STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
UNITED CARGO MANAGEMENT, INC.	:	DECISION DTA NO. 814250
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 1992 and 1993.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on April 10, 1997 with respect to the petition of United Cargo Management, Inc., 1111 Watson Road, Unit C-1, Carson, California 90745. Petitioner appeared by Galland, Kharasch & Garfinkle, P.C. (Gregory P. Cirillo and David P. Street, Esqs., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James P. Connolly, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception and a reply brief. Petitioner filed a brief in opposition. Oral argument, at the request of the Division of Taxation, was heard on December 10, 1997 in New York, New York.

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

***ISSUE*S**

I. Whether the Division of Taxation properly determined that petitioner was a corporation subject to tax under Article 9, sections 183 and 184, of the Tax Law.

II. Whether the Division of Taxation's imposition of tax under Tax Law §§ 183 and 184 violates the Commerce Clause of the United States Constitution.

FINDINGS OF FACT

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

The Division of Taxation ("Division") and petitioner entered into a stipulation of facts which was received into evidence in this matter. The facts as set forth in the stipulation have been substantially incorporated into this determination.

Petitioner, United Cargo Management, Inc. ("UCM"), was incorporated in the State of California on April 17, 1987 and began doing business in New York State on August 1, 1987. Petitioner is headquartered in the State of California and has two United States offices: the first is located in Los Angeles, California, while the second is located in New York State at 184-45 147th Avenue, Suite 103, Springfield Gardens, New York. Petitioner's New York office consists of approximately 1,500 square feet of rented office space.

Petitioner is a nonvessel-operating common carrier ("NVOCC"). As such, it files tariffs and posts a surety bond with the Federal Maritime Commission ("FMC").

UCM contracts for bulk space on oceangoing vessels of about six unrelated vessel-operating common carriers ("VOCCs") and resells the space to its customers. A VOCC is an independent shipping line which files its tariffs and posts a surety bond with the FMC.

UCM does not own or lease any ships, barges, or seagoing vessels of any kind; any trucks, trailers, rail cars, or other ground transportation equipment; or any containers, storage or

packing equipment. It also does not own or lease any warehouse space. Petitioner's business is conducted mainly by telephone and fax machine.

Petitioner must be an NVOCC in order to be able to enter into a service contract with a VOCC. The record includes a representative service contract entered into by petitioner with a VOCC, i.e., the Yangming Marine Transport Corp., covering the transportation of goods from points in Asia to points in the United States. Under the terms of this service contract, petitioner is committed to ship a minimum quantity of cargo throughout the year or pay liquidated damages. The terms also include the classification of specific items of cargo in five commodity groups, i.e., Groups "A" through "E". The rate for shipment of either a 20-foot or 40-foot container to various destinations on the East and West coasts, as well as points in between, is based upon the commodity group of the cargo. In addition, according to the terms of this service contract, the VOCC provides consolidated freight service or container yard off-dock terminals or both at two locations in Taiwan.

There are two types of water-based shipping services to the East Coast from Asia. The first is the all-water route through the Panama Canal and the other is the miniland bridge service by train from the West Coast. The same types of services are also used for shipments from the East Coast to Asia. Some shipping lines sail once a week each way, while others sail twice a week.

Consolidation cargo is always shipped via the miniland bridge route. Time sensitive cargo, such as clothing, is usually shipped via the miniland bridge service because that route is faster than the all-water route.

Cargo is usually packed in 20 or 40-foot containers supplied by the particular shipping line which will be transporting the cargo. A 40-foot container holds about 50 cubic meters ("CBM"). Container ships traveling across the Pacific or the Atlantic can carry approximately 4,000 or 5,000 20-foot containers at one time.

Petitioner supplies information about various shipping lines, whose oceangoing vessels travel to and from Asia, to small importers or small exporters of goods ("shippers"). Based on the information supplied by the shipper, i.e., the type and amount of cargo, the time frame for delivery and the amount which the shipper wishes to spend on transportation, UCM advises the shipper about the services supplied by the VOCCs with which UCM has a service contract.

Some of petitioner's customers wish to ship cargo sufficient to fill one or more 20 or 40-foot containers, while others wish to ship small quantities of loose freight.

