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

TSB-A-96 (23) C
Corporation Tax
October 1, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C960508B

On May 8, 1996, a Petition for Advisory Opinion was received from Gold Service Movers, Inc., 95 Virginia Road, White Plains, New York 10603.

The issue raised by Petitioner, Gold Service Movers, Inc., is whether revenues from charges for packing and unpacking goods and the sales of packing materials are derived from a transportation business under sections 183 and 184 of Article 9 of the Tax Law.

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

The taxpayer is engaged in business as a moving and storage company and derives its income from several sources, e.g. transportation, storage, commissions, etc.

Petitioner states that traditionally, a moving company would be engaged to move boxes or cartons that have been packed by the customer in anticipation of the move. Upon delivery to the new home or office, the customer would then unpack the boxes. Therefore, Petitioner contends that packing and unpacking is to be distinguished from mere loading and unloading. In fact, a customer may retain Petitioner to pack or unpack goods without utilizing Petitioner's transportation services. Packing and unpacking goods is an additional service provided by Petitioner for which the customer is charged separately. The service entails the careful packing and sealing of household or office belongings of the customer, so that the goods may be moved safely, and then unpacked in an organized manner utilizing a sequentially numbered pattern. This service provides an administrative and time-saving benefit to the customer.

Petitioner further states that packing materials consist of boxes (including boxes for specific types of goods), cartons, foam, tape, etc. This includes specialized crating for vulnerable items such as mirrors or pianos. Packing materials may be purchased at the option of the customer. The customer may, and frequently does, use packing materials purchased from other sources. Also, one may purchase packing materials from Petitioner and not hire Petitioner for the move. In several cases where special crating was purchased, Petitioner did not provide the transportation service.

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 a corporation liable for tax under sections 183 and 184 of Article 9 of the Tax Law is not subject to tax under Article 9-A of the Tax Law.

Sections 183 and 184 of the Tax Law impose annual franchise taxes on a domestic or foreign corporation formed for or principally engaged in the conduct of a transportation business. The tax is imposed 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 purpose for which the corporation was organized. In Matter of Stat Equipment Corp and Matter of Bi-County Ambulance and Ambulette Transport Corp, Dec Tax App Trib, January 25, 1996, TSB-D-96(3)C, the Tax Tribunal stated the test for proper classification of business activities as follows:

> We stated the test in Matter of Capitol Cablevision Sys. (Tax Appeals Tribunal, June 9, 1988):
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> "[i]t is well established that classification for corporation tax purposes is to be determined by the nature of the taxpayer's business and not by the words in its certificate of incorporation, nor by focusing on one aspect of its business operations. The business must be viewed in its entirety and from the perspective of its customers - what they buy and pay for. (Ouotron Sys v Gallman, 39 NY2d 428; Matter of Holmes Elec. Protective Co. v McGoldrick, 262 AD 514, affd 288 NY 635; Matter of McAllister Bros. v Bates, 272 AD 511)" (Matter of Capitol Cablevision Sys.,supra).

Ordinarily, a corporation is deemed to be principally engaged in the activity from which more than 50 percent of its receipts are derived. See, e.g., Re Joseph Bucciero Contracting Inc., Adv Op St Tax Commn, July 23, 1981, TSB-A-81(5)C.

In Matter of RVA Trucking Inc. v New York St Tax Commn, 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, St Tax Commn Dec, July 18, 1984, TSB-H-84(34)C; see, Matter of Newton Creek Towing Co. v Law, 205 App Div 209, 211, affd 237 NY 578)."

Section 2.33 of the Transportation Law provides that the "transportation of property" includes any service in connection with the receiving, delivery, elevation, transfer in transit, ventilation, refrigeration, icing, storage and handling of the property transported. A person engaged in intrastate transportation as a common carrier of property by motor vehicle transporting household goods on any highway in New York State is regulated under Article 9 of the Transportation Law and Part 814 of the Transportation Regulations.

Under section 814 of the Transportation Regulations, all common carriers of household goods by motor vehicle shall establish rates for the transportation of the household goods. The transportation charges shall be computed in accordance with the carrier's tariff on file with the Commissioner of Transportation. In addition, the charges to be made for each accessorial, additional or terminal service rendered in connection with the transportation of household goods by motor vehicle shall be established by a separate tariff. The tariffs establishing these charges shall separately state each service to be rendered and the charge therefor. A carrier shall establish one charge for a complete packing service including providing a container, packing and unpacking and a separate charge for such service without unpacking. These charges are not to be included in, but are in addition to the charges based on the rate for transporting the household goods.

In this case, when determining the classification and proper taxability of Petitioner, its business activities "must be viewed in its entirety and from the perspective of its customers - what they buy and pay for" as stated in Stat Equipment Corp, supra. If more than 50 percent of Petitioner's receipts are derived from a transportation business, Petitioner is properly taxable under sections 183 and 184 of Article 9 of the Tax Law. Otherwise, Petitioner is taxable under Article 9-A of the Tax Law.

In applying the principles of RVA Trucking, supra, Stat Equipment Corp, supra, and the tariff treatment for common carriers of household goods by motor vehicle under the Transportation Law, it is determined that where packing and unpacking is done in connection with the actual transportation of the goods, the entire receipt for this activity is from a transportation business. That is, where a customer hires a moving company to pack the customer's goods, transport the goods to another location and then unpack the goods, the packing and unpacking is done in connection with the actual transportation of the goods and both services, together, is what the customer is paying for. Even though the charges may be separately stated, the packing and unpacking is done in conjunction with the actual transportation, and both services constitute a transportation business.

However, where a customer hires a moving company to pack and unpack the customer's goods (or to just pack the customer's goods) and the moving company does not transport the goods, the packing and unpacking activity is not done in connection with the actual transportation of the goods and the moving company's receipts for this activity is not from a transportation business.

Where a moving company sells packing material to a customer, the receipt for this activity is from the sale of tangible personal property and is not a receipt for a transportation business even if the moving company subsequently transports the goods that are packed in this material.

Accordingly, for purposes of determining whether more than 50 percent of Petitioner's receipts are from a transportation business, the charges for the transportation of goods are receipts from a transportation business. However, the separately stated charges for packing and unpacking a customer's goods are receipts from a transportation business only if it is done in conjunction with the actual transportation of the goods. Otherwise, the receipts from the charges

for packing and unpacking a customer's goods is not ancillary to the transportation of goods and, therefore, are not receipts from a transportation business as contemplated under sections 183 and 184 of the Tax Law. Likewise, the receipts from the sales of packing material are not receipts from a transportation business as contemplated under sections 183 and 184 of the Tax Law.

The actual classification of Petitioner as either an Article 9 of the Tax Law taxpayer or an Article 9-A of the Tax Law 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.Twenty-fourth; 20 NYCRR 2376.1(a).

It should be noted that Chapter 309 of the Laws of 1996 provides that under section 184 of the Tax Law, the tax rate for trucking companies is decreased from .75 percent to .6 percent on gross earnings effective for 1997 and thereafter. In addition, starting in 1998, trucking companies will be subject to tax under Article 9-A of the Tax Law rather than under Article 9 unless the company opts to remain under Article 9 of the Tax Law.

/s/

DATED: October 1, 1996

John W. Bartlett
Deputy Director
Technical Services Bureau

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