

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-89(11)C
Corporation Tax
September 11, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C890320A

On March 20, 1989, a Petition for Advisory Opinion was received from Raymond Rizzo Associates, Inc., 97 East Hawthorne Avenue, Valley Stream, New York 11580.

The issue raised is whether Petitioner, Raymond Rizzo Associates, Inc., is subject to franchise tax as a transportation corporation pursuant to sections 183 and 184 of the Tax Law for taxable years ended September 30, 1986, September 30, 1987 and September 30, 1988.

Facts

Petitioner was incorporated in New York on June 18, 1973. Petitioner has been filing franchise tax returns under Article 9 as a transportation corporation. However, Petitioner maintains that as of the fiscal year beginning October 1, 1985, the nature of the business activities has changed so substantially that since then it has not been a transportation corporation and that it should have filed franchise returns under Article 9A as of the taxable year ended September 30, 1986.

Since October 1, 1985, Petitioner has been engaged as a demolition and excavation contractor for institutional, governmental and commercial entities. Petitioner's business activities for the taxable years at issue consisted of:

1. Demolition, excavation and hauling away of debris and soil.
2. Excavation, carting and hauling away of debris and soil.
3. Carting and hauling away of debris and soil.
4. Sand or soil sales and delivery.
5. Machine and/or truck and/or operator hire.
6. Container (disposal) service.
7. Grading of soil.
8. Pipe jacking and underpinnings.

Petitioner hauls away debris to an off site dumpsite and not to a location designated by the general contractor. Any contract involving the removal of sand or soil is drafted as follows: "Any sand or soil being removed becomes the property of Raymond Rizzo Associates." Therefore, when the Petitioner "transports" the soil and sand, it is not transporting someone else's property, but its own.

Petitioner's records allocate the income received to its various activities. Contract revenues earned for the taxable years at issue are as follows:

<u>FYE 9/30/88</u>		<u>%</u>
Sales - Materials	\$ 182,754	4.64
Sales - Trucking	283,930	6.07

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Sales - Demol./Excavation	1,546,391	39.29
Sales - Misc.	628,905	15.98
Sales - Grading	211,483	5.37
Sales - Mach/Truck Hire	630,331	16.01
Sales - Operator Hire	<u>497,492</u>	<u>12.64</u>
Subtotal	3,936,286	100.00
Less-Sales Discounts	<u>17,850</u>	
Contract Revenues Earned	<u>\$3,918,436</u>	

FYE 9/30/87

Sales - Material	\$ 212,437	7.97
Sales - Trucking	536,705	20.14
Sales - Demol./Excavation	827,359	31.04
Sales - Misc.	83,534	3.13
Sales - Grading	53,053	1.99
Sales - Mach/Truck Hire	547,356	20.54
Sales - Operator Hire	<u>404,362</u>	<u>15.19</u>
Subtotal	2,664,806	100.00
Less-Sales Discounts	<u>25,692</u>	
Contract Revenues Earned	<u>\$2,639,114</u>	

FYE 9/30/86

Sales - Materials	\$ 413,552	13.54
Sales - Trucking	567,338	18.58
Sales - Demol./Excavation	778,554	25.49
Sales - Misc.	47,293	1.55
Sales - Grading	13,800	.45
Sales - Mach/Truck Hire	668,237	21.88
Sales - Operator Hire	<u>565,441</u>	<u>18.51</u>
Subtotal	3,054,215	100.00
Less-Sales Discounts	<u>25,624</u>	
Contact Revenues Earned	<u>\$3,028,591</u>	

Petitioner argues that its principal business activities consist of demolition, excavation, the holding out for hire of machinery, trucks and operators, grading, and the sale of materials. The transporting of debris and/or dirt or gravel is clearly not the principal source of revenues. Furthermore, a substantial portion of the Petitioners's transportation activities, whereby it transports its own property, is not transportation within the intent of sections 183 and 184 of the Tax Law. The transporting of ones own property or providing a disposal service to an nondesignated off-site location is not "transportation" for purposes of sections 183 and 184.

Petitioner contends that the dirt and gravel being transported belongs to Petitioner. It is not being transported for a customer. Generally, in the situations where debris is carted away it is dumped in an unrelated dump site. Petitioner argues that this is a disposal service activity. In any event, the amount of transportation of dirt and gravel from one area of a construction site to another area on the site or to another location designated by the general contractor amounts

to no more than a nominal percentage of Petitioner's gross receipts.

Petitioner asserts that it was formed as a transportation company, in so far that it originally was principally engaged in trucking. Since October 1, 1985, the activities of the business have become construction related and not transportation related. Since a corporation is to be taxed according to the business it conducts rather than the law under which it is organized, Petitioner further asserts that the business activities of Petitioner are principally in the nature of construction activities and a disposal service which are subject to tax as a general business corporation under Article 9-A.

Discussion

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax on domestic or foreign corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office, in New York State. Section 209.4 of the Tax Law, provides that corporations liable to tax under sections 183 and 184 of Article 9 of the Tax Law are not subject to tax under Article 9-A.

Sections 183 and 184 of Article 9 of the Tax Law impose franchise taxes, on a domestic or foreign corporation formed for or principally engaged in the conduct of a transportation business, for the privilege of exercising its corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office, in New York State.

To determine the classification and proper taxability of a corporation under either Article 9 or Article 9-A, an examination of the nature of the corporation's activities is necessary, regardless of the purposes for which the corporation was organized. See McAllister Bros., Inc., v Bates, 272 App Div 511, 517.

The determination of whether Petitioner is subject to tax under Article 9-A or Article 9, hinges on what activity the taxpayer is principally engaged in. Ordinarily, a corporation is deemed to be principally engaged in the activity from which more than 50% of its receipts are derived. See, e.g. Re Joseph Bucciero Contracting Inc., Advisory Op St Comm, July 23, 1981, TSB-A-81(5)C.

In the RVA Trucking Inc. v State of New York State Tax Commission, 135 AD2d 938, affirming State Tax Commission Decision, June 12, 1986, TSB-H-86(24)C, the Court stated that the State Tax Commission "quite reasonably defined "transportation" as comprehending "any real carrying about or from one place to another" and "trucking" as generally involving "the process or business of carting goods on trucks" (Matter of Joseph A. Pitts Trucking, State Tax Commission Decision, July 18, 1984, TSB-H-84(34)C; see, Newton Creek Towing Co. v Law, 205 App Div 209, 211, affd 237 NY 578)."

A corporation engaged primarily in performing subcontracting work on road construction and other major construction sites, deriving 65% of gross receipts from loading, hauling and dumping of construction materials and debris both on and off construction job sites, and also engaged in transporting snow, was a transportation corporation rather than a business corporation. RVA Trucking Inc., supra.

It has been held that the leasing of vehicles with drivers is the conduct of a transportation business subjecting the corporation doing such a business to tax under sections 183 and 184 of the Tax Law (People ex rel. Peter J. Curran Funeral Service Co. v. Graves, 257 App Div 888).

It has also been held that if more than 50% of a corporation's receipts are from the leasing of trucks without drivers, such corporation is not principally engaged in the transportation business but is functioning as a truck leasing business and would be classified as a corporation subject to tax under Article 9-A of the Tax Law. Joseph Bucciero Contracting, Inc., supra.

Since a corporation is taxed according to the business it conducts, a corporation that is engaged in more than one activity must determine what activity or activities the corporation is principally engaged in. Such determination is based on the percentage of the corporation's receipts from Article 9 type activities versus the percentage of its receipts from Article 9-A type activities.

Herein, Petitioner's business activities consisting of carting and hauling away of debris and soil is a trucking business and clearly is an Article 9 activity. However, the transportation of ones own property is not an activity from which income is derived and is neither an Article 9 nor an Article 9-A activity. Petitioner's business activities consisting of sand or soil sales and delivery, operating a container (disposal) service, leasing machines, demolition, excavation, grading and pipe jacking and underpinnings are Article 9-A type activities. Petitioner's business activities of leasing trucks and/or operators may be classified as Article 9 or Article 9-A. If a truck is leased with an operator, such activity is a transportation business and is an Article 9 activity. If a truck is leased without an operator, such activity is a leasing business and is an Article 9-A activity.

Conclusion

Based on the facts presented, it is unclear what classification should be given to Petitioner's activities. In Petitioner's breakdown of contract revenues for taxable years September 30, 1986, September 30, 1987 and September 30, 1988, the sale of materials, the demolition/excavation, the leasing of machines and the grading are derived from Article 9-A type activities. The trucking revenues are derived from an Article 9 activity. However, the truck hire and operator hire revenues may be derived from either Article 9 or Article 9-A activities depending on whether the lease includes the operator. Also, it is not known what the miscellaneous revenues consist of.

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The actual classification of Petitioner as either an Article 9 or Article 9-A taxpayer is a question of fact not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts". Tax Law, §171, subd. twenty-fourth, 20 NYCRR 901.1(a).

Accordingly, if after a review of the facts it is determined that Petitioner is principally engaged in the transportation business, Petitioner will be classified as a transportation and transmission corporation subject to tax under Article 9 of the Tax Law. If not, Petitioner will be classified as a general business corporation subject to tax under Article 9-A of the Tax Law.

DATED: September 11, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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