

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

| | | |
|--------------------------------------------------------|---|----------------|
| In the Matter of the Petition | : | |
| of | : | |
| E.S.F., INC. | : | DECISION |
| TOTAL TRANSPORTATION SERVICES | : | DTA No. 812119 |
| | : | |
| for Redetermination of a Deficiency or for Refund of | : | |
| Corporation Tax under Article 9 of the Tax Law for the | : | |
| Years 1988, 1989 and 1990 and for Revision of a | : | |
| Determination or for Refund of Highway Use Tax under | : | |
| Article 21 of the Tax Law for the Period July 1, 1990 | : | |
| through June 30, 1991. | : | |

Petitioner E.S.F., Inc., Total Transportation Services, c/o Elliot S. Frankfort, President, 97 Bennington Drive, East Windsor, New Jersey 08520, filed an exception to the determination of the Administrative Law Judge issued on August 10, 1995. Petitioner appeared by Elliot S. Frankfort, President. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Vera R. Johnson, Esq., of counsel).

The Division of Taxation filed a brief in opposition to petitioner's exception. Any reply brief by petitioner was to be filed on October 27, 1995, and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and DeWitt concur.

ISSUES

I. Whether petitioner is a transportation business within the meaning and intent of Tax Law §§ 183 and 184.

II. Whether the Division of Tax Appeals has jurisdiction to direct the Division of Taxation to allow petitioner to offset its truck mileage tax liabilities with fuel use tax refunds, some of which are claimed for subsequent periods.

FINDINGS OF FACT

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

On May 18, 1992, the Division of Taxation ("Division") issued to petitioner, E.S.F., Inc., Total Transportation Services ("ESF"), a Notice of Determination under Article 21 of the Tax Law for the quarters ended September 30, 1990, December 31, 1990, March 31, 1991 and June 30, 1991 and assessing tax due of \$19,171.29, plus penalty and interest.

On June 1, 1992, the Division issued three notices of deficiency to ESF as follows:

| <u>Year</u> | <u>Tax Section</u> | <u>Tax</u> | <u>Interest</u> | <u>Total</u> |
|-------------|--------------------|--------------|-----------------|--------------|
| 1988 | 183 | \$ 75.00 | \$ 29.64 | \$ 104.64 |
| 1989 | 183 | 75.00 | 19.01 | 94.01 |
| 1990 | 183 | <u>86.00</u> | <u>10.57</u> | <u>96.57</u> |
| Total | | \$ 236.00 | \$ 59.22 | \$ 295.22 |

| <u>Year</u> | <u>Tax Section</u> | <u>Tax</u> | <u>Interest</u> | <u>Total</u> |
|-------------|--------------------|-----------------|-----------------|-----------------|
| 1988 | 184 | \$2,349.00 | \$ 928.25 | \$ 3,277.25 |
| 1989 | 184 | 3,076.00 | 779.66 | 3,855.66 |
| 1990 | 184 | <u>4,179.00</u> | <u>513.67</u> | <u>4,692.67</u> |
| Total | | \$9,604.00 | \$2,221.58 | \$11,825.58 |

| <u>Year</u> | <u>Tax Section</u> | <u>Tax</u> | <u>Interest</u> | <u>Total</u> |
|-------------|--------------------|---------------|-----------------|---------------|
| 1988 | 184A | \$ 399.00 | \$ 157.67 | \$ 556.67 |
| 1989 | 184A | 523.00 | 132.56 | 655.56 |
| 1990 | 184A | <u>618.00</u> | <u>75.96</u> | <u>693.96</u> |
| Total | | \$1,540.00 | \$ 366.19 | \$ 1,906.19 |

The notices were the result of an audit as discussed hereinafter.

ESF was incorporated in the State of New Jersey on November 17, 1983 and began doing business in New York State in 1988. It operated out of the home of its president, Elliot S. Frankfort, which was located at 97 Bennington Drive, E. Windsor, New Jersey. Petitioner had a contract with NTS, Inc. ("NTS") to haul food product from NTS's two warehouses in Edison, New Jersey and Wallkill, New York to numerous Shop Rite supermarket food stores in Connecticut, Massachusetts, New Jersey, New York and Pennsylvania. On occasion, the

tractor-trailers would pick up goods at the Shop Rite stores and deliver it to the warehouses. ESF also had a contract with Sort Freight Systems, Inc. ("Sort") by which Sort was to provide tractors and drivers to allow ESF to satisfy the conditions of its agreement with NTS.

Petitioner filed two applications for highway use and/or automotive fuel carrier permits on August 30, 1990 and December 18, 1990. The applications requested permits for 13 different tractors that were being leased from Sort.

In performing the audit, the auditor reviewed petitioner's books and records in detail, including vehicle manifests, odometer readings, trip reports, dispatcher records, New York State Thruway receipts, fuel tax reports of other states, the amount of fuel purchased by ESF in New York State and settlement sheets from NTS which indicated mileage, trips and location of the vehicles. These records were maintained at 97 Bennington Drive, E. Windsor, New Jersey. The auditor reviewed petitioner's U.S. corporation income tax returns (Form 1120) for the years 1988, 1989 and 1990 which indicated, among other things, that ESF took a deduction for repairs in all three years and took a deduction for depreciation in 1990. The Federal income tax returns reported the transportation activities of the vehicles and drivers leased by ESF.

The auditor explained that ESF met the three criteria necessary for a business to be classified as an Article 9 transportation corporation: that the entity must be a corporation; that the business operation must have made two pickups in New York State during any period; and that the revenue of the business must be more than 50% from trucking. It was the auditor's opinion that ESF met these criteria.

The auditor utilized petitioner's U.S. corporation income tax returns to initially verify income. For Federal purposes, petitioner reported gross receipts of \$782,851.00, \$1,025,372.00 and \$1,012,076.00 for the years 1988, 1989 and 1990, respectively. The Division applied to the gross receipts a mileage ratio to arrive at revenue subject to Article 9 franchise tax.¹ The auditor applied the appropriate franchise tax rate, added the surcharge taxes and minimum tax

¹Error ratios of 40% were agreed upon for 1988 and 1989. For 1990, the Division compared the actual mileage traveled in New York State to the total mileage traveled by the vehicles operated by petitioner to arrive at the ratio of .4787.

imposed under Article 9, Tax Law § 183 for tax on capital stock, to arrive at the total franchise tax deficiency of \$11,380.00.

The truck mileage tax ("TMT") notice issued by the Division asserts the tax due based upon the results of an audit for the period September 11, 1990 through June 30, 1991. Petitioner filed truck mileage tax/fuel use tax returns (MT-903) for the period under audit but never completed the TMT portion of the returns. The Division determined the mileage traveled in New York State by petitioner for the audit period and multiplied it by the applicable tax rate to arrive at the TMT due of \$19,171.00.

On the fuel use tax ("FUT") portion of the MT-903's filed for the period at issue, petitioner claimed a refund of \$10,743.00. After review, the auditor allowed a refund in the amount of \$4,823.00. Petitioner's refund claims were based upon taxes paid to the states of New Jersey, Connecticut, Massachusetts and Pennsylvania. Petitioner filed motor carrier's tax returns with the Massachusetts Department of Revenue and motor fuel use tax returns with the Division of Motor Vehicles; bureau of motor carriers' returns in New Jersey; motor carriers road tax returns with the Commonwealth of Pennsylvania; and motor carrier road tax returns with the State of Connecticut, Department of Revenue Services.

Petitioner contends that it is not a transportation company but a sales company, with no employees and no equipment, and that 100% of its revenue is derived from Edison, New Jersey. ESF pays other companies for doing the trucking of the goods, submitting bills to these other companies for fuel charges and taxes. Mr. Frankfort testified that ESF received 10% of the gross receipts for the transportation of goods, with Sort being paid the remaining 90%. He also testified that the depreciation, repairs and insurance on ESF's U.S. corporation income tax returns were for automobiles, not trucks.

Petitioner concedes the TMT due of \$19,171.00, plus interest. In fact, petitioner entered into a deferred payment agreement with the Division which provided that petitioner was to pay 25% of the liability within 30 days of the date of the agreement and \$1,250.00 a month thereafter. ESF paid \$5,233.60 initially, and then made four payments of \$1,250.00 before

stopping payments because certain refunds claimed to be due were not being paid by the Division. Petitioner claimed that the refund approved by the Division in the amount of \$4,823.00 for the period September 11, 1990 through June 30, 1991 and the refund of \$11,053.00 claimed by ESF for the period July 1, 1991 through June 30, 1992 should be used to offset the TMT liability. At the time of the hearing, petitions had not been filed with the Division of Tax Appeals concerning the refunds claimed for the period July 1, 1991 through June 30, 1992.

The Division contends that ESF is a transportation corporation because it obtained highway use permits, filed motor carrier returns with states other than New York, has Federal corporation tax returns that report the transportation activities of the vehicles and drivers it leases, submits bills to Sort charging fuel taxes, maintains records regarding the trucking activities and obtains highway use tax stickers.

The Division further contends that petitioner may not offset the refund claimed for the later period because no petition has been filed with the Division of Tax Appeals and thus there is no jurisdiction to hear this issue. As for the refund claimed for the earlier period, it is the position of the Division that no offset is allowed as ESF is attempting to credit a FUT refund against a TMT liability.

OPINION

In the determination, below the Administrative Law Judge visited Tax Law § 209(1) of Article 9-A relative to the imposition of an annual franchise tax, sections 183 and 183-A for the imposition of a tax and surcharge tax on the capital stock of domestic and foreign transportation and transmission corporations and associations, along with sections 184 and 184-A for the imposition of tax and surcharge tax on the gross earnings of all transportation and transmission corporations and associations.

The Administrative Law Judge held that:

"[a] transportation or transmission corporation or association is one formed for or principally engaged in the conduct of aviation, railroad, canal, steamboat, ferry, express, navigation, pipeline, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or

sleeping car business or formed for or principally engaged in the conduct of two or more such businesses" (Determination, conclusion of law "A").

The Administrative Law Judge, after reviewing court decisions relative to the classification of businesses under Articles 9 and 9-A, held that "[t]he term 'transportation' means 'any real carrying about or from one place to another' (Matter of Joseph A. Pitts Trucking, State Tax Commn., July 18, 1984; see; Matter of RVA Trucking v. State Tax Commn., 135 AD2d 938, 522 NYS2d 689)" (Determination, conclusion of law "B"), and further held, "[i]n determining whether a corporation is properly classified as a transportation company under article 9 it is most appropriate to examine the nature of its business activities (see, Matter of McAllister Bros. v. Bates, 272 App Div 511, 72 NYS2d 532, lv denied 272 App Div 979, 73 NYS2d 485)" (Determination, conclusion of law "C").

The Administrative Law Judge also held that: (1) NTS engaged the services of ESF to operate a transportation service for the benefit of NTS; (2) ESF leased the drivers and tractors, maintained all records normally associated with a transportation business, and held State permits necessary to enable it to operate as a transportation business; (3) ESF filed tax returns as a transportation business, filed motor carrier returns with states other than New York, and reported on its Federal corporation tax returns the transportation activities of the vehicles and drivers it leased; and (4) "ESF was involved in the business of transporting goods" and "it is clear that ESF was conducting a transportation business for the benefit of NTS (Matter of Transervice Lease Corporation, Tax Appeals Tribunal, October 14, 1993, affd 214 AD2d 775, 624 NYS2d 661)" (Determination, conclusion of law "C").

The Administrative Law Judge held that petitioner's business would not even exist if it was not providing a transportation service which offers to move goods and, further, "[t]he 'sale' of the contract rights was provided in conjunction with the transportation service provided to its customers" (Determination, conclusion of law "D").

The Administrative Law Judge, after discussing at length petitioner's attempt to offset the TMT liability with the FUT refund approved by the Division for the audit period, rejected the

Division's denial of the offset because two different taxes were involved, holding same as not being supported by the record, and granted petitioner's offset of \$4,823.00 for the period September 11, 1990 through June 30, 1991 against the TMT liability for the same period (Determination, conclusion of law "E"). As to petitioner's attempt to offset with FUT refunds claimed to be due for the period following the audit period, namely July 1, 1991 through June 30, 1992, the Administrative Law Judge held that: (1) petitioner is not entitled to the \$11,053.00 offset; (2) the liability year is not the same as the refund year; (3) "[t]here is very little evidence in the record so as to be able to determine whether the refund relates to the same transactions as those upon which tax was assessed (Matter of Abbe L. Kadish, Tax Appeals Tribunal, November 15, 1990)" (Determination, conclusion of law "F"); and (4) as to the claims for refund in the amount of \$11,053.00, the Division of Tax Appeals lacks jurisdiction over the claims since no petition was filed.

On exception, petitioner, who did not submit a brief, argues that during the corporation tax periods of 1988, 1989 and 1990 ESF did not order permits, did not pay fuel taxes until October 1990 and is, therefore, being charged for 2 years and 10 months when NTS held the permits and licenses.

Petitioner also argues that: (1) TMT taxes and refunds were both for the same periods and, thus, all refunds should be honored, not just 40%; (2) all refunds were for the same business, same trucks, same routes and same formula; (3) a tremendous excess of New York fuels were bought and taxes paid at the time of sale, and it is ridiculous that he is now being denied tax relief; and (4) absolutely too much time elapsed between the hearing and the Administrative Law Judge's ruling (a full year).

The Division, in reply, argues that even though petitioner did not submit a reply brief, the six-month time period within which the Administrative Law Judge was required to issue his determination ran from the due date of the reply brief, February 15, 1995.

The Division also argues that: (1) "[t]he petitioner's challenge is based on factors which pale in significance when viewed against the other more compelling evidence supporting the

ALJ determination" (Division's brief, p. 6); (2) the Administrative Law Judge correctly determined that prior to October 1990 petitioner conducted a transportation business for purposes of Article 9 of the Tax Law; and (3) "the petitioner has failed to plead or establish that the Division improperly disallowed a portion of the petitioner's refund claim" (Division's brief, p. 7).

We affirm the determination of the Administrative Law Judge.

We find that the Administrative Law Judge completely and adequately addressed the issues before him and timely issued his determination. A review of the record below shows that petitioner has failed to present any evidence or legal authority which would cause us to make a change in the conclusions reached by the Administrative Law Judge and, therefore, we affirm the Administrative Law Judge's determination for the reasons stated in the determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of E.S.F., Inc., Total Transportation Services is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of E.S.F., Inc., Total Transportation Services is granted to the extent indicated in Conclusion of Law "E" of the Administrative Law Judge's determination, but is otherwise denied; and

4. The Division of Taxation is directed to modify the Notice of Determination, dated May 18, 1992, in accordance with Conclusion of Law "E" of the Administrative Law Judge's determination, but such notice is otherwise sustained.

DATED: Troy, New York
March 21, 1996

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner