

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-05(11)C
Corporation Tax
August 22, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C041027A

On October 27, 2004, a Petition for Advisory Opinion was received from Port Imperial Ferry Corp., Pershing Road, Weehawken, New Jersey 07087.

The issues raised by Petitioner, Port Imperial Ferry Corp., are:

- (1) Whether gross receipts from its interstate and interborough routes, as well as its intrastate routes, should be included in its taxable gross earnings for purposes of section 184 of Article 9 of the Tax Law.
- (2) Whether it is permitted to allocate the receipts from its intrastate routes that traverse into another state or country based on the mileage traveled in New York divided by the total mileage traveled on those routes.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a New Jersey corporation that operates ferry routes between New Jersey and New York (interstate routes), ferry routes between various New York City boroughs (interborough routes) and ferry routes between various points in New York State (intrastate routes).

The interborough routes are operated under a lease of a ferry franchise and a lease of a ferry terminal with New York City. The intrastate routes originate and terminate in New York, but may traverse into another state or country.

Applicable law

Section 183.1(b) of Article 9 of the Tax Law imposes a franchise tax on transportation and transmission corporations and provides, in part:

For the privilege of exercising its corporate franchise, or of doing business, or 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 corporation, joint-stock company or association formed for or principally engaged in the conduct of ... ferry (except a ferry company operating between any of the boroughs of the city of New York under a lease granted by the city) ... business ... shall pay, in advance, an annual tax to be computed upon the basis of the amount of its capital stock within this state during the preceding year, and upon each dollar of such amount....

Section 184.1 of Article 9 of the Tax Law imposes an additional franchise tax on transportation and transmission corporations and associations, and provides, in part:

Every corporation, joint-stock company or association formed for or principally engaged in the conduct of ... ferry (except a ferry company operating between any of the boroughs of the city of New York under a lease granted by the city) ... business ... for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or maintaining an office in this state, shall pay a franchise tax ... upon its gross earnings from all sources within this state ... excluding earnings derived from business of an interstate or foreign character

Section 209 of Article 9-A of the Tax Law, provides, in part:

1. For the privilege of exercising its corporate franchise, or of doing business, or 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, for all or any part of each of its fiscal or calendar years, every domestic or foreign corporation, except corporations specified in subdivision four of this section, shall annually pay a franchise tax, upon the basis of its entire net income base, or upon such other basis as may be applicable as hereinafter provided, for such fiscal or calendar year or part thereof, on a report which shall be filed, except as hereinafter provided, on or before the fifteenth day of March next succeeding the close of each such year, or, in the case of a corporation which reports on the basis of a fiscal year, within two and one-half months after the close of such fiscal year, and shall be paid as hereinafter provided.

* * *

4. Corporations liable to tax under sections one hundred eight-three to one hundred eighty-five, inclusive ... shall not be subject to tax under this article.

Section 210.3 of the Tax Law provides, in part:

The portion of the entire net income of a taxpayer to be allocated within the state shall be determined as follows:

(a) multiply its business income by a business allocation percentage to be determined by

(1) ascertaining the percentage which the average value of the taxpayer's real and tangible personal property, whether owned or rented to it, within the state during the period covered by its report bears to the average value of all the taxpayer's real and

tangible personal property, whether owned or rented to it, wherever situated during such period....

(2) ascertaining the percentage which the receipts of the taxpayer, computed on the cash or accrual basis according to the method of accounting used in the computation of its entire net income, arising during such period from

(A) sales of its tangible personal property where shipments are made to points within this state,

(B) services performed within the state ...,

(C) rentals from property situated, and royalties from the use of patents or copyrights, within the state ... and

(D) all other business receipts earned within the state, bear to the total amount of the taxpayer's receipts, similarly computed, arising during such period from all sales of its tangible personal property, services, rentals, royalties ... and all other business transactions, whether within or without the state;

(3) ascertaining the percentage of the total wages, salaries and other personal service compensation, similarly computed, during such period of employees within the state, except general executive officers, to the total wages, salaries and other personal service compensation, similarly computed, during such period of all the taxpayer's employees within and without the state, except general executive officers; and

(4) adding together the percentages so determined and dividing the result by the number of percentages; provided, however, except (i) in the case of a New York S corporation ... the business allocation percentage shall be determined by adding the percentages so determined and an additional percentage equal to the percentage determined under subparagraph two of this paragraph together, and dividing the result by the number of percentages so added together ...;

* * *

(b) multiplying its investment income by an investment allocation percentage to be determined by

(1) multiplying the amount of its investment capital invested in each stock, bond or other security (other than governmental securities) during the period covered by its report by the issuer's allocation percentage of the issuer or obligor thereof.

* * *

(2) adding together the sums so obtained, and

(3) dividing the result so obtained by the total of its investment capital invested during such period in stocks, bonds and other securities ... and provided further, that if a taxpayer's investment allocation percentage is zero, interest received on bank accounts shall be multiplied by its business allocation percentage ...; and

(c) add the products so obtained.

* * *

8. If it shall appear to the [Commissioner of Taxation and Finance] that any business or investment allocation percentage or alternative business allocation percentage determined as hereinabove provided does not properly reflect the activity, business, income or capital of a taxpayer within the state, the [Commissioner] shall be authorized in [his] discretion, in the case of a business allocation percentage or alternative business allocation percentage, to adjust it by (a) excluding one or more of the factors therein, (b) including one or more other factors, such as expenses, purchases, contract values (minus subcontract values), (c) excluding one or more assets in computing such allocation percentage, provided the income therefrom is also excluded in determining entire net income or minimum taxable income, or (d) any other similar or different method calculated to effect a fair and proper allocation of the income and capital reasonably attributable to the state, and in the case of an investment allocation percentage, to adjust it by excluding one or more assets in computing such percentage provided the income therefrom is also excluded in determining entire net income or minimum taxable income.

Section 4-4.5 of the Business Corporation Franchise Tax Regulations (Regulations) provides rules for the allocation of receipts from transportation by omnibus, in part, as follows:

Receipts by the taxpayer from transportation by omnibus may be allocated to New York State by the percentage that the mileage within New York State bears to the total mileage within and without New York State, or by the percentage that the time operated within New York State bears to the total time operated within and without New York State or by any other method approved by the [Commissioner of Taxation and Finance]....

Opinion

In this case, Petitioner operates New York City interborough ferry routes as well as New York intrastate and interstate ferry routes. The interborough routes are operated under a lease of a ferry franchise and a lease of a ferry terminal with New York City. The intrastate ferry routes originate and terminate in New York, but may traverse into other states and countries.

Before addressing Petitioner's issues, it must be determined whether Petitioner is subject to tax under section 184 of the Tax Law. Historically, Chapter 908 of the Laws of 1896 consolidated the corporation tax law provisions creating Article 9 of Chapter 60 (Tax Law) of the Consolidated Laws. As added by Chapter 908 of the Laws of 1896, section 182 of Article 9 of the Tax Law imposed a franchise tax on corporations that was based on capital stock; section 183 of Article 9 of the Tax Law contained specific exemptions from the section 182 franchise tax; and section 184 of Article 9 of the Tax Law imposed an additional franchise tax on transportation and transmission corporations. Both the franchise tax under section 182 and the additional franchise tax under section 184 were imposed on corporations formed for carrying on a ferry business within New York State.

Section 184 of the Tax Law was amended by Chapter 334 of the Laws of 1914, to exclude from the additional franchise tax, "a ferry company operating between any of the boroughs of the city of New York under a lease granted by the city." This exemption was not added to section 183 and did not apply to the franchise tax imposed under section 182 of the Tax Law. Therefore, such ferry companies continued to be subject to such section 182 of the Tax Law, even though exempt from section 184 of the Tax Law.

Article 9-A of the Tax Law was added by Chapter 726 of the Laws of 1917, imposing a franchise tax on manufacturing and mercantile corporations. Pursuant to Chapter 628 of the Laws of 1919, the imposition of tax under Article 9-A was amended to include *business* corporations generally, taxing every domestic corporation and foreign corporations doing business in New York, except those specifically exempted. One exemption was for corporations liable to a tax under section 184 of the Tax Law. There was no exemption for taxpayers liable to a tax under section 182 of the Tax Law. Therefore, a ferry company operating between any of the boroughs of the city of New York under a lease granted by the City (which company was exempt from section 184) was subject to the franchise tax imposed under Article 9-A of the Tax Law. Chapter 431 of the Laws of 1922 amended section 183 of the Tax Law to exclude corporations taxable under Article 9-A from the tax on capital stock imposed under section 182. Sections 182 and 183 of the Tax Law were repealed by chapter 663 of the Laws of 1930 and replaced by a new section 183 of the Tax Law to impose a franchise tax measured by capital stock on transportation and transmission corporations. The new section 183 imposes the franchise tax on ferry companies, but exempts a ferry company operating between any of the boroughs of the city of New York under a lease granted by the City.

Therefore, pursuant to sections 183.1 and 184.1 of the Tax Law, a corporation principally engaged in the conduct of a ferry business is subject to the franchise tax and the additional franchise tax, respectively, imposed annually under sections 183 and 184. However, a ferry company that operates between any of the boroughs of the city of New York under a lease granted by New York City is not taxable under the franchise tax imposed under section 183 of the Tax Law or the additional franchise tax imposed under section 184 of the Tax Law.

Accordingly, pursuant to section 209.4 of Article 9-A of the Tax Law, a ferry company operating between any of the boroughs of the city of New York under a lease granted by the City is not exempt from the franchise tax imposed under section 209.1 of the Tax Law. Therefore, Petitioner is subject to franchise tax under Article 9-A of the Tax Law and is not subject to the franchise tax imposed under section 183 of the Tax Law or the additional franchise tax imposed under section 184 of the Tax Law.

Since Petitioner is not subject to tax under section 184 of the Tax Law, this Advisory Opinion will address Petitioner's issues with respect to its taxation under Article 9-A of the Tax Law.

Issue 1 For purposes of Article 9-A of the Tax Law, Petitioner's income from its interborough ferry routes, its intrastate ferry routes and its interstate ferry routes is included in its entire net income as computed under section 208.9 of the Tax Law, and is treated as business income that is allocated within and without New York State pursuant to section 210.3(a) of the Tax Law using the three factor formula contained in such section.

Issue 2 Petitioner's receipts from its interborough, intrastate and interstate ferry routes are receipts from a transportation activity. Section 210.3(a)(2)(A), (B) and (C) of the Tax Law does not provide an enumerated method for determining the portion of such receipts that is allocated to New York. Therefore, Petitioner's receipts from its ferry business constitute *other business receipts* under section 210.3(a)(2)(D) of the Tax Law. *Other business receipts* earned by a taxpayer in New York State are allocated to New York State.

Petitioner's transportation of passengers by ferry boat is similar to the transportation of passengers by omnibus. Therefore, a reasonable method to determine the portion of Petitioner's receipts from its interborough, intrastate and interstate ferry business that is earned in New York is to use one of the methods described in section 4-4.5 of the Regulations. Following section 4-4.5 of the Regulations, Petitioner's allocation of its receipts from its ferry business should be based on the percentage that the mileage within New York State of Petitioner's ferry routes bears to the total mileage of such routes within and without New York State, or on the percentage that the time the ferries operate within New York State bears to the total time the ferries operate within and without New York State. A different method of allocating Petitioner's receipts from its ferry business may not be used unless it is approved by the Commissioner of Taxation and Finance.

It should be noted that section 210.8 of the Tax Law authorizes the Commissioner of Taxation and Finance to use other methods to more accurately reflect the taxpayer's business activity within New York State when it appears to the Commissioner that the business allocation percentage determined pursuant to section 210.3(a) of the Tax Law does not properly reflect the activity, business, income or capital of a taxpayer within New York State. If a different method is used, it must be calculated to effect a fair and proper allocation of the business income and business capital reasonably attributable to New York State. The determination of whether the

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business allocation percentage determined pursuant to section 210.3(a) of the Tax Law results in a fair allocation of Petitioner's business capital and business income to New York State is a factual matter that is not susceptible of determination within the scope of an advisory opinion. (Tax Law, §171.24; 20 NYCRR 2376.1(a).)

DATED: August 22, 2005

/s/
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.