The shipper, rather than petitioner, usually chooses the VOCC which will carry the cargo. The exception is when a shipper has loose freight insufficient to fill an entire container ("less than a container load" or "LCL"). In the case of LCL, petitioner attempts to consolidate LCL from a number of its customers to fill a container. In instances where petitioner is unable to fill a container, it transfers its customer's loose freight to one of three major consolidators, usually KYC Container Line, which consolidates small cargo from a number of sources into a full container for shipment.

After a decision is made as to which shipping line will be carrying the cargo, petitioner advises the customer where to obtain the shipping container or where to take the cargo.

Petitioner does not load the shipper's cargo into the containers, nor does it transport the loaded containers to the VOCC's container yard. Rather the shipper obtains the container from

the shipping line chosen to ship the cargo, loads its freight into the container and returns the filled container to that line's container yard.

In instances where a small importer is shipping less than a container load, it contacts petitioner's overseas agent who directs the importer to deliver its cargo to a warehouse chosen by the shipping line. At that warehouse, the cargo is consolidated along with other cargo into a full container for shipment. When the container reaches the destination railhead, petitioner appoints a warehouse to pick up the container from the rail ramp, take it to its facility, strip/unload the container and place the loose freight on different pallets for each importer or its consignee to pick up.

According to Nelson Liu, petitioner's New York regional sales manager, petitioner appoints St. George Warehouse, located in New Jersey, to strip about 90% of its consolidated cargo business.

In instances where another NVOCC handles petitioner's customer's loose freight, that NVOCC appoints the warehouse which strips the container.

Petitioner does not appoint a warehouse to strip a container filled with only one customer's cargo. Rather the customer gets access to the container and its contents once it is off-loaded from the vessel.

Petitioner has no control over the arrival, departure or scheduling of any of the carriers with which it has a service contract. Nor does it have any control over the personnel of any of the carriers.

Even though petitioner has a service contract with a VOCC, it still must reserve space for a particular sailing. On occasion, petitioner will be "shut out" and petitioner's customer's cargo

must remain in a container at the shipping line's container yard until the VOCC's next sailing. This usually happens during the peak season, when a shipping line overbooks a sailing.

Petitioner's services are valuable to its customers because of its knowledge of various shipping lines' rates, procedures, schedules and the quality of the services provided. In addition it has the ability to offer small shippers lower container rates than a VOCC would offer them directly. Furthermore, in instances where an importer/shipper and its manufacturer/supplier distrust each other, petitioner's agent in Asia can and does act as the go-between.

The fee which petitioner charges and collects from each of its customers includes the fee of the shipping line which actually transports the cargo. Petitioner retains only a small portion of the fee it collects, forwarding the remainder to the shipping line involved. In instances where a customer requests trucking services to its door (so-called "door service"), petitioner may assist the customer in obtaining those services; however, petitioner does not own or lease any trucks.

In every transaction involving petitioner, including ones in which petitioner transfers its customer's loose freight to another NVOCC for consolidation, two bills of lading are always issued, i.e., a master bill of lading and a house bill of lading. Either the shipping line or the NVOCC which has consolidated the cargo, issues the master bill of lading to petitioner as shipper. The master bill of lading never identifies the actual shipper. Petitioner, in turn, issues a house bill of lading to its customer, the actual shipper. All house bills of lading identify petitioner as the agent of the shipping line which is transporting the cargo.

A bill of lading has many purposes in the international shipment of goods. Not only is it a required record of the shipment of a particular cargo, it is also a valuable piece of customs

documentation. At times, it is presented along with a letter of credit to a bank in order to obtain payment for cargo.

Petitioner carries error and omission insurance to protect solely against employee misdirection of the cargo. It does not insure against physical damage or theft of the goods being shipped. Rather the shipping line which transports the goods takes care of any damage claims. According to petitioner's president, Thomas Lee, petitioner has never had a claim brought against it for damage to shipments.

If business is very good, petitioner might direct 40 20-foot containers to one vessel for shipment.

During the years in issue, petitioner also shipped cargo by air through carriers operating out of JFK International Airport. About 5% of petitioner's shipments during those years went by air.

For calendar years 1992 and 1993, petitioner filed general business corporation franchise tax returns (Form CT-3) pursuant to Article 9-A of the Tax Law, in which it listed its principal business activity as "shipping agency".

The Division conducted a desk audit of petitioner's 1992 and 1993 returns. Based on correspondence it had received from petitioner in relation to a desk audit it had conducted for tax year 1991, the Division determined that petitioner was a freight forwarder acting as principal ("principal freight forwarder") and, as such, should have filed franchise tax returns for the years 1992 and 1993 under Article 9, as a transportation corporation, rather than under Article 9-A, as a general business corporation.

The Division's determination was based on the following definition of a freight forwarder (principal and agent) as outlined in an October 5, 1993 letter sent to Donald Pan, petitioner's general manager, by Irene Easton, tax technician - advocate.

> FREIGHT FORWARDERS. Freight forwarders are companies that ship, or arrange the shipping of, the goods of another to a specified destination via a third party. Whether the freight forwarder acts as principal or agent determines whether or not its receipts are from transportation activities.
>
> 1. PRINCIPAL. A principal conducts its business so as to lead the public to believe that it is a carrier of goods. If it does one or more of the following: issues bills of lading, makes contracts in its own name, receives goods for transport, or takes responsibility for the goods being transported, it is providing a transportation service. It is not necessary that the principal own the means of transportation; it may hire independent carriers to transport the goods. If over 50% of the taxpayer's gross receipts are derived from its activities as a principal, it is subject to tax under Article 9, Sections 183 and 184.
>
> 2. AGENT. An agent merely acts as a conduit between the provider of the goods and the carrier, and receives a fee for the service. It arranges for transportation without taking responsibility for the goods or insuring their safety, and it is only liable for its own negligence and not that of the carrier. If over 50% of the taxpayer's gross receipts are derived from its activities as an agent, it is subject to tax under Article 9-A.

By letter dated April 6, 1995, the Division requested that petitioner file tax forms CT-183 and CT-184 for the years 1992 and 1993 under Tax Law §§ 183 and 184. The letter further stated that if petitioner failed to file the requested returns within 30 days, the Division would issue an estimated assessment based on information in its files.

Petitioner respectfully declined to file returns under Tax Law §§ 183 and 184 by letter dated June 7, 1995, and further requested expedited assessment by the Division.

The Division computed petitioner's tax liability under Tax Law §§ 183 and 184 as follows: (1) it determined petitioner's minimum tax liability under Tax Law § 183, including the surcharge,[1] to be $86.00 for each year in issue; and (2) it determined petitioner's Tax Law § 184 tax liability, including the surcharge, to be $37,968.00 and $8,603.00, respectively, for the years 1992 and 1993. The Division calculated petitioner's liability under Tax Law § 184 for each year in issue by first multiplying .0075 by the income for services performed in New York State, which petitioner reported on line 125 of Schedule A of each Form CT-3, to arrive at the franchise tax and then adding the 15% surcharge.

By Notice of Deficiency (Notice No. L-010523688-6), dated June 22, 1995, the Division asserted a deficiency of $45,939.00, plus interest and penalty, based on the estimate of applicable Article 9 tax discussed above.

In its petition, dated August 15, 1995, petitioner asserted that the Division erred in determining that it is a transportation company subject to tax under Article 9.

During the hearing, one of petitioner's representatives made a motion to amend the petition to include the following additional defenses: first, that to the extent petitioner provides any transportation services, they are performed in the State of New Jersey at Port Elizabeth and Port Newark, not in New York State at the Port of New York and New Jersey; second, that petitioner is engaged in international commerce and thus should not be subject to the transportation tax; and third, that the gross receipts for tax year 1992 were incorrectly calculated and therefore the transportation tax, assuming it is due, was incorrectly calculated.

---

[1]Tax Law § 188 imposes a tax surcharge on transportation and transmission corporations and associations. A 15% tax surcharge applied to taxable years 1990 through 1993. For the years in issue, the surcharge was computed on forms CT-183 and CT-184 on the tax due, after the deduction of tax credits.

The motion to amend the petition was granted and the record remained open until May 29, 1996 to afford petitioner the opportunity to submit any or all of the following: (1) every arrival notice issued by UCM for the years in issue; (2) the carrier's tariffs on file with the FMC; (3) copies of any carrier lease agreements for berths on file with the FMC; (4) an affidavit from a representative of the Port Authority of New York and New Jersey; (5) affidavits from the carriers identifying either the 1992 and 1993 transactions involving petitioner, or the location of their berths; (6) for the period in issue, any brochures issued by the carriers used by petitioner or any general shipping publications; and (7) the affidavit of Ronald Su, petitioner's accountant, and supporting documentation concerning the recalculation of the gross receipts for the 1992 tax year.

Both Thomas Lee and Nelson Liu testified that ocean container carriers dock at either Port Elizabeth or Port Newark, both of which are located in New Jersey, not in the New York State portion of the Port of New York and New Jersey.

After the hearing, petitioner submitted, among other things, its arrival notices (i.e., notices announcing to the consignee in an import transaction that the shipment it was waiting for was ready to be picked up) for the period in issue. The arrival notice always indicates where the cargo can be picked up ("the cargo location"). Those arrival notices showed that all of the ocean cargo was to be picked up at terminals and warehouses outside of New York.

Based on this information as to the site of petitioner's shipments, the Division, in its brief, concedes that none of petitioner's ocean freight forwarding pickups or deliveries occur in New York. In its letter remitting its hearing brief in this matter, the Division revised the Notice of Deficiency issued to petitioner to reflect application of an allocation factor calculated in

accordance with the method set forth in an Advisory Opinion, TSB-A-94(12)C, issued to S&S Westchester Shipping, Ltd., causing the amount of the deficiency to be reduced to $28,824.00, plus penalty and interest for 1992, and $5,455.00, plus penalty and interest for 1993. The worksheet attached to the transmittal letter contained the Division's calculation of the revised Notice of Deficiency as follows:

1992

Section 184 tax:

receipts per 1120	15,375,938
allocated @ 21.67%	3,331,966
surcharge @ 15%	3,748
total	28,738[2]

3 factors:

property (per CT-3)	31%
pick-ups and deliveries	0%
wages (per CT-3)	34%
total	65%

Section 183 tax: minimum tax: 86

Revised Total: $28,824

1993

Section 184 Tax

receipts per 1120	2,827,045
allocated @ 22.02%	622,515
tax @ .0075	4,669
surcharge @ 155	700
total	$5,369

[2]The calculation fails to include a line for the computation of tax @ .0075 in the amount of $24,990 (rounded).

3 factors:

property (per CT-3)	25.05%
pick-ups and deliveries	0%
wages (per CT-3)	41 %
total	66.05%
÷ 3	22.02%

Section 183 Tax

Minimum Tax: $86

Total: $5,455

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reasoned that a corporation is properly held subject to tax under Article 9 based upon an examination of the nature of its business activities. As an NVOCC, petitioner was involved in the international shipment of goods by water, regulated by the Federal Maritime Commission. The Administrative Law Judge found that petitioner was a "conduit" between shippers and the shipping lines which transported their cargo, arranging for the ocean transportation of the cargo, akin to a travel agent. As such, the Administrative Law Judge determined that, from the perspective of its customers, petitioner was a freight forwarder acting as an agent and, therefore, a general business corporation subject to tax under Article 9-A.

ARGUMENTS ON EXCEPTION

On exception, the Division contends that petitioner was a principal freight forwarder not an agent freight forwarder as those terms were defined in two advisory opinions issued by the Division, to wit: ***S&S Westchester Shipping Co., Ltd.*** (TSB-A-94[12]C) and ***Preferred Air Freight*** (TSB-A-85[19]C). In support of its position that petitioner was a principal freight forwarder, the Division argues that petitioner controlled the transportation process, despite not

owning the means of transportation. The Division contends that petitioner was engaged in activities which were closely related to the movement of the cargo, such as receiving , transferring, storing and forwarding the goods. Therefore, even if not the actual transporter, petitioner was an integral part of the transportation process. Further, petitioner was authorized to consolidate cargo to achieve advantageous rates with shipping lines, establishing even greater control over the freight.

The Division maintains that, as an NVOCC, petitioner was performing the functions of a principal freight forwarder for its customers and was, therefore, properly held to be a transportation corporation. Technically, as stated on the bills of lading issued by the carriers, NVOCCs were shippers in their relationship with the ocean common carriers (46 USC App. § 1702[17]). The Division argues that by issuing bills of lading to its customers, NVOCCs assume absolute liability for the cargo during transit, notwithstanding the customer's right to seek damages from the shipping lines. In addition, the Division argues that petitioner controls the choice of lines with which its customers ship by virtue of its service contracts. The Division also notes that petitioner exerted even more control where UCM consolidated shipments because petitioner chose the warehouse to perform the stuffing or stripping of the cargo as well as the shipping line to handle the consolidation.

The Division argues that the legal and economic position of petitioner strongly suggests that its customers viewed it as a principal freight forwarder and, thus, a transportation corporation. The Division alleges that petitioner presented no direct evidence as to how its customers viewed it and whether it did anything to distinguish itself from a common carrier. Since the theory behind NVOCCs is that they can offer lower rates through volume discounts

with shipping lines, it reinforces the belief that petitioner is a principal freight forwarder, as opposed to an agent which may only give transportation advice or the service of making the actual arrangements for the transportation.

Petitioner argues that its status as an NVOCC does not entail taxation under Article 9. Rather, it believes that the Administrative Law Judge properly examined its business activities to determine its true nature, i.e., a middleman between its customers and shipping lines which arranges for the transportation of their goods at advantageous prices. Since petitioner does not own, operate or control the means of transportation, it contends it cannot be held to be a transportation company.

Petitioner also argues that the Division's classification of petitioner as a principal freight forwarder is irrelevant to its actual business operations, which should be paramount in its determination of whether petitioner is a transportation company. Although petitioner believes that labeling it as a principal freight forwarder for the purpose of defining its true business was an invalid analysis, it also urges that its business operations were more closely analogous to that of an agent freight forwarder as found by the Administrative Law Judge.

Finally, petitioner maintains that the Division's use of a business allocation percentage based upon a three-factor formula was unconstitutional because it sought to tax transportation services which were not performed in New York and was, therefore, in violation of the Commerce Clause. In addition, the Division sought to deem petitioner a common carrier for purposes of the transportation tax classification, but not for purposes of the allocation formula, in violation of the Equal Protection Clause of the Constitution.

The Division agrees that the inquiry is whether petitioner is a transportation business and that this is determined from an examination of a taxpayer's business and what it is that customers are purchasing. The Division points out that an NVOCC is a common carrier, or a person holding itself out as providing the transportation of goods. The Division contends that petitioner's pervasive control over and responsibility for the transportation process demonstrates its role as a transportation company. The fact that petitioner has no direct control over the ships is not relevant to the Division, which also notes the total control petitioner has over the shipping lines used and the responsibility it assumes for the successful completion of the shipping process. With all of these characteristics, the Division believes that customers view petitioner as a transportation corporation because of its control over the entire transportation process, without regard for whether petitioner owns, operates or controls the means of transportation.

OPINION

Petitioner is in the business of contracting with shipping lines for space on vessels (and, to a much lesser degree, on aircraft) and selling space on said lines to their customers, regardless of the size of the shipment. The chief issue presented is whether petitioner is taxable on its entire net income as a general business corporation under Article 9-A of the Tax Law or on its gross receipts as "a corporation . . . principally engaged in the conduct of a transportation . . . business" under Article 9 of the Tax Law.

For the privilege of exercising its corporate franchise, of doing business, of employing capital, or of owning or leasing property in this State in a corporate or organized capacity, or of maintaining an office in this State, every domestic or foreign corporation (except those corporations subject to tax under sections 183 and 184 and such other corporations as are

specified in Tax Law § 209[4]) must pay an annual franchise tax to this State (Tax Law § 209[1]). Sections 183 and 184 of Article 9 impose a franchise tax and an additional franchise tax, respectively, upon corporations and associations 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, and other domestic corporations or associations principally engaged in the conduct of a transportation or transmission business.

Petitioner's business is not one of the businesses specifically enumerated in sections 183 and 184. If petitioner's business is taxable under sections 183 and 184, it must be because it is "principally engaged in the conduct of a transportation . . . business."

We conclude that petitioner is not and affirm the determination of the Administrative Law Judge.

Whether a given corporation is properly classified and held subject to taxation under Article 9 or under Article 9-A is to be determined from an examination of the nature of its business activities. Neither the laws under which a petitioner was incorporated nor the provisions of a petitioner's certificate of incorporation are controlling (***see***, ***McAllister Bros. v. Bates***, 272 App Div 511, 72 NYS2d 532, ***lv denied*** 272 App Div 979, 73 NYS2d 485; ***Holmes Elec. Protective Co. v. McGoldrick***, 262 App Div 514, 30 NYS2d 589, ***affd*** 288 NY 635). In ***McAllister Bros. v. Bates*** (***supra***), the court set forth a ***de facto*** test with respect to such determination as follows:

> it has firmly been established that classification for franchise tax purposes is to be determined by the nature of [the corporation's] business and that the purposes for which the corporation was organized are immaterial. This rule with respect to classification for franchise tax purposes applies especially to corporations organized under the general business corporation laws which have within their certificates of incorporation a wide variety of chartered powers (***McAllister Bros. v. Bates***, ***supra***, 72 NYS2d, at 536).

Regarding the classification of a taxpayer's business activities for tax purposes, we set forth a similar test in ***Matter of Capitol Cablevision Sys.*** (Tax Appeals Tribunal, June 9, 1988):

> [i]t is well established that classification for corporation tax purposes is to be determined by the nature of the taxpayer's business and not by the words in its certificate of incorporation, nor by focusing on one aspect of its business operations. The business must be viewed in its entirety and from the perspective of its customers - - what they buy and pay for [citations omitted] (***Matter of Capitol Cablevision Sys., supra***).

Applying this test to the instant matter, we conclude that petitioner, as an NVOCC, was not, when viewed in its entirety from the perspective of its customers, providing transportation, as that term has been traditionally defined: "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). Rather, petitioner made arrangements for its customers with VOCCs that transport goods by water between foreign countries and the United States at discounted prices it receives through its service contracts with the VOCC's. Although a very small percentage of its business, petitioner also has the ability to handle very small or odd lot shipments through consolidation with other shipments.

The Division's case relies upon the policy enunciated in two advisory opinions: ***Preferred Air Freight*** (***supra***) and ***S & S Westchester Shipping Co., Ltd.*** (***supra***). In ***S & S Westchester***,

the issue involved corporations which contract with vendors to ship goods, arranging for the transportation of those goods and the transportation of the goods from the vendor to the ship and from the ship to the ultimate destination. In ***Preferred Air Freight***, petitioner was a "freight forwarder" which owned no transportation equipment, but purchased the services of others. In the latter opinion, the Division relied on ***People ex rel. New York & Albany Lighterage Co. v. Cantor*** (239 NY 64) for the proposition that a corporation could be a transportation corporation without engaging in the transportation of freight as a common carrier, and that such transportation corporations include not only those corporations owning and managing the means of transportation but also corporations which provide services directly connected with such transportation.

In ***Preferred Air Freight***, the Division examined the relationship between the freight forwarder and the shipper to determine whether it was a transportation company. It noted that a freight forwarder acting as a principal in the transportation process assumed control and full responsibility for the goods shipped, issued a bill of lading and paid all transportation charges to the shippers. Essentially, it did everything except own the means of transportation. On the other hand, the Division said a freight forwarder acting as an agent had no control over or responsibility for the goods being shipped. It receives only payment for arranging for the transportation and issues no bill of lading.

The advisory opinions do not provide any authority for the conclusions reached other than the ***Cantor*** case. However, we believe that the Division's reliance on ***Cantor*** was misplaced. The Court of Appeals in ***Cantor*** stated that the purpose set forth in a corporation's charter was determinative of whether it was a transportation company. It is now recognized that a

corporation's statement of purpose in its charter is not determinative of whether it is a transportation corporation (***see, Matter of Capitol Cablevision Sys., supra***). Further, the Division's policy set forth in the advisory opinions that companies need not own the means of transportation but merely provide services directly connected to transportation, has no support in the ***Cantor*** case, since the corporation in ***Cantor***, Albany Lighterage, did, in fact, operate barges and lighters.

After establishing this basic division between freight forwarders who act as principals and agents, the Division tried to bolster its position by referencing the Shipping Act (46 USC App. § 1700, et seq.) and various definitions contained therein. However, as correctly noted by the Administrative Law Judge, there is no basis for the Division's assertion that ocean freight forwarders, defined at 46 CFR 510.2(n), which the Division contends act as agents only, are prohibited from issuing bills of lading or consolidating shipments (***see***, Determination, conclusion of law "D"). Further, as both NVOCCs and ocean freight forwarders are within the term "shippers" as defined in the Act (46 USC App. 1702[21]), it appears both may enter into service contracts withVOCCs. Hence, the distinction between the two entities is not as clear as the Division contends.

The Division also argues that the fact that petitioner issues a bill of lading evidences its responsibility for the goods being shipped and the control it has over the entire transportation process. However, NVOCCs are required to issue bills of lading as agents for the carrier (46 USC App. § 1303[3]) and these documents need to be viewed in the context of the entire transaction. The bills of lading in the record clearly indicate to the customer that the goods are being shipped through a VOCC with whom petitioner has contracted as agent and which also

signs the bill. To the extent that petitioner is liable for the goods, it stands as the indemnitee of the VOCC and the true parties in interest in such situations would be the owner and the VOCC (***see, Insurance Co. of North America v. M/V Ocean Lynx***, 901 F2d 934, ***cert denied*** 498 US 1025). Consistent with this and as indicated in the facts, UCM only carries error and omission insurance to protect against misdirection of the goods, which belies any responsibility for loss or damage claims by UCM's customers and corroborates its denial of responsibility for and control over the goods during transport.

In a similar fact scenario decided under the ICC Termination Act of 1995, wherein the term freight forwarder is defined as an entity providing transportation which assembles and consolidates goods and assumes responsibility for the transportation (49 USC App. § 13102[8]), a shipper was barred from recovering losses allegedly occasioned by mishandling of equipment being transported from England to Ohio, where the shipper sued the company it had engaged to arrange for transportation because the company acted as a forwarding agent (not a freight forwarder) in arranging transportation, which did not assemble or consolidate goods in the ordinary course of its business and did not assume responsibility for the safe transportation of cargo from origin to destination (***Independent Mach. v. Kuehn & Nagel***, 867 F Supp 752, emphasis added).

Petitioner provides one segment of a complex importation transaction whereby goods are shipped from foreign countries to the United States. Petitioner possesses dual qualities: it has the quality of a common carrier in relation to its shippers, and the quality of a shipper in relation to the underlying carriers (***New York Foreign Freight Forwarders & Brokers Assoc. v.***

Interstate Commerce Commn., 589 F2d 696, 699). However, petitioner's role is as agent for the VOCCs, which it communicates clearly to its customers, the real shippers, on its bills of lading.

After examining the relationship of UCM with its customers and the bills of lading it both gives and receives, the Division's basis for its assessment, as set forth in the October 5, 1993 letter to petitioner by the Division's auditor, appears to misapprehend UCM's true place in the scheme of the transaction relying on general definitions rather than an analysis of petitioner's business. A closer analysis of the nature of UCM's business, as dictated by the ***McAllister*** case, indicates that the Division's own definition of an agent freight forwarder is a more accurate portrayal of petitioner than the forced analogy to the principal freight forwarder upon which it based its assessment. UCM does not own or operate any of the transportation facilities, does not have dominant control over the goods shipped, does not choose the shipping lines for its customers or assume liability for loss or damage. Therefore, we cannot accept the Division's assertion that UCM controls the entire transportation process.

For these reasons, we agree with the Administrative Law Judge that, viewed from the perspective of its customers, petitioner is a convenient conduit by which space is acquired on vessels for its goods and which acts as an agent for the carriers. Given the language of the bills of lading issued by UCM and signed by the master or carrier, we believe that petitioner's role is as an agent which unites the transportation needs of importers with available space for their goods on vessels owned, controlled and operated by VOCCs. As such, UCM is a general business corporation taxable under Article 9-A of the Tax Law. Having reached this conclusion, we need not address the issue of whether imposition of tax under Tax Law §§ 183 and 184 would be constitutional in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

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

3. The petition of United Cargo Management, Inc. is granted; and

4. The Notice of Deficiency, dated June 22, 1995, is cancelled.

DATED: Troy, New York
June 4, 1998

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner