STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

Petitioner, Howgen Transport Co., Inc., Olean Road - Route 16, Holland, New York 14080, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9 of the Tax Law for the years 1979, 1980 and 1981 (File No. 800729).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on May 18, 1987 at 1:15 P.M., with all briefs to be submitted by August 4, 1987. Petitioner appeared by Albrecht, Maguire, Heffern & Gregg, P.C. (George M. Zimmerman, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

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

2. On July 7, 1983, the Audit Division issued to petitioner, Howgen Transport Co., Inc.,

three notices of deficiency for additional corporation franchise tax due under Article 9 of the Tax Law, plus interest, as follows:

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

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

4. The balance of the deficiencies herein was premised on the Audit Division's failure to allow for petitioner's interstate transactions. At hearing, the Audit Division conceded that this failure was improper and that adjustments should properly be made to reflect such interstate transactions.

5. With respect to petitioner's interstate business, certain of its shipments originated in New York and terminated outside New York; other shipments originated outside of New York and terminated within New York. Petitioner's charges for these interstate shipments in 1979 were $20,435.89 and its charges for these shipments in 1980 were $89,659.51. In 1981, petitioner's total mileage was 1,247,373 miles; its total New York mileage was 1,154,130 miles.

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

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

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

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

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

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

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

11. Petitioner's business was started in the 1950's as a partnership. The partners were Howard L. Draper and his wife, Genevieve Draper. Subsequently, also in the 1950's, the Drapers incorporated the business as H. L. Draper Trucking, Inc.

12. After 1965, following the sale of the corporation's Interstate Commerce Commission rights, H. L. Draper Trucking, Inc. changed in form to a partnership with Mr. and Mrs. Draper once again as the partners. The name of the partnership was Howgen Transport.

13. Mr. Draper died in November 1973, and his partnership interest passed to his wife. Mrs. Draper subsequently incorporated the business as Howgen Transport Co., Inc. in June 1974.

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

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

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

CONCLUSIONS OF LAW

A. Tax Law § 184 imposes an additional franchise tax as follows:

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

B. As used in Tax Law § 184, the term "gross earnings" means "all receipts arising from or growing out of the employment of its capital, whether that capital is employed in the transportation business or otherwise." (People ex rel. New York Cent. & Hudson Riv. R.R. Co. v. Roberts, 157 NY 677, affg on opn below 32 App Div 113.)

C. The Audit Division's determination of petitioner's tax liability under Tax Law § 184,

subject to the adjustments conceded at hearing by the Audit Division (Findings of Fact "4" and "5"), was in all respects proper. The receipts earned by petitioner in fulfilling its contracts were receipts which, in the language of People v. Roberts, supra, "arose from" or "grew out of" employment of petitioner's capital. No deductions from those receipts for the cost to petitioner of materials or hired trucks may properly be taken.

D. Petitioner's contention that its gross earnings for purposes of Tax Law § 184 should properly be determined in light of the construction given to "gross earnings" in Brooklyn Union Gas Co. v. Morgan (114 App Div 266, affd 195 NY 616) is rejected. At issue in Brooklyn Union Gas was the meaning of "gross earnings" under Tax Law § 186. The taxpayer in that case bought coal and oil as raw material which it converted into gas and sold to its customers. The taxpayer claimed the right to deduct the cost of the raw material from its gross receipts in order to determine gross earnings. The State took the position that the taxpayer's gross earnings properly included the cost of the raw material. The court held the following:

> "Capital of a corporation which must first be invested before it begins to earn anything cannot be said to be a part of the earnings of such corporation merely because it is turned into cash, and thus in one sense becomes a receipt of the corporation. Earnings do not include capital, but are the productions or outgrowth of capital... In fixing the 'gross earnings' of the relator there should therefore have been deducted from the gross receipts the cost of the raw material." (Id__. at 267.)

Petitioner argues that because the expression "gross earnings from all sources within this state" appears in both Tax Law §§ 184 and 186, and because the two statutes were originally enacted at the same time (L 1896, ch 908, §§ 184, 186), the two expressions should be given the same meaning in the absence of an indication that the legislature intended a contrary meaning (see___ McKinney's Cons Laws of NY, Book 1, Statutes § 236).

In support of its argument, petitioner notes that Tax Law § 186 was amended following the Brooklyn Union Gas decision to add the following: "The term 'gross earnings' as used in this section means all receipts from the employment of capital without any deduction." (L 1907, ch 734.) Tax Law § 184 was never amended to provide for a definition of gross earnings as the

Legislature had done with respect to Tax Law § 186. Therefore, petitioner argues, the rule of Brooklyn Union Gas is applicable herein.

E. Petitioner's argument that the Brooklyn Union Gas holding is applicable herein fails, for it ignores People v. Roberts, supra. The Appellate Division in Brooklyn Union Gas did not overrule its prior decision in People v. Roberts. In fact, it is noteworthy that the 1907 amendment of Tax Law § 186 following Brooklyn Union Gas used language to define "gross earnings" similar to that used to define "gross earnings" in People v. Roberts. This is indicative of legislative approval of the People v. Roberts decision and the construction of "gross earnings" set forth therein. The People v. Roberts construction of "gross earnings" became as much a part of Tax Law § 184 as if it had been incorporated into the language of the statute itself (see___ McKinney's Cons Laws of NY, Book 1, Statutes § 72). The Legislature's amendment of Tax Law § 186 following Brooklyn Union Gas may therefore properly be seen as an effort to bring "gross earnings" under Tax Law § 186 into harmony with the interpretation of Tax Law § 184 following the People v. Roberts decision. It may well be that the term "gross earnings" should properly be given the same meaning in both Tax Law §§ 184 and 186, but, in view of the circumstances surrounding the enactment of these two statutes, the People v. Roberts and Brooklyn Union Gas decisions, and the amendment of Tax Law § 186, that common meaning is to be found in People v. Roberts and the 1907 amendment to Tax Law § 186.

F. It should be further noted that even if one were to accept petitioner's argument that Brooklyn Union Gas is applicable herein, the result reached in the instant matter would be unaffected. In Brooklyn Union Gas, the court allowed a deduction for costs of raw materials consumed by the taxpayer which costs were returned to the taxpayer in the form of cash. The costs of materials sold and hired trucks provided are not the same as the raw materials in Brooklyn Union Gas. Rather, such costs are in the nature of labor and incidental expenditures the receipts from which the court in Brooklyn Union Gas determined to be part of gross earnings:

> "In some cases like the one now under consideration the capital must be supplemented by labor and such other expenditures as may be incidental to the development of the manufactured product from the raw material. Such incidental expenditures are doubtless part of the 'gross earnings.' If the coal in question had been used under the boilers for developing heat, such coal like labor would be merely an incidental expenditure in the process of converting the capital from one form into another, and should probably be included as a part of the 'gross earnings' of the relator." (Id__. at 267.)

G. No presumption in favor of petitioner against the imposition of Tax Law § 184 is created under the circumstances herein. In support of its contention that such a presumption is created, petitioner notes the experience of H. L. Draper Trucking, Inc., discussed in Finding of Fact "14", and the Audit Division's subsequent failure to assert tax pursuant to Tax Law § 184 until the period at issue herein. As authority petitioner cites Matter of Consolidated Edison v. State Tax Commn. (24 NY2d 115) wherein the Tax Commission's failure to tax a certain type of receipts under Tax Law § 186 for a period of 53 years created such a presumption.

The facts present in the instant matter do not even remotely resemble those of Consolidated Edison. Unlike in Consolidated Edison, petitioner contends only that the Audit Division failed to assert tax under Tax Law § 184 against it, not that the Audit Division failed to tax the type of receipts which are the subject of this matter. Second, petitioner has been in existence only since 1975. It is a separate and distinct entity from H. L. Draper Trucking, Inc. Finally, even assuming that the H. L. Draper Trucking, Inc. matter is of relevance, that business took the form of a partnership for a period beginning after 1965 and continuing until 1975. Tax Law § 184 does not apply to partnerships and petitioner's argument has no merit for that partnership period. The four years remaining until 1979 (the beginning of the period at issue) do not create a presumption in favor of petitioner.

H. The petition of Howgen Transport Co., Inc. is granted only to the extent indicated in Findings of Fact "4" and "5" and is in all other respects denied; the Audit Division is directed to

adjust the notices of deficiency herein to the extent indicated in Findings of Fact "4" and "5" and, as adjusted, the notices are sustained.

DATED: Albany, New York
February 5, 1988

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ADMINISTRATIVE LAW JUDGE