STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LES TRANSPORTS SYLVAIN CLEROUX, INC.	:	DETERMINATION DTA NO. 815669
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 1988 through 1994.	:	

Petitioner, Les Transports Sylvain Cleroux, Inc., 328 St. Georges, Ange-Gardien, Cte Rouville, Qc JOE 1EO, Canada, filed a petition for redetermination of a deficiency or for refund of corporation tax under Article 9 of the Tax Law for the years 1988 through 1994.

On October 23, 1997 and October 24, 1997, respectively, petitioner, appearing *pro se,* and the Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Marvis A. Warren, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were due to be submitted by March 2, 1998, which date began the six-month period for the issuance of this determination. After due consideration of the record, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly determined that petitioner was subject to taxation as a transportation corporation pursuant to Article 9 of the Tax Law.

FINDINGS OF FACT

1. On May 30, 1995, the Division of Taxation ("Division") issued two notices of deficiency to petitioner, Les Transports Sylvain Cleroux, Inc.[1] One notice asserted tax due pursuant to Tax Law § 183 in the amount of $579.38, plus penalty and interest, for a total amount due of $1,346.00 for the tax years 1988 through 1994. The other notice asserted tax due pursuant to Tax Law § 184 in the amount of $3,755.60, plus penalty and interest, for a total amount due of $5,415.84 for the tax years 1988 through 1994.

2. By a Conciliation Order (CMS. No. 149097) dated November 1, 1996, penalty imposed upon the Tax Law § 183 deficiency of $579.38 was canceled and the interest thereon was computed to be $284.69. With respect to the deficiency imposed pursuant to Tax Law § 184, the tax due was reduced from $3,755.60 to $3,083.76, penalty was canceled and interest was computed to be $1,072.88. By check dated October 16, 1996, petitioner paid, under protest, the sum of $5,020.71 (this amount represented the entire amount due pursuant to the Conciliation Order) and now, therefore, seeks a refund of the amount paid.

3. In the petition filed with the Division of Tax Appeals, petitioner contends that the tax imposed by the Division is an income tax. Petitioner states that it is incorporated in Quebec and that its income tax was paid there.

4. As part of its documentary evidence (the Division submitted its documentary evidence on November 25, 1997), the Division submitted the affidavit of Marjorie Thompson, Tax Technician I, who performed the desk audit of petitioner. Ms. Thompson's affidavit explained that the corporation tax assessed pursuant to Tax Law § 183 was based upon the statutory

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[1]While the notices of deficiency were issue to "Les Transport Sylvain Cleroux, Inc.," the petition and other documents in the record, including a check drawn on petitioner's account, indicate that the actual name of petitioner is " Les Transports Sylvain Cleroux, Inc."

minimum amount of $75.00 to which was added a surcharge of 15% for the years 1990 through 1993 and a surcharge of 12 1/2% for the year 1994. As part of her desk audit, Ms. Thompson received and reviewed worksheets prepared by petitioner which showed the computation of corporation tax pursuant to Tax Law § 184 for the years 1988 through 1993. The tax assessed for these years was based upon petitioner's own figures; a 15% surcharge was added for the years 1990 through 1993. For the year 1994, the tax assessed pursuant to Tax Law § 184 was based upon the miles reported on petitioner's highway use tax return filed for that year. The rate of $1.18 per mile, utilized by the petitioner on its worksheet, was used to compute its gross receipts for 1994. Ms. Thompson's affidavit further explained that at the conciliation conference held on July 8, 1996 (Ms. Thompson represented the Division at the conference), the tax imposed pursuant to Tax Law § 183 was sustained while the tax imposed pursuant to Tax Law § 184 was reduced to reflect the proper exchange rate between the United States and Canada. She also noted that penalties imposed upon the tax deficiencies were canceled.

5. On February 11, 1998, the Division submitted a letter in lieu of a brief.

6. Petitioner submitted no documentary evidence in support of its position in this matter and filed no briefs.

CONCLUSIONS OF LAW

A. Tax Law, article 9, §§ 183 and 184, imposes a franchise tax and an additional franchise tax, respectively, on corporations formed for or principally engaged in the conduct of a transportation or transmission business. Tax Law § 183 imposes a tax, prospectively, based upon "the amount of its capital stock within this state during the preceding year" (Tax Law § 183 [1][b]), computed by application of an asset ratio comparing in-state gross assets to gross assets everywhere (Tax Law § 183[2]). The minimum tax due under section 183 is $75.00. Tax Law §

184 imposes an additional franchise tax computed upon the portion of gross earnings from all sources properly allocable to New York State. Allocation is made by calculating a percentage using New York revenue miles as the numerator and total revenue miles as the denominator (Tax Law § 184[4]). The surcharges imposed upon the deficiencies (***see***, Finding of Fact "4") were pursuant to the provisions of Tax Law § 188.

B. Petitioner does not deny that it was formed for or was principally engaged in conducting a transportation business. It merely contends that the taxes imposed by the Division pursuant to Article 9 of the Tax Law are income taxes and petitioner states that it paid its income taxes in Quebec where it was incorporated.

Foreign entities, such as petitioner, are subject to tax under Article 9 of the Tax Law, as transportation (or transmission) corporations and associations, if they do business, employ capital, own or lease property or maintain an office in the State and are principally engaged in a transportation business.

C. As correctly noted by the Division in its letter brief, in any proceeding before the Division of Tax Appeals, the petitioner bears the burden of proof (Tax Law § 1089[e]; 20 NYCRR 3000.15[d][5]) to establish, by clear and convincing evidence that the tax assessed by the Division was erroneous (***see***, ***Matter of Guiliano v. Chu*****,** 135 AD2d 893, 521 NYS2d 883).

Although a determination of tax must have a rational basis to be sustained on review, the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis as long as no evidence is introduced which challenges the assessment (***see***, ***Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759, 431 NYS2d 174; ***Matter of Leogrande***, Tax Appeals Tribunal, July 18, 1991, ***confirmed*** 187 AD2d 768, 589 NYS2d 383, ***lv denied*** 81 NY2d 704, 595 NYS2d 398). However, where the petitioner fails to make any inquiry into the audit

method or the calculation of the amount of the assessment (which is the case in the present matter), the presumption of correctness raised by the issuance of the assessment provides the rational basis for the assessment (***Matter of Atlantic & Hudson Limited Partnership,*** Tax Appeals Tribunal, January 30, 1992).

Petitioner produced no evidence, of any kind, in this proceeding. It merely set forth in its petition a general allegation that the taxes imposed were income taxes which (as explained in Conclusion of Law "A") they are not and stated that it paid its income taxes to the Canadian province of Quebec where it was incorporated. While petitioner raised no constitutional issues, its petition does imply that, by virtue of having to pay the taxes imposed by Article 9 of the Tax Law, it is being subjected to double taxation. That issue was addressed in ***Ontario Trucking Assn. v. New York State Dept. of Taxation & Fin.*** (236 AD2d 70, 665 NYS2d 694), a case in which a Canadian trucking company challenged New York State franchise taxes applicable to Canadian transportation companies doing business in the State. The Court, citing ***Container Corp. of America v. Franchise Tax Bd.*** (463 US 159, 77 L Ed 2d 545), held that Tax Law § 184 does not enhance the risk of multiple taxation, stating:

> Multiple taxation is not inevitable but depends on individual cases since Canada allows its taxpayers a deduction for New York corporate franchise taxes in the computation of their net income (Canadian Tax Act 18[1][a]), creating the possibility that the deduction could reduce a taxpayer's net income to a level at which Canada could not impose a tax. (***Id.***, 665 NYS2d at 696-697.)

Petitioner has not provided any evidence to substantiate its contention that, by virtue of the imposition of the Article 9 corporation taxes, it was subjected to double taxation.

D. The petition of Les Transports Sylvain Cleroux, Inc. is denied.

DATED: Troy, New York
August 27, 1998

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE