driver as well as the truck. In the years in question, petitioner's costs for these hired trucks were as follows:

1979	$445,036.55
1980	202,129.64
1981	768,034.84

The price charged to the contractor for the delivery included the cost of the hired truck and driver. The payment from the contractor was included in petitioner's gross income and out of it, the renter of the truck was paid.

Petitioner's business was started in the 1950's as a partnership. The partners were Howard L. Draper and his wife, Genevieve Draper. Subsequently, also in the 1950's, the Drapers incorporated the business as H. L. Draper Trucking, Inc. After 1965, following the sale of the corporation's Interstate Commerce Commission rights, H.L. Draper Trucking, Inc. changed in form to a partnership with Mr. and Mrs. Draper once again as the partners. The name of the partnership was Howgen Transport. Mr. Draper died in November 1973, and his partnership interest passed to his wife. Mrs. Draper subsequently incorporated the business as Howgen Transport Co., Inc. in June

1974. This corporation, the entity which is the petitioner herein, began doing business on January 1, 1975.

The issue of what constitutes "gross earnings" pursuant to Tax Law section 184 with respect to this business arose in 1964. At that time, the Audit Division asserted a deficiency against petitioner's predecessor, H. L. Draper Trucking, Inc., premised on a position substantially similar to that asserted by the Division herein. In response to that deficiency, H. L. Draper Trucking, Inc. filed a protest to contest the Audit Division's position. Subsequently, representatives of H. L. Draper Trucking, Inc. and the Audit Division met to discuss the issues raised in H. L. Draper's protest. The meeting did not produce a resolution of the issues, but neither H. L. Draper Trucking, Inc. nor its representatives heard again from the Audit Division with respect to the asserted deficiency. The tax demanded was never paid and no tax under Tax Law section 184 has been paid since.

Petitioner did not compute any tax pursuant to Tax Law section 184 on its franchise tax returns for the years at issue.

OPINION

In the decision below, the Administrative Law Judge concluded that no deduction could be taken by petitioner with respect to receipts earned in fulfilling contracts, specifically those receipts for the cost of materials or hired trucks. It was reasoned that the receipts "arose from" or "grew out of" the employment of petitioner's capital such that they were properly considered as "gross earnings" consistent with People ex rel. New York Cent. & Hudson Riv. R.R. Co. v. Roberts (157 NY 677, affg on opn below 32 AD 113). It was also concluded that no presumption in favor of petitioner against the imposition of Tax Law section 184 was created due to the Audit Division's failure to assert tax against the petitioner.

On exception petitioner argues that "gross earnings" as used in section 184 of the Tax Law does not include the return of the cost of materials and trucks hired by petitioner. Petitioner argues that People v. Roberts does not address the issue of defining "gross earnings" and as a result is inapplicable to the case at hand. Petitioner contends that receipts from materials purchased should not be included in the meaning of "gross earnings" because such receipts represent the return of

invested capital. Support for this is purported to be in the decision in Brooklyn Union Gas Co. v. Morgan (114 AD 266, affd 195 NY 616). Additionally, petitioner argues that the State's inaction in asserting the tax under the circumstances of the case created a presumption that the tax is inapplicable to the transactions at issue.

In response, the Division relies on the determination of the Administrative Law Judge in support of its position.

We reverse the determination of the Administrative Law Judge in part and sustain it in part.

The first issue we will address is the definition of "gross earnings" as used in Tax Law section 184 and whether amounts paid to petitioner for the cost of sand, gravel and like materials furnished to its customers fall within the definition. We will address the issue of the cost of the hired trucks separately.

Tax Law section 184 provides in part:

> "[E]very corporation . . . formed for or principally engaged in the conduct of a transportation or transmission business . . . shall pay . . . an excise tax or license fee which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state, excluding earnings derived from business of an interstate character." (Emphasis added.)

In order to ascertain the meaning of "gross earnings" as used in the statute, we approach the question according to well established principles of statutory construction designed to further our fundamental objective of ascertaining and giving effect to the apparent intent of the Legislature. Unfortunately, the legislative history that is available for Tax Law section 184 is sparse and not of use for our inquiry.[1] Nor has the Division adopted regulations on the subject. Accordingly, we must look to the language of the statute itself and its interpretation by the courts.

One case that addresses the term "gross earnings" as it is used in Tax Law section 184 is People v. Roberts. In People v. Roberts, however, the issue of the computation of gross earnings was not directly at issue. Instead, the dispute was whether a corporation's gross earnings from

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[1] Legislative materials for years prior to 1921 were destroyed by fire, except for portions of 1905.

activities other than the business of transportation or transmission were to be included when calculating the gross earnings of a transportation or transmission corporation pursuant to section 184. In the course of the decision, Justice Herrick noted that, "By gross earnings, it seems to me, that the statute means all receipts arising from or growing out of the employment of its capital, whether that capital is employed in the transportation and transmission business or otherwise" (People v. Roberts, supra, at 115 [emphasis added]).

Contrary to the interpretation of the Administrative Law Judge, we believe that the statement in People v. Roberts does not preclude the computation of gross earnings as urged by the petitioner. The words ". . . receipts arising from or growing out of the employment of its capital . . ." characterize those receipts to be included in the gross earnings computation. Those words are not defined further in People v. Roberts, but their meaning is clarified in Brooklyn Union Gas Co. v. Morgan (114 AD 266, affd 195 NY 616).[2]

In Brooklyn Union the computation of gross earnings for Tax Law section 186 purposes was directly at issue and the language under analysis was exactly the same as that used in section 184. The taxpayer bought coal and oil as raw materials which it converted into gas and sold to customers. This purchase of raw materials was characterized as an investment of capital which came back to the taxpayer in cash as part of the price of the gas sold. The Court stated, "Capital of a corporation which must first be invested before it begins to earn anything cannot be said to be a part of the earnings of such corporation merely because it is turned into cash and thus in one sense becomes a receipt of the corporation. Earnings do not include capital but are the productions or outgrowth of capital." (Brooklyn Union Gas Co. v. Morgan, supra, at 267.) The essence of the Court's decision is that a section 186 taxpayer who actually sells a good is entitled to deduct from the receipt for the good the cost of the raw materials incorporated into the good to calculate his gross earnings.

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[2] See, District of Columbia v. Georgetown Gaslight Co., 45 App D.C. 63 at 75-77, where People v. Roberts and Brooklyn Union are discussed in a similar manner with respect to the definition of "gross earnings" as opposed to "gross receipts".

In 1907, apparently reacting to the decision of the Appellate Division in Brooklyn Union, the Legislature amended section 186 by providing a statutory definition of the term "gross earnings". Shortly after the amendment, the Court of Appeals had the opportunity to interpret the amendment in People ex rel Westchester Lighting Co v. Gaus (199 NY 147). The Court first characterized the basis of the Appellate Division decision in Brooklyn Union and then the amendment intended to overcome this decision stating that:

> " . . . where the tax was limited by the statute to 'gross earnings', that limitation was too precise to permit of the taxation of any receipts, which could not be classified as earnings, or profits, upon the capital invested. The statutory amendment followed upon the construction given by the Appellate Division. . . . It is argued that the amended statute still limits receipts, for the purposes of taxation, to such as result from 'the employment of capital'; which would exclude receipts representing the replacement of capital. The argument has its force, unquestionably. . . . But the argument does not suffice to meet the objection that the legislature meant to enlarge the scope of the franchise tax by including all moneys that were received as products of all uses of corporate capital, 'without any deduction'. . . . In this amendment, it cannot be denied that the legislature has chosen to give a definition to the term 'gross earnings', which makes it include all receipts, and caps its mandate, in that respect, by adding the words 'without any deduction'. . . ." (People ex rel Westchester Lighting Co. v. Gaus, supra, at 149.)

The significance of this statement by the Court is its recognition that the term "gross earnings" as used in section 186 prior to its amendment did not include receipts from the sale of goods to the extent that the receipt represented the replacement of capital, i.e., the recovery of the cost of the raw materials incorporated in the good. Thus, it is only because of the 1907 amendment to section 186 that receipts from the sale of goods representing the replacement of capital are included in gross earnings for section 186 purposes. Commenting on the 1907 amendment, the Court characterized it as offending against the normal concept of gross earnings (People ex rel Westchester Lighting Co. v. Gaus, supra, at 150). We agree that this definition of gross earnings is strained and we conclude that it applies only to section 186 because of the amendment in 1907. Accordingly, gross earnings, for purposes of section 184, do not include receipts from the sale of goods to the extent the receipts represent the cost of raw materials incorporated into the good, under the rule of Brooklyn Union.

Applying this rule to the facts of the instant case, we find that the sand, gravel and similar materials purchased by petitioner are essentially the same as the coal at issue in Brooklyn Union. The coal was converted into gas and sold as gas. The only difference between the coal and petitioner's gravel and similar materials is that petitioner does not transform the materials at all, he simply sells them in the same form as he purchased them. The lack of a change in the nature of the materials does not take petitioner outside of the Brooklyn Union principle, however, for the conversion of the raw materials was not essential to the decision.[3] Instead, it was the sale of the raw materials in some form, that required the exclusion of the cost of the raw materials from gross earnings. In the instant case, the fact that the raw materials are sold exactly as purchased emphasizes the incongruity of taxing as an earning the cost of the material sold.

Based on the foregoing, we conclude that petitioner is entitled to exclude receipts which represent the cost of raw materials, the sand, gravel, etc., subsequently sold to its customers in order to calculate his gross earnings for purposes of section 184.

Our conclusion is not inconsistent with the decision in People v. Roberts. In People v. Roberts, the Court's determination appears to address only earnings as the result of investments held by the corporation, not investments sold by the corporation. Clearly a dividend received on a stock held by a corporation is an earning from the employment of capital.[4] Had the Court in People v. Roberts held that on the sale of a stock or bond a transportation company was entitled to no

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[3] In Chesapeake & Potomac Telephone Co. v. District of Columbia, 137 F2d 674, a telephone company was allowed to deduct the cost of phone books, which it purchased as finished products and subsequently delivered to customers, from gross receipts in order to calculate gross earnings. It was held that such a practice was similar to a gas company receiving a similar deduction for raw materials converted into gas. The Court reasoned that the two situations should not be distinguished just because in one it happens that the entire commodity that is bought is furnished to the customer while in the other materials are bought in a raw state and converted into a commodity before being furnished to the customer.

[4] In Matter of American Telephone and Telegraph Company v. State Tax Commn., 61 NY2d 393, concerning the application of section 184 gross earnings tax to funds received as the repayment of loans, it was accepted that the section 184 tax did not apply to the receipts representing a return of capital but it would apply to the interest received as an earning if the interest had its source in New York State.

exclusion from gross earnings for the cost of the stock or bond, such a conclusion would have been in conflict with Brooklyn Union and our result here. However, with the facts of People v. Roberts limited to the holding of an investment, with no sale, we see no conflict with Brooklyn Union.

Contrary to the determination of the Administrative Law Judge, we believe that the interpretation of gross earnings in Tax Law section 186 in Brooklyn Union is controlling here. Prior to the amendment of Tax Law section 186 (L 1907, ch 734), sections 184 and 186 had identical language in that both merely referred to gross earnings without any further explanation of the term. Section 186 was amended to define "gross earnings" as "all receipts from the employment of capital without any deduction". This amendment was made to overcome the result of Brooklyn Union (People ex rel. Westchester Lighting Co v. Gaus, supra). No similar amendment was made to section 184. Since the statutes were enacted together (L 1896, ch 908) and they employed the term gross earnings in similar ways, they may be considered as in pari materia as they respectively impose gross earnings taxes on different types of businesses. Because of this close relationship between the two statutes, it is proper to look to the interpretation of section 186 as an aid in interpreting section 184 when section 184 has not been similarly addressed, as in the present case. The two expressions should be given the same meaning in the absence of an indication that the Legislature intended a contrary meaning. Further it has been held that there is a presumption that similar meaning attaches to use of similar words as they appear in other statutes of like import (see, McKinney's Cons Laws of NY, Book 1, Statutes { 236). As a result, we look to the interpretation of section 186, prior to its amendment in 1907, for assistance in interpreting gross earnings as used in section 184.

We do, however, reject petitioner's contention that it is entitled to deduct the cost of hired trucks in computing its gross earnings under Tax Law section 184. The expenditures for the trucks represent petitioner's employment of its capital, in the same manner as the purchase of trucks, to perform its transportation services. The purchase or lease of trucks to provide a service is clearly distinguishable from the purchase of raw materials which are sold as a commodity. The former are the employment of capital, the gross earnings from which are specifically subject to tax (People v.

Roberts, supra; see also, People ex rel, Westchester Lighting Co. v. Gaus, supra; Chesapeake & Potomac Telephone Co. v. District of Columbia, 137 F2d 674).

Lastly, we reject petitioner's contention that inaction in asserting the tax under Tax Law section 184 created a presumption that the tax is not applicable to the transactions in question. Petitioner only contends that the Division failed to assert the tax against it, not that the Division failed to tax the type of receipts at issue here. Thus, petitioner's reliance upon Matter Consolidated Edison v. State Tax Commn. (24 NY2d 115) is mistaken since in Consolidated Edison the issue concerned the failure to tax a certain type of receipt. Additionally, petitioner has only been in existence in the corporate form since 1975. It is a separate entity from H. L. Draper Trucking, Inc. Even assuming that H. L. Draper Trucking, Inc. is relevant, that business was a partnership from 1965 until 1975. Tax Law section 184 does not apply to partnerships, therefore, there could be no failure to assert the tax for that period. That leaves the years 1975 to 1979 remaining for petitioner's argument. Four years clearly do not create a presumption. Accordingly, petitioner's argument concerning the Division's inaction in asserting tax is rejected and the tax on the receipts applicable to the hired trucks is sustained.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Howgen Transport Co., Inc. is granted to the extent that petitioner is allowed a deduction in the computation of its gross earnings for the years in issue for the costs incurred to purchase sand, gravel and like materials, but except as so granted is in all other respects denied;

2. The determination of the Administrative Law Judge is modified as indicated "1" above, but except as so modified is affirmed;

3. The petition of Howgen Transport Co., Inc. is granted to the extent indicated in "1" above and in conclusion of law "H" of the Administrative Law Judge's determination and the Division of

Taxation is directed to recompute the notices of deficiency issued on July 7, 1983 accordingly, but except as so granted the petition is denied and the notices are sustained.

Dated: Albany, New York
January 12, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner