STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
TRANSERVICE LEASE CORPORATION	:	DECISION DTA No. 809901
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 1985 and 1986.	:	

Petitioner Transervice Lease Corporation, 5 Dakota Drive, Lake Success, New York 11042, filed an exception to the determination of the Administrative Law Judge issued on November 19, 1992. Petitioner appeared by Martin B. Miller, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a brief in opposition to the exception. Petitioner filed a reply brief on May 3, 1993, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner was principally engaged in the conduct of a transportation business and thus subject to the tax imposed by sections 183 and 184 of the Tax Law.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

During the years in issue, petitioner Transervice Lease Corporation ("Transervice") was the parent of its former subsidiary, Motormen Haulage Corporation ("Motormen"). Motormen, a New York corporation, filed timely 1985 and 1986 corporation franchise tax returns under article 9-A of the Tax Law. In 1989, Transervice sought the permission of the Division of

Taxation ("Division") to carry out the merger of Transervice and Motormen. Following an audit, the Division determined that in 1985 and 1986 Motormen was primarily engaged in the conduct of a transportation business and subject to tax under sections 183 and 184 of the Tax Law. Before permitting the merger, the Division required payment of tax under article 9 of the Tax Law in the amount of $145,996.78. On December 14, 1989, Motormen paid the taxand concurrently filed a claim for refund. By letter dated February 14, 1990, the Division denied Motormen's claim. As successor in interest to Motormen, Transervice filed a petition for reconsideration of its claim for refund of taxes paid.

Motormen, formerly known as TLC Rental Corp., had no employees prior to 1985. In that year, Motormen entered into agreements with Waldbaum, Inc., and its subsidiary, Charro Trucking, Inc., to provide certain services to those corporations. Waldbaum owns and operates 103 supermarkets in the vicinity of New York City. It owns and maintains a warehouse and distribution center in Central Islip, New York. Charro and Waldbaum were involved in transporting and delivering merchandise from the warehouse in Central Islip to the Waldbaum supermarkets. In 1985 Charro had over 100 employees, including mechanics, yardmen and truck drivers, and a fleet of delivery trucks. The machinists and mechanics were all members of International Association of Machinists, District 15, Local 447, and the drivers were part of International Brotherhood of Teamsters, Local 202. At some point, Waldbaum decided that it wanted to be relieved of the responsibility of negotiating union contracts and of performing the associated administrative tasks necessary to comply with those contracts (such as payroll, tax withholding, benefit plans and the like). It also wanted to be relieved of the maintenance and upkeep of the fleet of tractors, trailers and associated equipment owned by Charro. To accomplish Waldbaum's goals, Waldbaum and Charro entered into a series of agreements with Motormen in September 1985. By the terms of these agreements, Motormen took responsibility for performing a number of tasks previously performed by Waldbaum and Charro. These agreements are described below.

(a) Equipment Leasing and Maintenance Agreement. This agreement contains the following provision:

> "Customer [Charro] owns certain tractors, trailers and other equipment . . . and desires to lease the Equipment to Company [Motormen] so that Company may maintain the Equipment and use the Equipment to furnish said transportation services to Waldbaum Inc."

All of the identified vehicles, trailers and other equipment identified in the lease were leased to Motormen for $1.00 per year. The term of the lease agreement was to commence on September 30, 1985 and "terminate upon termination of the Contract Carrier Agreement". Motormen agreed to inventory all shop equipment and tools and to maintain, repair and service such equipment as needed. Upon the termination of the agreement, Motormen was required to return to Charro the original equipment leased or to replace that equipment. Motormen was required to maintain the leased equipment in good mechanical condition and running order and to provide service, parts, motor oil, fuel, etc. The equipment was to be used only to perform services for Charro and Waldbaum. It was to be operated by a "qualified operator selected, employed and paid by, and under the direction of, [Motormen]". Charro was to provide space for servicing the vehicles and equipment and heat and utilities for that space. The agreement contained a number of insurance provisions which will be discussed in detail later on.

(b) Contract Carrier Agreement. This was an agreement among Waldbaum, Charro and Motormen. The Agreement states that Motormen "is engaged in the business of furnishing transportation services". Motormen agreed to receive, transport and deliver goods to and from points designated by Waldbaum consisting of Waldbaum's retail stores, Waldbaum's Central Islip warehouse, other distribution facilities and backhaul locations. Waldbaum agreed to provide space, utilities and heat for the maintenance, service and repair of vehicles used by Motormen. Waldbaum agreed to pay Motormen certain costs to be incurred by Motormen in providing services. These were referred to as basic costs and the amount of these costs was set forth in a separate schedule. The basic costs included: wages, fringe benefits, and payroll taxes, operating and franchise taxes, permit and license fees, fuel and tolls, "engine accrual",

administration and overhead (exclusive of franchise taxes and not to exceed $50,000.00 per year), interest and depreciation on vehicles acquired by Motormen at Waldbaum's request and insurance. If the basic costs set forth on the schedule increased or decreased, adjustments were to be made to reflect actual costs. Motormen agreed not to extend union contracts or enter into new agreements with the unions without prior agreement of Charro and Waldbaum. In addition to agreeing to reimburse Motormen for basic costs it incurred in providing services to Waldbaum, Waldbaum agreed to pay Motormen a fixed management fee of $334,000.00 per year. Insurance provisions were included in the agreement. Waldbaum agreed to indemnify Motormen and hold it harmless from any and all claims, damages, expenses or other liabilities arising out of this and the equipment leasing agreement.

(c) Supplemental Agreement. Under certain provisions of the Employment Retirement Income Security Act of 1974 ("ERISA"), an employer contributing to the pension funds of the union employees initially employed by Charro and later by Motormen may become liable as a result of a withdrawal from such funds or a termination of those funds ("withdrawal liability"). By the terms of this agreement, Waldbaum agreed to reimburse Motormen for any withdrawal liabilities Motormen incurred as a union employer with certain restrictions not pertinent here.

Also in September 1985, Motormen entered into agreements with Teamsters Local 202 and District 15, Local 447. By the terms of those agreements, Motormen was essentially substituted for Charro as a signator on collective bargaining agreements between the union locals and Charro. All former Waldbaum and Charro union employees became Motormen employees. The agreement with Teamsters Local 202 contained the following provisions:

> "Motormen agrees, effective September 30, 1985 to offer employment to the ninety-six (96) transport drivers, inclusive of two (2) yardmen, who are currently employed by Charro to perform transfer and trucking services at Waldbaum's Central Islip warehouse, provided such employees submit employment applications to Motormen. Each employee whom Motormen hires shall be a new employee of Motormen for all purposes and shall be considered a probationary employee during the first sixty (60) days of employment, at the successful completion of which he or she shall become a regular employee of Motormen."

The agreements among Motormen, Waldbaum and Charro required Motormen to provide and maintain certain insurance policies in minimum amounts. The following policies were to

name Motormen as insured with Waldbaum as an additional named insured: Worker's Compensation, Employer's Liability, Disability Benefits Insurance, Garage Liability/Garage Keepers Legal Liability, Umbrella Liability. Additional policies naming Waldbaum as the insured and Motormen as an additional named insured were to be maintained by Motormen as follows: Automobile Liability (to include all owned, non-owned and hired vehicles of Waldbaum), Comprehensive General Liability, Umbrella Liability and All Risk Physical Damage Comprehensive and Collision.

Motormen had a manager at Waldbaum's Central Islip facility who supervised the maintenance and repair of the vehicles and received orders from Waldbaum and Charro with regard to shipping and delivery to Waldbaum supermarkets. Motormen had no customers or clients other than Waldbaum and Charro. All services performed by Motormen were performed at Waldbaum's facility in Central Islip.

During the relevant periods, Waldbaum employed a vice-president of warehousing and transportation. It was the responsibility of his staff to select the travel routes to be used by trucks delivering to Waldbaum stores and to formulate the schedule of deliveries, referred to by petitioner's witnesses as the "matrix formula". The matrix formulae identified the time at which a truck should leave Central Islip, the trip time, the store or stores to be delivered to, the time of delivery, the unloading time and the hour when the truck should return to Central Islip. Delivery routes and matrix formulas were given to Motormen by Waldbaum. Under the terms of collective bargaining agreements, drivers were allowed to select their routes based on seniority. Motormen had no independent responsibility or authority to select a route, dispatch trucks or assign drivers. Trucks were loaded and unloaded by Waldbaum employees.

The term "backhaul" as used in the trucking industry refers to a delivery truck's return trip. Rather than return with an empty trailer after making a delivery, a truck may pick up a second load for delivery on its return route. This secondary delivery is called a backhaul. Waldbaum controlled the backhaul on all Motormen deliveries. Backhaul arrangements were made by Waldbaum's purchasing manager and Waldbaum's warehousing and transportation

staff and communicated to Motormen. Apparently, all backhauls were performed in connection with Waldbaum's supermarket business.

In September 1985, Motormen owned no motor vehicles. In September 1986, Transervice entered into a lease with Security Pacific Leasing, Inc. ("Security Pacific") for the lease of 15 International Harvestor Tractors at a price of $667,869.60. By letter to Security Pacific dated September 29, 1986, Waldbaum agreed to guarantee the lease. As pertinent here, the letter states:

> "Upon the occurrence of any Event of Default (as defined in the Lease) with respect to Transervice Lease Corp.'s obligations under the Lease and each Schedule to the Lease, Waldbaum shall either (i) assume the obligations of Transervice Lease Corp. under the Lease Schedule(s) including, without limitation, the obligation to pay all rentals due or to become due and all other sums due or to become due under the Lease and applicable Lease Schedule(s) as if Waldbaum were originally a party thereto or (ii) shall purchase the vehicles leased by Transervice Lease Corp. pursuant to the Lease Schedule(s) for such vehicles, plus any and all amounts of all types and character then due under the Lease and Schedule(s) including, but not limited to, the rentals then due."

Transervice and Waldbaum have a similar arrangement with regard to other vehicles acquired by Transervice since 1986.

Motormen filed New York State diesel tax returns, and Federal highway use tax reports. It was registered as a hauler of goods with the Interstate Commerce Commission ("ICC") and as a motor carrier with the New York State Department of Transportation. Motormen maintained ICC logs as required by law.

Motormen maintained all books and records associated with the transportation and delivery of goods to Waldbaum including: odometer readings, tachograph readings, driver's logs, vehicle manifests, thruway toll receipts, and fuel tax reports. Motormen did not prepare or submit bills of lading.[1]

Waldbaum reimbursed Motormen on a dollar-for-dollar basis for all costs incurred by Motormen under the terms of their agreements. These costs included all Federal and State taxes

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[1]The Division conducted a motor fuel tax audit of Motormen, using a representative test period of May 1987 through November 1987. A checklist included in the audit report indicates that the auditor utilized bills of lading; however, that auditor was not called to testify. Edward Flannigan, president of Transervice, credibly testified that Motormen did not submit bills of lading.

and permit and license fees paid by Motormen. If the actual cost of vehicle maintenance and repair, labor, delivery costs, etc. exceeded the basic costs agreed to by the parties, Waldbaum assumed responsibility for the costs. If the actual costs were less than the basic costs agreed to, Waldbaum profited from the savings.

The Contract Carrier agreement stated that Waldbaum was obligated to:

> "indemnify and hold [Motormen] harmless from any and all claims, damages, expenses, or other liabilities arising out of or in any way connected with the services to be performed by [Motormen under the Contract Carrier Agreement and Equipment Lease Agreement] to the extent the insurance coverage herein shall fail to do so."

Thus, Waldbaum bore the risk of loss for all goods transported by Motormen. Insurance maintained by Motormen ran to the benefit of Waldbaum, and ultimately the insurance fees were paid by Waldbaum.

Edward Flannigan testified that Motormen was employed by Waldbaum to serve as a buffer between Waldbaum and the unions. In order to accomplish this, it was necessary for Motormen to appear to be the actual employer of the machinists, mechanics and trucks drivers represented by the unions. Mr. Flannigan indicated that the agreements among Motormen, Waldbaum and Charro were written to make it appear to the unions that Motormen was an entirely independent entity in the business of providing transportation services to Waldbaum, although this was not case.

OPINION

The Administrative Law Judge found that Motormen was conducting a transportation business for the sole benefit of Waldbaum. In making this determination, the Administrative Law Judge stated that the nature of the corporation's business must be examined (see, Matter of McAllister Bros. v. Bates, 272 App Div 511, 72 NYS2d 532, lv denied 272 App Div 979, 73 NYS2d 485) and the business must be viewed from the perspective of the customers -- what they bought and paid for (see, Capital Cablevision Sys., Tax Appeals Tribunal, June 9, 1988). The Administrative Law Judge found Motormen had engaged in the following activities: (1) employed the drivers and mechanics; (2) maintained books and records normally associated

with a transportation business; (3) obtained necessary Federal and State permits to operate a transportation business; (4) filed tax returns as a transportation business; (5) supervised the maintenance and repair of the vehicles; and (6) negotiated with the unions. The Administrative Law Judge determined that these services constituted the conduct of a transportation business by Motormen.

The Administrative Law Judge noted that, although some of the arrangements made between Motormen and Waldbaum were unusual, e.g., the degree of control Waldbaum maintained over the drivers, routes and vehicles, these arrangements "do not prove that Motormen conducted anything but a transportation business" (Determination, conclusion of law "D").

On exception, petitioner continues to assert that Motormen was not engaged in a transportation business. Petitioner argues that the employees were not actual employees of Motormen but were nominal employees and that Motormen had no control over them. Specifically, Motormen could not negotiate any renewal agreements with the unions without the consent of Waldbaum and had no control over dispatching of drivers or selection of routes (Exception, p. 13). In addition, petitioner asserts that Waldbaum did not engage the services of Motormen to operate a transportation service for the sole benefit of Waldbaum. Petitioner, citing Matter of Capital Cablevision Sys. (supra), asserts that what Waldbaum paid for and expected from Motormen was its services as a conduit employer and supervisor of maintenance.

In response, the Division urges that the Administrative Law Judge's determination holding that Motormen was conducting a transportation business should be affirmed. The Division argues that, among other things, Motormen maintained permits and registrations, filed transportation business tax reports, maintained I.C.C. logs and other records, employed drivers and mechanics, negotiated with the unions and received delivery orders from Waldbaum. In view of the above, the Division argues that Motormen controlled the transportation services sufficiently to meet the definition of a transportation business contained in Tax Law § 184.

In its reply brief, petitioner repeats its primary argument that Motormen was not engaged in a transportation business and that what Waldbaum paid for was Motormen's service as a conduit employer and supervisor of maintenance. Petitioner argues that Motormen was an employer and provider of transportation services in name only and this was part of an image that Waldbaum wanted to present to the unions. In this regard, petitioner argues that Motormen, as a conduit employer, merely received delivery orders from Waldbaum so it could make them available to the drivers who then selected routes on a seniority basis. Motormen also could not conclude any new agreements with the unions without Waldbaum's consent. Further, petitioner asserts that the bulk of the records maintained in Motormen's name were maintained by the drivers who were only "nominal" employees of Motormen.

Finally, petitioner asserts in the alternative, that if Motormen's activities are found to be integrally related to a transportation business, a refund should be granted to the extent that the tax it paid exceeds the tax that would have been imposed upon the fixed management fee alone.

We find no basis in the record before us for modifying in any respect the determination of the Administrative Law Judge. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Transervice Lease Corporation is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Transervice Lease Corporation is denied.

DATED: Troy, New York
October 14, 1993

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

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