STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LAND TRANSPORT CORPORATION	:	DETERMINATION DTA NO. 816111
for Revision of a Determination or for Refund of Highway Use Tax under Article 21 of the Tax Law for the Period January 1, 1990 through November 30, 1993 and for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 1987 through 1992.	:	

Petitioner, Land Transport Corporation, 21 Beaver Court, Framingham, Massachusetts 01702, filed a petition for revision of a determination or for refund of highway use tax under Article 21 of the Tax Law for the period January 1, 1990 through November 30, 1993 and for redetermination of a deficiency or for refund of corporation tax under Article 9 of the Tax Law for the years 1987 through 1992.

On June 12, 1998 and June 22, 1998, respectively, petitioner, by Donald J. Malkin, president, and the Division of Taxation, by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs submitted by December 24, 1998, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether, as a result of an audit, the Division of Taxation properly determined additional highway use tax and corporation tax due.

FINDINGS OF FACT

1. On January 23, 1995 and January 30, 1995, following an audit, the Division of Taxation ("Division") issued to petitioner, Land Transport Corporation, three notices of deficiency which assessed corporation tax under Article 9 of the Tax Law for the years 1987 through 1992 as follows:

Assessment Number	Tax Law Section	Tax Assessed
L-010021442-4	§ 184	$ 16,521.00
L-010021417-8	§ 184-a	$ 628.00
L-010025748-9	§ 183	$ 483.00

2. For the years 1990 through 1992, the tax assessed under Tax Law §§ 183 and 184 included a 15 percent surcharge imposed pursuant to Tax Law § 188.

3. On February 16, 1995, following the same audit, the Division issued to petitioner two notices of determination which assessed highway use tax under Article 21 of the Tax Law for the period January 1, 1990 through November 30, 1993 as follows:

Assessment Number	Tax Law Section	Tax Assessed
L-010074180-6	§ 503-a (fuel use tax)	$ 7,512.63
L-010074179-6	§ 503 (truck mileage tax)	$ 1,707.49

4. Each of the statutory notices listed herein also assessed penalty and interest.

5. Petitioner is a carrier which hauls general freight throughout the United States. At the beginning of the audit, the Division requested all of petitioner's books and records for the period January 1, 1991 through November 30, 1993. Petitioner complied with this request.

6. The Division used a test period audit method in its highway use tax audit of petitioner. The test period selected was October 1, 1992 through December 31, 1992. Within that period, the Division examined the trips of 18 vehicles. Based on this examination the Division determined that petitioner had inaccurately reported total mileage and Thruway mileage on certain trips. The Division also found that petitioner had inaccurately reported its total in-state fuel usage and the miles per gallon efficiency of its vehicles. The Division calculated that petitioner had underreported its truck mileage tax liability by 2.9 percent and its fuel use tax liability by 10.2 percent during the test period. The Division applied these error factors to the amounts reported on petitioner's filed highway use tax returns for the audit period to calculate the assessments of additional tax due set forth in the notices of determination dated February 16, 1995 (***see***, Finding of Fact "3").

7. Petitioner did not file Article 9 corporation tax returns after 1986. Through examination of petitioner's records and conversations with petitioner, the Division determined that petitioner was subject to tax under Article 9 of the Tax Law because it had made at least three pickups or deliveries in New York in each of the years in question. The Division therefore decided to audit petitioner's liability under Article 9.

8. The Division determined petitioner's liability under Article 9 of the Tax Law, §§ 184 and 184-a for the years 1989 through 1992 by using miles driven in New York State as reported on petitioner's monthly highway use tax returns for the same period. The Division increased such reported mileage figures by 10.2 percent to reflect the error factor determined in the

highway use tax audit. Petitioner advised the Division during the audit that it was paid approximately $1.00 per mile driven in New York. Accordingly, the Division multiplied annual total audited mileage amounts by $1.00 to reach annual New York gross earnings. Tax under sections 184 and 184-a of the Tax Law for the years 1989 through 1992 was then calculated by applying the appropriate tax rates to the gross earnings as determined on audit.

9. During the audit, the Division requested, but petitioner did not produce, documentation of petitioner's gross earnings for the years 1987 and 1988. Therefore, the Division estimated petitioner's liability under sections 184 and 184-a for those years by using audited New York gross earnings for 1989 determined as noted in Finding of Fact "8" and applying the appropriate tax rates.

10. The assessment of tax herein pursuant to Tax Law § 183 (exclusive of the 15 percent surcharge pursuant to Tax Law § 188 for the years 1990 through 1992) was in the amount of $75.00 per year.

11. In its letter-brief, the Division conceded that it had improperly resorted to an estimation audit method. Accordingly, the Division conceded that the highway use tax assessments should be cancelled for all periods except the three-month test period. The Division thus reduced the fuel use tax assessment to $1,040.89 and the truck mileage tax assessment to $208.64, exclusive of penalty and interest. With respect to the corporation tax assessments, the Division conceded that it improperly increased petitioner's reported New York mileage by 10.2 percent and reduced its corporation tax assessments under Tax Law §§ 184, 184-a and 183 by approximately $1,650.00, $62.00 and $48.00, respectively, exclusive of penalty and interest.

CONCLUSIONS OF LAW

A. Article 21 of the Tax Law imposes a tax for the privilege of operating any vehicular unit (as defined in Tax Law § 501) upon the public highways of New York. Tax Law § 503 imposes what is known as the truck mileage tax, and Tax Law § 503-a imposes an additional highway use tax known as the fuel use tax.

B. Tax Law § 510 provides that if a return filed under Article 21 is "insufficient or unsatisfactory . . . the commissioner of taxation and finance shall determine the amount of tax due from such information as is available." Here, the Division calculated petitioner's fuel use tax and truck mileage tax liability for the period October 1, 1992 through December 31, 1992 based upon a detailed examination of petitioner's records for that period. Petitioner has not submitted any evidence to show that the Division's calculations or its own records were erroneous in any respect. Petitioner did contend that, because of errors made by one of its drivers, it had overreported mileage and failed to claim Thruway credits and had therefore overpaid its highway use taxes during the audit period. Petitioner presented no source documentation to support this claim. In any event, evidence regarding petitioner's highway use tax liability outside the test period is not relevant because, as noted previously, the Division has cancelled its assessment of tax under Article 21 for all periods except the test period. Accordingly, the Division's assessment for the period remaining at issue, October 1, 1992 through December 31, 1992, is sustained.

C. Article 9 of the Tax Law imposes taxes on corporations formed for or principally engaged in the conduct of, among other things, 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]). Tax Law § 184-a imposes a metropolitan transportation business tax surcharge on transportation and transmission corporations doing business in the metropolitan commuter transportation district. This surcharge is a percentage of tax payable under Tax Law § 184.

D. In this case, the Division imposed the minimum charge payable under Tax Law § 183 for each of the years at issue.[1] Petitioner submitted no evidence to show that it was not subject to tax under Tax Law § 183. Accordingly, this assessment is sustained.

E. The assessments imposed pursuant to Tax Law §§ 184 and 184-a for the years 1989 through 1992, as modified by the Division (***see***, Finding of Fact "11"), were based on petitioner's own highway use tax returns filed for this same period. Petitioner presented no evidence to show that such highway use tax returns were erroneous. Nor did petitioner allege any errors in the Division's calculation of tax due. For the years 1987 and 1988, the Division estimated petitioner's liability under sections 184 and 184-a. Given petitioner's failure to document its gross revenue for these years, the use of such a method was reasonable. Petitioner has presented no evidence of its actual gross revenue for the years 1987 or 1988. Further, petitioner did not allege any errors in the Division's calculation of tax due for those years. Accordingly, the assessments of tax pursuant to Tax Law §§ 184 and 184-a as modified by the Division must be sustained.

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[1]As noted previously the minimum amount due under section 183 is $75.00. For the years 1990, 1991 and 1992, however, Tax Law § 188 imposed a surcharge of 15 percent on amounts due under section 183. Accordingly, the minimum amount due for those years, including the surcharge, was $86.00.

F. The petition of Land Transport Corporation is denied and the notices of determination dated February 16, 1995 and the notices of deficiency dated January 23, 1995 and January 30, 1995, as modified in accordance with Finding of Fact "11", are sustained.

DATED: Troy, New York
April 29, 1999

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE