STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RUJAK TRUCKING CORP.	:	DECISION DTA No. 807073
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Period January 1, 1982 through December 31, 1987.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 26, 1992 with respect to the petition of Rujak Trucking Corp., c/o Sheldon Eisenberger, 225 Broadway, Suite 2100, New York, New York 10007, for redetermination of a deficiency or for refund of corporation tax under Article 9 of the Tax Law for the period January 1, 1982 through December 31, 1987. Petitioner appeared by Sheldon Eisenberger, Esq. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Both the Division of Taxation and petitioner filed briefs on exception. Oral argument, requested by the Division of Taxation, was heard on October 8, 1992. The Division of Taxation's letter dated September 17, 1992 in response to petitioner's brief was accepted by the Tax Appeals Tribunal at oral argument over petitioner's objections on the basis of timeliness. Having found the contents of the September 17, 1992 letter unnecessary for the issuance of its decision in this matter, the Tax Appeals Tribunal did not offer petitioner an opportunity to respond to the letter.

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

ISSUE

Whether the Division of Taxation properly utilized a mileage ratio, derived from a test period audit of highway use tax under Tax Law Article 21 to calculate corporation tax deficiencies pursuant to Tax Law §§ 184 and 184-a for the periods at issue.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "9" and "10" and the first three sentences of findingof fact "4" which have been deleted[1] and for findings of fact "2," "5" and "6" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

On May 1, 1989, the Division of Taxation issued notices of deficiency of corporation tax to Rujak Trucking Corp. ("petitioner") as follows:

Period	Tax Law §	Tax	Interest	Additional Charge	Total
Begun 1-1-82	183	$ 75.00	$ 86.26	18.75	$ 180.01
Begun 1-1-83	183	75.00	64.12	18.75	157.87
Begun 1-1-84	183	75.00	48.61	18.75	142.36
Begun 1-1-85	183	75.00	35.70	18.75	129.45
Begun 1-1-86	183	75.00	23.48	18.75	117.23
Begun 1-1-87	183	75.00	14.63	18.75	108.38
Begun 1-1-88	183	75.00	8.11	18.75	101.86
Ended 12-31-81	184	6,228.00	7,162.26	1,557.05	14,947.31
Ended 12-31-82	184	6,059.00	5,179.32	1,514.66	12,752.98
Ended 12-31-83	184	6,195.00	4,016.11	1,548.79	11,759.90
Ended 12-31-84	184	6,109.00	2,908.54	1,527.21	10,544.75
Ended 12-31-85	184	6,259.00	1,959.69	1,564.81	9,783.50
Ended 12-31-86	184	6,254.00	1,220.15	1,563.62	9,037.77
Ended 12-31-87	184	7,159.00	773.90	1,789.65	9,722.55
Ended 12-31-82	184-a	1,091.00	932.28	272.64	2,295.92
Ended 12-31-83	184-a	1,053.00	682.75	263.30	1,999.05
Ended 12-31-84	184-a	1,039.00	393.49	259.63	1,692.12
Ended 12-31-85	184-a	1,064.00	333.15	266.02	1,663.17
Ended 12-31-86	184-a	1,063.00	207.42	265.82	1,536.24
Ended 12-31-87	184-a	1,217.00	131.56	304.24	1,652.80

[1]Findings of fact "9" and "10" and the first three sentences of finding of fact "4" have been omitted as they relate to issues decided by the Administrative Law Judge but not excepted to by either petitioner or by the Division of Taxation.

Statements of audit adjustment were attached to each of the above notices of deficiency issued to petitioner.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> On September 9, 1988, this case was assigned to Hallan E. Riley, Jr., Tax Auditor I, for the performance of a highway use tax audit. In addition, the auditor stated that he was also under instruction to determine whether or not petitioner had been filing corporation tax returns and paying the required corporation taxes.
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> On September 22, 1988, the auditor met with Peter B. Levine, petitioner's general manager, who, along with his wife, owns 100 percent of the stock of the corporation. At the initial meeting, which occurred at petitioner's place of business, Mr. Levine was not able to produce all of the records requested. He stated that he had been trying to obtain trip report sheets from McDonnell Douglas Truck Services, Inc., the company which had been leasing trucks to petitioner. The auditor testified that, at the initial meeting, a test period audit method was discussed and that Mr. Levine orally consented both to the utilization of such method and to the period selected by the auditor (the fourth quarter of 1987).
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> Contained within the field audit record (Petitioner's Exhibit "1") is a form AU-377.15, audit method election, which was filled out and signed by the auditor on September 22, 1988. This form indicated that with respect to the highway use tax audit, the auditor had advised that the records available for audit were adequate and sufficient to warrant an audit method which utilizes all records within the audit period, but in lieu thereof, petitioner elected to utilize a representative test period audit method to determine any truck mileage or fuel use tax liability. Neither Mr. Levine nor any other person signed this form on behalf of petitioner.
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> The auditor testified that, upon his next visit to petitioner's place of business in November 1988, Mr. Levine had obtained the necessary records to permit him to complete his audit, i.e., to check the fourth quarter of 1987 in detail. The audit checklist prepared by the auditor on January 18, 1989 described the condition of petitioner's records as "fair" and stated that odometer and hub readings, drivers' logs (I.C.C.), trip reports, lease invoices, fuel tax reports of other states and motor vehicle registrations had been utilized during the audit. The field audit report (on page 1 thereof) indicates that a review of the taxpayer's records indicated that records were adequate to do a complete audit, that detailed audit and test period methods were explained to the taxpayer, that a representative test period (fourth quarter of 1987) was agreed to and that the taxpayer signed a consent agreement.

> Because petitioner had no records for the period prior to 1986, the statements in the field audit report as to the adequacy of petitioner's records relate only to the highway use tax audit.
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> The report further indicated that highway use tax had been understated by approximately $7,617.00 (the photocopy is illegible with regard to cents). It was the testimony of both the auditor and Mr. Levine that the results of the highway use tax audit were agreed to, that part payment was made to the auditor and that the remainder was subsequently paid in full.[2]

The auditor's examination of the trip sheets supplied by McDonnell Douglas Truck Services, Inc. for the fourth quarter of 1987 revealed that petitioner's total miles for the period were 67,616, 22,012 of which were New York miles. The percentage of New York miles was, therefore, determined to be 32.55 percent (22,012 divided by 67,616).

The auditor obtained petitioner's Federal income tax returns (forms 1120) for the years 1982 through 1987. Since the return for 1981 was unavailable, a Department of Labor statistical report was used. From this report and from the returns, the auditor took the total income figure (which he utilized as petitioner's gross receipts) and multiplied the total income by the New York allocation percentage to obtain New York revenue. The New York revenue was then multiplied by .75 percent to determine tax due pursuant to Tax Law § 184. For the years 1982 through 1987 (no metropolitan surcharge was in effect for 1981), the tax due pursuant to Tax Law § 184 was multiplied by 18 percent for 1982 and 17 percent for the years thereafter to determine tax due per Tax Law § 184-a. For tax due per Tax Law § 183, minimum tax of $75.00 per year was imposed.

For the years at issue, petitioner did not file returns or pay taxes imposed pursuant to Article 9 of the Tax Law.

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[2]We modified the Administrative Law Judge's finding of fact "2" by adding the words "with respect to the highway use tax audit" to the second sentence of the third paragraph and by adding the fifth paragraph. We made these changes to clarify that statements in the record about the adequacy of petitioner's records related only to the highway use tax audit.

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

> Peter B. Levine became petitioner's general manager in 1985. Prior thereto, he was a forman-supervisor (Rujak was a family business). At the hearing, Mr. Levine testified that, prior to 1986, petitioner's business consisted of trucking, drayage, warehousing, cross docking and freight brokerage. Mr. Levine stated that, for the years 1981 through 1985, approximately 40 to 45 percent of petitioner's revenues were derived from trucking. Up until 1986, petitioner employed non-union labor for its warehousing and handling (cross docking, freight brokerage, etc.) functions. In 1986, the labor unions applied pressure to employ union workers. Mr. Levine was forced, therefore, to use union workers or give up much of the handling operations. He chose the latter option which resulted in trucking becoming approximately 70 percent of petitioner's business. The percentages were estimates made by Mr. Levine in or around 1986. To make up for lost revenue after ceasing much of its handling activities, petitioner leased trucks from Leaseway Transportation on full service leases (lessor was responsible for fueling, maintenance and much of the administrative functions such as mileage reporting and paying of taxes). Therefore, petitioner sold the 8 trucks which it owned and began leasing 13 to 16 trucks from Leaseway. Leaseway Transportation was subsequently sold to Hertz-Pensky and, approximately nine months later, McDonnell Douglas took over petitioner's account. Petitioner's trucking business consisted primarily of deliveries for Panasonic, Toshiba America, MacGregor Sporting Goods, Technika of Fairfield, New Jersey and certain other businesses.
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> Petitioner's general manager testified that after petitioner became a lessee, it had difficulty keeping accurate mileage reports because the lessors did not always turn this information over to petitioner. The general manager testified that the auditor spent a considerable amount of time during the audit trying to obtain the mileage reports from the lessors.
>
> Mr. Levine also testified that petitioner's invoices often included demurrage charges (such as wharfing) and disbursements made on behalf of customers (approximately $300,000.00 per year) except where customers requested separate billing for these other charges. In its sales journals, everything was listed as "trucking."[3]

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

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[3]We modified the Administrative Law Judge's finding of fact "5" by adding the second paragraph to reflect the record in more detail.

> With respect to the corporation tax audit, the parties concur that no records were requested in addition to the records requested for the highway use tax audit and the Federal income tax returns for each of the years at issue.[4]

We find an additional finding of fact to read as follows:

> The extent of petitioner's efforts to establish that the test period used was not representative of the years at issue was the testimony of Peter Levine, petitioner's general manager. When asked whether he would have consented to the use of the fourth quarter of 1987 as a test period for franchise tax purposes, he responded, "No . . . because the business can vary. [The auditor] only wants to look at a three-month period." When asked what was specific with regard to the fourth quarter, petitioner responded, "[t]hat's usually the biggest quarter, and not representative" (Hearing Tr., p. 124).

It is unclear from the record as to the period under audit for highway use tax purposes. The auditor stated that, prior to performing this audit, he reviewed a prior highway use tax audit of petitioner for the period of approximately 1977 through 1980. While Mr. Levine testified that a Martin Sherman performed a highway use tax audit of petitioner in 1985 (the auditor in this matter was unaware of this audit), no other evidence of such audit was presented herein. Mr. Levine stated that petitioner's invoices for the years 1981 through 1985 were disposed of because of the audit by Mr. Sherman through 1985. Mr. Levine testified that he had invoices from 1987 through 1989 (only 1987 is at issue herein), although only one such invoice was offered into evidence at the hearing (and this invoice by the Division as Exhibit "J").

At or about the time at which the highway use tax audit was completed, the auditor informed Mr. Levine that he was probably subject to New York corporation taxes under Article 9 of the Tax Law. The auditor stated that it was standard auditing procedure, when performing a highway use tax audit, to also check for franchise tax compliance.

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[4]The Administrative Law Judge's finding of fact "6" read as follows:

> "With respect to the corporation tax audit, the parties concur that no sales invoices, cash receipts or any other records were requested other than mileage records for the fourth quarter of 1987 and Federal income tax returns for each of the years at issue."

This fact was modified to more accurately reflect the record.

OPINION

In the determination below, the Administrative Law Judge held that: 1) petitioner failed to meet its burden of proving that 50 percent or less of its receipts were attributable to a trucking business for the years at issue and, therefore, was properly classified as a transportation corporation under Tax Law § 183; 2) because the mileage ratios used by the Division of Taxation (hereinafter the "Division") to calculate franchise tax under Tax Law §§ 184 and 184-a were the product of an improper highway use tax audit methodology, the use of these mileage ratios was improper, and cancelled the notices of deficiency assessing franchise tax under these sections; 3) petitioner's ignorance of its responsibilities under Article 9 does not entitle it to abatement of penalties imposed under Tax Law § 1085; and 4) the Division is not prevented under the theory of estoppel from pursuing the corporation tax deficiencies against petitioner.

On exception, the Division contends that: 1) more than 50 percent of petitioner's revenue for each year at issue was derived from transportation activity; 2) it conducted a franchise tax audit of petitioner's records; 3) its use of a test period audit procedure to compute petitioner's tax liability under section 184-a was proper because a) petitioner consented to the use of this method, b) the Division requested petitioner's truck mileage records, and c) the Division was authorized by statute to estimate petitioner's tax liability; 4) petitioner did not supply the Division with its 1981 Federal income tax return, therefore, the franchise tax due for that year was required to be estimated, irrespective of the availability of mileage records for that year; 5) a statutory requirement that a complete audit of a taxpayer's records be conducted is separate and distinct from the requirement that an audit method be rational; 6) the notices of deficiency should be sustained, as petitioner has failed to meet its burden of proving that the notices are erroneous, and 7) this matter is distinguishable from Matter of Golden Coach (State Tax Commission, November 7, 1985) because the Division's audit method in that case was based merely on negotiated figures.

In response, petitioner argues that the record clearly demonstrates that no rational basis existed for the Division to assess tax under sections 184 and 184-a, as the assessments were based on a mileage ratio derived from an improper test period audit of highway use tax, and the Division's auditor had no evidence that the taxpayer's books and records would not accurately reflect its income.

We reverse the determination of the Administrative Law Judge.

We begin with the assumption that petitioner was subject to tax as a "transportation corporation" pursuant to sections 183, 184 and 184-a. This conclusion was reached by the Administrative Law Judge, and the issue was not raised by petitioner on appeal.

"Chartair" Requirement

In determining petitioner's franchise tax for the years at issue, the Division calculated New York gross earnings by multiplying petitioner's gross earnings by the percentage of miles driven in New York, which was ascertained by examining petitioner's mileage records for the fourth quarter of 1987. These mileage reports were used in the Division's test period audit of highway use tax. In asserting that the Division's method of assessment lacked a rational basis, petitioner urges us to apply the standard used to determine when a sales tax assessment may be estimated. This standard prohibits the use of a test period audit unless the taxpayer's records are inadequate to permit a complete audit (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41; Matter of Mohawk Airlines v. Tully, 75 AD2d 249, 429 NYS2d 759). Tax Law § 1138(a)(1), which provides the statutory foundation for this standard, states that the Division shall determine the amount of tax due "from such information as may be available [and] [i]f necessary, the tax may be estimated on the basis of external indices" (emphasis added). This statutory language has been characterized as conferring upon a taxpayer the right to have his sales tax liability determined from the records which the taxpayer is required by law to maintain (Matter of Chartair, Inc. v. State Tax Commn., supra, 411 NYS2d 41, 43; see, Tax Law §§ 1131[1], 1135; 20 NYCRR 533.2).

In urging that a similar standard be applied in the franchise tax area, petitioner argues that because the Division had no evidence that its records would not accurately reflect income, the Division's failure to examine these records renders the assessment invalid. A necessary corollary of this argument is that when complete records exist, the Division must perform a complete examination of these records to determine the amount of franchise tax due, even where the taxpayer has failed to file a return. However, this argument ignores the critical distinction between section 1138(a)(1) and its franchise tax counterpart, section 1081(a). Section 1081(a) provides that if a taxpayer required to file a franchise tax return fails to do so, "the [Division] is authorized to estimate the taxpayer's New York tax liability from any information in its possession" (emphasis added). Unlike section 1138(a)(1), section 1081(a) contains no preconditions to the Division's use of estimate techniques. In our view, if the Legislature's intention was to require a complete examination of a non-filing corporation's records before estimation techniques are permitted, it would have stated this intention within section 1081(a).

The Chartair line of cases can also be distinguished based on the nature of the subject tax and a taxpayer's record-keeping obligations. In Matter of Hennekens v. State Tax Commn. (114 AD2d 599, 494 NYS2d 208), the court, in response to the taxpayer's contention than an indirect audit methodology is appropriate only where the taxpayer's records are demonstrably incomplete, stated:

> "[t]he obvious distinction between this [income tax] case and the Chartair line of cases is the type of tax being imposed. Those cases seek recovery under Tax Law § 1138 for sales and use taxes imposed directly upon verifiable receipts evidenced by books and records, which vendors are required by statute to maintain (see, Licata v. Chu, 64 NY2d 873, 874, 487 NYS2d 522) whereas, in the case at bar, the tax is imposed upon income, the receipt of which cannot easily be verified by reference to books and records. In other words, Chartair depends upon the existence of verifiable records, not here present" (Matter of Hennekens v. State Tax Commn., supra, 494 NYS2d 208, 209).

Franchise tax under Tax Law §§ 184 and 184-a is a tax on gross earnings from all sources within New York. Because gross earnings are closely akin to income (with the only difference

being that the latter is net of deductible expenses), we find the reasoning in Hennekens to apply equally to our case. It is true that the Division's estimation methodology involved mileage records -- information petitioner was required to maintain for highway use tax purposes[5] -- which were available to the Division. However, to hold that a taxpayer has a right to a complete examination of its records in the assessment of one tax (franchise tax), which arises out of a record-keeping obligation imposed for purposes of another (highway use tax) would, in our opinion, be an illogical extension of this principle recognized in Chartair.

For the above reasons, we hold that the case law interpreting section 1138(a)(1), which requires sales tax liability to be based on a complete examination of a taxpayer's books and records, does not apply to the facts of this case.

Rational Basis Requirement

We now address whether there was a rational basis for the assessment. It is well established in New York that there must exist a rational basis for an assessment, without which the notice of deficiency must be set aside (Matter of Donahue v. Chu, 104 AD2d 523, 479 NYS2d 889, 892; Matter of Rosenthal v. New York State Tax Commn., 102 AD2d 325, 477 NYS2d 767, 769; Matter of Welch v. State Tax Commn., 89 AD2d 683, 453 NYS2d 802, 803; Matter of Fortunato, February 22, 1990). This requirement exists regardless of the adequacy of the taxpayer's records, and is established if there is a factual foundation in the record for the asserted deficiency (Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219, 221). Thus, our determination of whether the franchise tax was proper under section 1081(a) must be tempered by the separate requirement that the assessment have a rational basis.

It has been held that the use of information from a test period audit is sufficient "if the method adopted is reasonably calculated to reflect the taxes due" (Matter of Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, 157, cert denied 355 US 869). In the Division's audit of highway

[5]See, Tax Law § 507.

use tax, it determined, by examining petitioner's mileage records for the fourth quarter of 1987, that petitioner's vehicle traveled 67,616 miles, with 22,012 of those miles, or 32.55 percent, representing the miles traveled in New York. Petitioner asserts that the use of this mileage ratio to determine its franchise tax liability was improper.

In our view, the use of the truck mileage tax ratio to determine corporate franchise tax due under sections 184 and 184-a of the Tax Law was rationally based. We also believe that petitioner's statement that the Division never requested, much less examined, any of petitioner's records is not an accurate characterization of the process that resulted in the sections 184 and 184-a tax assessments.

First, it is important to stress that the taxes imposed by sections 184 and 184-a require the gross earnings of a transportation corporation from its transportation services to be allocated to New York based on the corporation's mileage within New York compared to its total mileage (Tax Law § 184[4]). Thus, the calculation made for purposes of petitioner's truck mileage tax assessment was exactly the same calculation that was required for computing the tax under sections 184 and 184-a. As a result, the considerable time spent by the auditor in trying to obtain and compile petitioner's mileage reports for purposes of the truck mileage assessment was time that was equally applicable to the assessments pursuant to sections 184 and 184-a. Further, petitioner did not have records available for the period prior to 1986, and the mileage reports from the third party lessors, relied on by the auditor, were only available for 1986 onward. Accordingly, the essence of petitioner's challenge to the mileage ratio used for the sections 184 and 184-a assessments, which cover the period of January 1, 1981 through December 31, 1987, is that the Division should have spent more time obtaining or utilizing mileage reports from lessors for a larger test period, i.e., the period of 1986 and 1987, and that the failure to do so was

irrational.[6] We see no basis for imposing such a requirement on the Division given the broad language of section 1081(a).

The extent of petitioner's efforts to establish that the test period used was not representative of the years at issue was the testimony of Peter Levine, petitioner's general manager. When asked whether he would have consented to the use of the fourth quarter of 1987 as a test period for franchise tax purposes, he responded, "[n]o . . . because the business can vary. [The auditor] only wants to look at a three-month period" (Hearing Tr., p. 24). When asked what was specific with regard to the fourth quarter, petitioner responded, "[t]hat's usually the biggest quarter, and not representative" (Hearing Tr., p. 124). While petitioner's overall volume may have increased in the fourth quarter of each year, petitioner has failed to assert, much less establish, that such an increase would result in a higher percentage of New York mileage than that which occurred in the remaining three quarters of the years at issue, effectively inflating the percentage of miles driven in New York during these years.

Petitioner argues that because the Division's use of a test period audit to determine petitioner's highway use tax was improper, this renders the mileage ratio derived from this test period invalid. Thus, petitioner concludes, the franchise tax assessment, which was calculated using this mileage ratio, is without a rational basis. While we decline to comment on the propriety of the highway use tax audit methodology employed by the Division, we conclude that even if a test period audit was improperly employed in determining highway use tax, the Division's use of this mileage information to calculate franchise tax was valid for purposes of calculating petitioner's franchise tax liability. In our opinion, the determination of whether an audit methodology is proper in a given instance must begin with an examination of the pertinent statute which provides the framework for the Division's ability to determine tax. In this case,

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[6]Petitioner does not challenge any other aspect of the audit, i.e., the accuracy of the total gross receipts used in the allocation (which were taken from petitioner's Federal corporate income tax returns for the years 1982 - 1987 and a Department of Labor report for 1981) or the propriety of gross receipts from non-transportation activities being included in a mileage-based allocation.

Tax Law § 510, which governs the determination of highway use tax, states that whether a taxpayer files a return or not, the Division "shall determine the amount of tax due from such information as is available to the [Division]." In our opinion, the fact that this standard for determining highway use tax may not have been met by the Division has no bearing on the propriety of the franchise tax assessment, which is governed by a broader standard under section 1081(a).

Finally, petitioner cites Matter of Golden Coach (supra) in support of its position. In that case, markup percentages (analogous to the mileage ratio in the present case) were agreed upon as a result of negotiations between a State auditor and the petitioner's accountant during the course of a sales tax audit. Without the petitioner's consent, the Division used these negotiated figures to calculate a franchise tax assessment issued to the petitioner. The State Tax Commission held that while the use of the negotiated figures did not vitiate the consented-to sales tax assessment, the fact that the petitioner was not made aware of and did not consent to the use of these percentages for franchise tax purposes invalidated the franchise tax assessment.

We find that Golden Coach fails to support petitioner's position in light of an important factual distinction between the two cases. In Golden Coach, the State Tax Commission, in disallowing the markup percentages for franchise tax purposes, found it critical that these percentages were not computed by using actual financial information from the petitioner's books;[7] rather, they were negotiated figures. Therefore, the State Tax Commission correctly limited these artificial indices to the sole use for which they were agreed upon -- the sales tax assessment. By contrast, the mileage ratio in the present case was calculated from actual mileage records obtained during the highway use tax audit. Although petitioner contends it was unaware

[7]We reject petitioner's reliance on Matter of Clarke & O'Sullivan Wines & Liqs. (State Tax Commission, July 3, 1986) for the same reason. In that case, a sales tax markup audit of the petitioner was used to determine its income tax liability. However, the markups used in the sales tax assessment were not determined by comparing the petitioner's purchases and selling prices, but rather by using markups considered to be common in the petitioner's industry. As in Golden Coach, the petitioner's agreeing to the use of these estimates was limited to the sales tax assessment. In light of these facts, the State Tax Commission's limiting of this estimation method to the sales tax assessment was proper.

the mileage records would be used for a purpose other than the highway use tax audit, it has failed to point to any facts in the record, nor are there facts apparent to us which would establish that the use of this mileage ratio to calculate petitioner's franchise tax liability was irrational. Because petitioner has failed to establish that the Division's method of estimating New York gross earnings was flawed, we hold that there was a rational basis for the franchise tax assessment.

Finally, we stress that we do not condone the Division's casual communication with petitioner regarding the corporation franchise tax assessments. However, petitioner has not demonstrated that it was injured by this lack of clear communication (cf., Matter of Eastern Tier Carrier Corp., Tax Appeals Tribunal, December 6, 1990).

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Rujak Trucking Corp. is denied; and

4. The notices of deficiency dated May 1, 1989 are sustained.

DATED: Troy, New York
April 1, 1993

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner