STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| CAPITAL TELEPHONE COMPANY, INC. | : | DETERMINATION<br>DTA NO. 807248 |
| for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 1976 through 1980 and 1985. | : | |

Petitioner Capital Telephone Company, Inc., c/o Roland, Fogel, Koblenz & Carr, 1 Columbia Place, Albany, New York 12207 filed a petition for redetermination of a deficiency or for refund of corporation tax under Article 9 of the Tax Law for the years 1976 through 1980 and 1985.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 15, 1992 at 10:45 A.M., with all further submissions to have been made by May 19, 1992. Petitioner appeared by Keith J. Roland, Esq. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether petitioner is entitled to a refund of tax paid pursuant to Article 9, sections 184 and 186-a.

II. Whether petitioner is entitled to a refund of penalties paid on the taxes assessed pursuant to Article 9, sections 184 and 186-a.

III. Whether petitioner is entitled to a refund of tax paid pursuant to Article 9, section 184, for the year 1985 due to the application of an incorrect tax rate by the Division of Taxation to petitioner's gross earnings from all sources for said year.

FINDINGS OF FACT

Petitioner, Capital Telephone Company, Inc. ("Capital"), was a corporation incorporated

under the laws of the State of New York on April 6, 1960. Capital was what is referred to as a "radio common carrier" ("RCC") that provided two-way mobile radio telephone service and one-way paging to members of the public.

Until July 1984, Capital was considered a "telephone corporation" subject to the jurisdiction of the New York State Public Service Commission, and operated during those years under a Certificate of Public Convenience and Necessity issued by said Commission and subject to tariffs filed with and approved by the Commission.

Petitioner was not clear on the issue of whether it was a Tax Law Article 9 or 9-A corporation and employed an accountant and attorney during the 1970s, both of whom had no expertise in the area of New York corporation tax law, and were unable to provide it with an opinion on said issue. The result was that petitioner did not file any franchise tax reports during the 1970s and early 1980s. At the same time, a Division of Taxation ("Division") report of delinquency follow-up, dated June 28, 1971, indicated that the Division had determined that the company was taxable under Article 9-A and Tax Law § 186-a.

Sometime prior to July 31, 1980, petitioner was notified by the corporation tax unit of the Division that its delinquency in filing franchise tax reports for a period of two or more consecutive years would subject it to the loss of its charter to do business in New York State by proclamation of the Secretary of State on recommendation of the State Tax Commission. Petitioner's attorney at that time, Keith J. Roland, Esq., responded to the notice requesting blank report forms for the delinquent periods and a statement of unpaid assessed taxes.

A letter was sent to Mr. Roland by the corporation tax unit on April 23, 1981 indicating that franchise tax reports were due for the periods ended December 31, 1973 through December 31, 1979. A separate memorandum from Michael Siciliano, Tax Technician, set forth for each of the years stated above the tax, interest and penalty due and totals.

Mr. Roland responded to said schedule indicating that the corporation agreed to pay the total amount stated as due by Mr. Siciliano, the sum of $2,921.51, but "because the corporation is in a negative earnings position, payment of this entire sum at once will put a tremendous

burden on our finances." However, petitioner's president, Dr. Bakal, testified at hearing that the corporation was never in financial difficulty.

On June 30, 1982, the corporation was dissolved by proclamation of the New York State Secretary of State pursuant to the provisions of Tax Law § 203-a.[1]

By letter agreement dated June 3, 1985 from the law firm of Phillips, Nizer, Benjamin, Krim & Ballon to Mr. Robert Quirk, director of the corporate tax section of the Division, countersigned by Mr. Quirk on June 12, 1985, an understanding was reached between the radio common carrier industry and the Division with respect to the application of the initial State utility taxes to the radio common carrier industry. The salient terms of that letter agreement were as follows:

> "1. The industry will, as expeditiously as possible but not later than September 1, 1985, file retroactive returns and remit any tax due pursuant to Section 186-a, as follows:
>
> "(a) With respect to two-way service, retroactive filings to January 1, 1981.
>
> "(b) With respect to one-way paging service, retroactive filings to January 1, 1983.
>
> "(c) The tax will be computed upon the gross income of the carrier derived from service income (air time) only.
>
> "(d) Carriers will be entitled to appropriate credit for corporate income tax paid during the respective taxing periods.
>
> "(e) Interest will be applied to all computed balances, computed at the rates in effect during the respective taxing periods, in accordance with Department regulations regarding interest computations, a copy of which you have forwarded to me.
>
> "(f) Companies filing in a timely manner will not be subject to penalties.
>
> "(g) For purposes of determining what constitutes New York State income, through 1982, it shall be presumed that income received from a customer

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[1]It is noteworthy that on March 29, 1974, petitioner was notified by the acting district tax supervisor of the Albany District Office that the corporation was being referred to the dissolution unit of the Corporation Tax Bureau for dissolution by proclamation for failure to file franchise tax reports due or for nonpayment of franchise taxes pursuant to Tax Law Article 9-A.

with a New York address is New York State income. Thereafter, the industry will adhere to the allocation method outlined in the Department's Technical Service Memorandum dated February 8, 1982 for transmission companies (TSB-M-82(6)-C).

"(h) All income attributable to service sold for resale shall be excluded from gross income.

"2. Corporations which have filed corporate income tax returns shall file amended returns with respect to Sections 183 and 184, retroactive to January 1, 1981. It is understood that individuals (not corporate carriers) shall have no obligation to file the Section 183 and 184 returns, that computation of such taxes shall be made in accordance with the applicable statute and that taxpayers shall be entitled to appropriate offsets for taxes paid pursuant to Section 9-A of the Tax Law during the pertinent period."

By letter dated November 1, 1985, the president of Capital, Dr. Peter A. Bakal, submitted a check in the amount of $11,291.06 which purportedly represented 3¾% of gross receipts, or $301,095.00, for the period January 1, 1981 through June 30, 1984. The letter referenced two companies, petitioner and a related corporation, Hudson Mohawk Telephone Company, Inc.

The proceeds of this check were applied to the account of Hudson Mohawk Telephone Company, Employer Identification Number 14-1633674, as follows:

| | |
|---|---|
| 12/82 - 184 | $ 1,000.00 |
| 12/82 - 186-a | 2,750.00 |
| 12/83 - 184 | 1,000.00 |
| 12/83 - 186-a | 2,791.00 |
| 12/84 - 184 | 1,000.00 |
| 12/84 - 186-a | 2,750.00 |
| Total | $11,291.00 |

On December 11, 1985, the Division, by Jeannette R. Durand, Corporation Tax Auditor, informed Dr. Bakal that it had received his letter of November 1, 1985 with the accompanying check of $11,291.00. Ms. Durand indicated that Dr. Bakal did not submit any franchise tax reports with this check to show proper application. Ms. Durand informed Dr. Bakal that common carriers were taxable under sections 183, 184 and 186-a of Article 9, applicable to transportation and transmission corporations. She informed Dr. Bakal that those franchise tax reports were required for both Capital and Hudson Mohawk Telephone Company, Inc., as well as another related corporation, Mobilfone Industries, Inc.

With specific regard to petitioner herein, Ms. Durand stated the following in her letter:

"If the corporation was inactive and had no gross receipts, reports are due under Article 9-A on Form CT-4 for the period ended December 31, 1973 to date, or to the period in which the corporation was active.

"For the periods in which the corporation was active, reports are required under Article 9, section 183, 184 and 186-A as follows:

"December 31, 1973 to December 31, 1975 - CT-40 (Section 183)
December 31, 1973 to June 30, 1976 - CT-36 (Section 184)
December 31, 1973 to December 31, 1975 - CT-11A (Section 186-A)
December 31, 1976 to December 31, 1978 - CT-183 (Section 183)
December 31, 1976 to December 31, 1978 - CT-184 (Section 184)
December 31, 1979 to December 31, 1983 - CT-183/184 (Sections 183/184)
December 31, 1976 to December 31, 1984 - CT-186-A (Section 186-A)

"Copies of all pages of the corresponding Federal returns will also be required."

On February 18, 1986, Ms. Durand called Dr. Bakal to ask about a response to her December 11, 1985 letter and was informed that it had been turned over to Mr. Roland. Ms. Durand followed up with a telephone call to Mr. Roland, who said that he did not understand the requirements for previous years, referring to the agreement between the radio common carrier industry and the Division which only dealt with tax years 1981 forward. Mr. Roland was informed that petitioner was due to be dissolved by proclamation because petitioner had not filed reports for years prior to 1981 and that said returns were still due.

On April 22, 1986, in a telephone conversation between Ms. Durand and Mr. Roland, it was disclosed that the reports had been completed for petitioner and the two related corporations and a conference was scheduled to review said reports.

On April 25, 1986, a conference was held with petitioner, who submitted CT-4's for the period 1973 through 1980 and CT-183's, CT-184's and CT-186-P's for the period 1981 through 1984. On October 1, 1986, the business of petitioner was sold. A final return for 1986 was filed on behalf of petitioner on Form CT-184 on December 10, 1986.

Petitioner filed the CT-184, Franchise Tax Report on Gross Earnings, for 1985 on April 25, 1986 and its CT-186-P's, Reports of Gross Income, for the years 1976 through 1980 on March 24, 1987. None of these reports was filed with the tax indicated as due.

On April 6, 1987, Ms. Durand sent a letter to Mr. Roland which stated, in pertinent part, as follows:

> "We have received the Forms CT-186-A for the periods December 31, 1976 through 1980 and Forms CT-184 for the periods ended December 31, 1985 and 1986. These reports have been sent for processing.
>
> "However, you did not submit the reports under Article 9, sections 183 and 184 for the periods ended December 31, 1976 through 1980 and Form CT-183 for December 31, 1985. Please send these reports so we may finalize this case."

By letter dated April 23, 1987, the processing division of the New York State Department of Taxation and Finance sent a letter to petitioner indicating that the corporation had been dissolved by proclamation of the Secretary of State in December 1982.

By letter dated May 4, 1987, Mr. Roland responded to said notice indicating that he had been working with the Division with regard to past franchise taxes owed by Capital and that, pursuant to an agreement with Ms. Durand, the corporation was not to be dissolved by proclamation.

Mr. Roland indicated that the corporation had been formally and voluntarily dissolved at the end of 1986 and that the company had filed a final return.

In fact, petitioner did file a CT-184, Franchise Tax Report on Gross Earnings, marked "Final Return" on December 10, 1986 (see Finding of Fact "12").

On or about May 7, 1987, the Division issued notices and demands for payment to petitioner as follows:

| Statement Date | Tax Article and Section | Taxable Period Ended | Tax, Penalty & Interest Due |
|---|---|---|---|
| 5/7/87 | 9, 184 | 12/31/85 | $ 1,783.92 |
| 5/7/87 | 9, 186-a | 12/31/76 | 9,029.04 |
| 5/7/87 | 9, 186-a | 12/31/77 | 9,085.83 |

| | | | |
|---|---|---|---|
| 5/7/87 | 9, 186-a | 12/31/78 | 10,037.64 |
| 5/7/87 | 9, 186-a | 12/31/79 | 10,599.90 |
| 5/7/87 | 9, 186-a | 12/31/80 | 13,184.14 |

By letter dated August 25, 1987, Mr. Roland forwarded a check to the corporation tax section of the Division to the attention of Mr. Earl Womer in the sum of $53,720.47 indicating that the check was in payment of Article 9 gross revenue taxes due from petitioner under Tax Law § 186-a for the years 1976 through 1980 and Tax Law § 184 for the year 1985. It was in this August 25, 1987 letter that Mr. Roland requested that the penalty amounts be waived due to the confusion as to the applicability of corporation franchise taxes to the RCC industry. However, the auditor, Ms. Durand, responded by letter, dated July 27, 1988, in which she refused to abate penalties because tax remained unpaid under Tax Law §§ 183, 184 and 186-a for subsequent periods.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that it is entitled to Article 9-A status for years prior to 1981 or 1983, instead of being subject to Article 9 gross revenue taxes on services prior to those years due to the terms of the letter agreement between the Division and the RCC industry.

Petitioner's second argument is that it should not be subject to penalty since there was a great amount of confusion in the industry with regard to which tax the corporation was subject. Petitioner also indicates its good faith efforts to clear up its franchise tax liabilities throughout the 1970s and 1980s as reasonable cause for the abatement of penalties.

The Division argues that petitioner has not established reasonable cause and the absence of willful neglect for its failure to timely file franchise tax reports or remit tax due for the years in issue and that petitioner's argument that it was not treated like other corporations similarly situated is without merit since years prior to the agreement with the RCC industry remained open for assessment due to petitioner's failure to file returns.

CONCLUSIONS OF LAW

A. The first issue which will be dealt with is whether the Division properly required petitioner to pay tax pursuant to Tax Law § 186-a, the tax on the furnishing of a utility, for the years 1976 through 1980.

Petitioner conceded that it was regulated by the New York State Department of Public Service during the years 1976 through 1980. Tax Law § 186-a provides, in pertinent part, as follows:

> "1. Notwithstanding any other provision of this chapter, or of any other law, a tax equal to three per centum of its gross income is hereby imposed upon every utility doing business in this state which is subject to the supervision of the state department of public service which has a gross income for the year ending December thirty-first in excess of five hundred dollars . . . .
>
> * * *
>
> "2. As used in this section, (a) the word 'utility' includes every person subject to the supervision of the state department of public service . . . ."

Clearly, petitioner is a utility within the scope of the statutory definition in Tax Law § 186-a(2) and, therefore, subject to the tax imposed by Tax Law § 186-a(1). The Division's requirement that petitioner file reports pursuant to this section was proper.

B. Although originally an issue, petitioner concedes liability for the tax assessed under Tax Law § 184 for the year 1985. However, as agreed by the parties at hearing, the tax was to be calculated by applying the tax rate of three tenths of one percent (.003) to petitioner's gross earnings from all sources within the State.

It appears that the tax as reported on the amended 1985 report filed by petitioner was properly computed in accordance with the statute for tax years beginning on or after January 1, 1985, i.e., the .003 tax rate was applied thereon.

After hearing, the Division revised the amount due to reflect gross earnings from all sources within New York to the gross receipts set forth on the Federal tax return, thereby rejecting petitioner's allocation of its Federal gross receipts. This yielded tax due in the sum of $2,240.00. However, the Division gives absolutely no reason for this gratuitous adjustment and, therefore, it cannot be sustained. The tax due under Tax Law § 184 for the year 1985

remains $1,269.00, as set forth on the notice and demand, dated May 7, 1987.

C. Petitioner also argues that the Division should cancel the penalties assessed and remit same to it for the years in issue.

It is noted that, during the years in issue, Tax Law § 209.4 provided, in pertinent part, as follows:

> "Corporations liable to tax under sections one hundred eighty-three to one hundred eighty-six, inclusive, . . . shall not be subject to tax under this article."

The conclusion to be drawn is that a corporation (utility) subject to tax under Tax Law § 186-a is not specifically exempt from the tax assessed pursuant to Tax Law § 209.4. Tax Law § 186-a(1) even provides that the tax assessed thereunder "shall be in addition to any and all other taxes and fees imposed by any other provision of law for the same period." (Emphasis added.) Note that the reference is not limited to any other provision of law "under this article", thereby permitting a more expansive reading of the statute, and justifying the Division's action in requiring petitioner to file reports under both Tax Law sections.

Further, this petitioner was not discriminated against or intentionally treated differently than other companies in the radio common carrier industry. Any taxpayer may be assessed at any time if no return is filed (Tax Law § 1083[c][1][A]). Presumably, the agreement was intended for companies in compliance with reporting requirements of the statute. To assume otherwise would extend a benefit to nonfilers which was not a stated intention of the letter agreement between the Division and the industry. Therefore, the Division was justified in requesting reports and payments pursuant to Tax Law § 186-a for the years 1976 through 1980 since no reports had been filed by petitioner for those years.

It is also noteworthy, as pointed out by the auditor, that petitioner was given the benefits afforded other RCC industry companies for the years after 1980 and was thereby treated as other RCC companies.

The basis for the agreement between the Division and the industry was to bring uniformity to the filings by the companies within the group. The Division wanted the industry to recognize its taxability under Tax Law §§ 183, 184 and 186-a. The immediate benefit to the

industry was that the companies were only taxed on air time rather than all of their gross operating income as specifically required under section 186-a. Petitioner was permitted to take advantage of these changes.

However, there is nothing in the record to support petitioner's contention that it acted in good faith throughout the 1970s and early 1980s. Although it contacted the Division at times between 1976 and 1985, it never followed up its conversations by filing returns with even a minimum tax. Even with the confusion in the industry, petitioner knew it was subject to some tax, but chose to pay nothing. Petitioner made one unsuccessful telephone inquiry to an unknown person in an unknown part of the Division in the 1970s, and believed this to be a prudent disposition of its taxability in New York State. It never wrote to the Division to get a written notification of its status, it simply did nothing. Petitioner did not have an accountant or attorney with expertise in New York corporate taxation and never made a request for an advisory opinion. Clearly, this was an unreasonable reliance on the advice of an accountant and attorney (Matter of LT & B Realty Corp. v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121; Matter of Byrnes, Tax Appeals Tribunal, November 21, 1991).

Petitioner was billed for its tax liability in 1981, but it chose not to file at that time because of its "negative earnings position". However, petitioner's president testified at hearing that the corporation was never in financial difficulty.

It is almost too coincidental that petitioner began its filings and payment of tax in such close proximity to the sale of its business on October 1, 1986, when it learned that it had been dissolved by proclamation in 1982 for failure to file tax returns or pay corporation franchise tax. Such a discovery would have been strong motivation for its sudden interest in compliance with the reporting requirements of the Tax Law.

In sum, it is determined that petitioner did not act in good faith and should have at least filed minimum returns. It has not stated a reasonable cause for its failure to file or remit taxes due (cf., Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557).

Tax Law § 1085(a) provides, in pertinent part, for a penalty for:

"(1) Failure to file return. -- (A) In case of failure to file a return under article nine, nine-a, nine-b or nine-c on or before the prescribed date (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect . . . .

* * *

"(2) Failure to pay tax shown on return. -- In case of failure to pay the amounts shown as tax on any return required to be filed under article nine, nine-a, nine-b or nine-c on or before the prescribed date (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect . . . ."

The regulation promulgated thereunder states, in pertinent part, as follows:

"(a) Where a taxpayer:

"(1) fails to file a return on or before the last date prescribed for filing (see section 1085[a][1] of the Tax Law for the addition to tax);

"(2) fails to pay the amount shown as tax on a return on or before the last date prescribed for paying (see section 1085[a][2] of the Tax Law for the addition to tax); or

"(3) fails to pay the amount required to be shown as tax on a return within 10 days of the date of a notice and demand therefor (see section 1085[a][3] of the Tax Law for the addition to tax);

"the applicable addition or additions to tax set forth in section 1085(a) of the Tax Law must be imposed, unless it is shown that such failure was due to reasonable cause and not due to willful neglect. In the event that these additions to tax have been imposed and it is later determined that failure to timely file the return or timely pay the tax was due to reasonable cause and not due to willful neglect, all or part of such additions to tax will be cancelled. The absence of willful neglect alone is not sufficient grounds for not imposing additions to tax or for cancelling additions to tax." (20 NYCRR 46.1.)

Since petitioner has not established reasonable cause for failing to file and remit any corporation franchise tax for the periods in issue, penalties must be sustained.

D. The petition of Capital Telephone Company, Inc. is denied and the Division's denial of petitioner's application for refund is sustained.

DATED: Troy, New York
February 25, 1993

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE