

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petitions	:	
of	:	
<b>SUNGARD CAPITAL CORP.</b>	:	DECISION
<b>AND SUBSIDIARIES</b>	:	DTA NOS. 823631, 823632
<b>SUNGARD DATA SYSTEMS, INC.</b>	:	823680, 824167 AND
<b>AND SUBSIDIARIES</b>	:	824256
<b>SUNGARD HIGHER EDUCATION MANAGED</b>	:	
<b>SERVICES, INC.</b>	:	
<b>SUNGARD INSTITUTIONAL BROKERAGE, INC.</b>	:	
<b>SUNGARD DATA SYSTEMS, INC.</b>	:	
	:	
for Redetermination of Deficiencies or for Refund of	:	
Corporation Franchise Tax under Article 9-A of the	:	
Tax Law for the Years 2004, 2005 and 2006.	:	

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Petitioners, SunGard Capital Corp. and subsidiaries, SunGard Data Systems, Inc., and subsidiaries, SunGard Higher Education Managed Services, Inc., SunGard Institutional Brokerage, Inc., and SunGard Data Systems, Inc., filed an exception to the determination of the Administrative Law Judge issued on April 3, 2014. Petitioner appeared by Alston & Bird, LLC (Richard C. Kariss, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer L. Baldwin, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a brief in reply. Oral argument was heard in New York, New York on November 19, 2014, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether SunGard Capital Corp. and subsidiaries and SunGard Data Systems, Inc. and subsidiaries are entitled to refunds of corporation franchise tax based on their amended filings of their franchise tax returns on a combined basis for the period August 13, 2005 through December 31, 2005 and for the calendar year 2006.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except for findings of fact 32, 42, 44, 45, 48, 49, 58, 63, 67, 69, 70 and 71, which we have modified to more accurately reflect the record. The Administrative Law Judge's finding of fact 74, a discussion of proposed findings of fact submitted by petitioners to the Administrative Law Judge, has been omitted. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. Petitioner SunGard Data Systems, Inc. (SDS) is incorporated in Delaware with its headquarters located in Pennsylvania.
2. Petitioner SunGard Capital Corp. (SCC) is incorporated in Delaware with its headquarters located in Pennsylvania.
3. Petitioner SunGard Higher Education Managed Services, Inc. (SHEMS [f/k/a SunGard Collegis, Inc.]) is incorporated in Delaware with its headquarters located in Florida.
4. Petitioner SunGard Institutional Brokerage, Inc. (SIBI) is incorporated in New York.
5. For the calendar year 2005, SDS was the corporate parent of a group of affiliated companies for federal corporation income tax purposes (the SunGard Group or the Group) and was ultimately responsible for filing the consolidated federal income tax returns for the Group.

6. For the calendar year 2006, SCC became the corporate parent of the SunGard Group for federal corporation income tax purposes and was ultimately responsible for filing the consolidated federal income tax returns for the Group.

7. The Division of Taxation (Division) is charged with the administration of the corporation franchise tax.

8. For tax years beginning before 2005, SDS filed separate company corporation franchise tax returns in New York.

9. For tax years beginning before 2005, the subsidiary corporations of SDS that conducted business in New York filed corporation franchise tax returns in New York.

10. On August 11, 2005, a consortium of private equity investment funds (Sponsors or Investors) acquired the SunGard Group in a leveraged buyout transaction (LBO).

11. As part of the LBO, 25 of the subsidiary corporations of SDS, all of whom were C corporations prior to the LBO, were converted from C corporations to single-member limited liability companies (SMLLCs) or disregarded entities (DREs) for federal and state corporation income and franchise tax purposes.

12. The subsidiary corporations of SDS that were not converted to DREs, and that conducted business in New York, filed corporation franchise tax returns in New York for the 2005 calendar year. The subsidiary corporations that were not converted to DREs were engaged in three of the SunGard Group's four business segments.

13. The subsidiary corporations of SDS that were converted to DREs, and that conducted business in New York, filed corporation franchise returns in New York for the short period January 1, 2005 through August 12, 2005.

14. SDS filed a separate company franchise tax return in New York for the 2005 calendar year that included its DREs for the period August 13, 2005 through December 31, 2005.

15. For the calendar year 2006, SDS filed a separate company franchise tax return in New York that included its DREs.

16. The subsidiary corporations of SDS that were not converted to DREs, and that conducted business in New York, filed corporation franchise tax returns in New York for the 2006 calendar year.

17. SDS and subsidiaries timely filed an amended corporation franchise tax return that included an application for refund of corporation franchise tax and MTA Surcharge in the amount of \$343,779.00 on the basis that those entities should have filed a combined corporation franchise tax return for the tax period August 13, 2005 through December 31, 2005 (2005 refund claim).

18. SCC and subsidiaries timely filed an amended corporation franchise tax return that included an application for refund of corporation franchise tax and MTA Surcharge in the amount of \$2,183,747.00 on the basis that those entities should have filed a combined corporation franchise tax return for the 2006 calendar year (2006 refund claim).

19. The Division conducted a limited scope audit of the 2005 and 2006 refund claims. The audit was conducted concurrently with separate audits of SDS, SHEMS and SIBI.

20. On February 11, 2009, the Division received a letter from petitioners' counsel, Richard C. Kariss, Esq., providing information and a summary of petitioners' position with respect to the 2005 and 2006 refund claims.

21. The Division issued an audit appointment letter on March 2, 2009.

22. On June 2 through 4, 2009, the Division conducted interviews of certain employees of SDS:

- a) Mike Ruane, Chief Financial Officer;
- b) Michelle Burno, Senior Director of Benefits;
- c) Sandy Garcia, Senior Manager of Corporate HR;
- d) Pete Polasek, Executive Vice President of Business Development;
- e) Patty O'Shea, Vice President Corporate Tax;
- f) Leslie Brush, Vice President Legal;
- g) Brian Robins, Chief Marketing Officer;
- h) Ed Rosario, Vice President Corporate Procurement;
- i) Eric Erikson, Vice President Corporate Treasury;
- j) Karen Mullane, Vice President Corporate Finance and Controller; and
- k) Jorge Green, Vice President Corporate Audit.

Interview notes to reflect the statements made by the foregoing interviewees were prepared by the two Division auditors (Larry Snider and Kristine Sprung) who were present at the interviews. The interview notes prepared by Kristine Sprung include "added comments [by the interviewees] that clarify or correct the notes recorded during the interviews. Some of the comments are provided as modifications to the notes and others are statements made by email clarifying or confirming the accuracy of the notes recorded during the interviews."

23. The Division issued Information Document Request (IDR) Number 1 on June 8, 2009, and issued IDR Number 2 on June 26, 2009.

24. The Division received a response to IDR Numbers 1 and 2 on July 3, 2009.

25. The Division issued IDR Number 3 on August 19, 2009 and issued IDR Number 4 on August 27, 2009. The Division did not receive a response to IDR Number 3 or IDR Number 4.

26. On August 31, 2009 and February 17, 2010, respectively, the Division received letters from Richard C. Kariss, Esq., providing further information and setting forth petitioners' position with regard to the 2005 and 2006 refund claims.

27. On April 16, 2010, the Division issued correspondence through which it denied the application for refund by SDS and subsidiaries in the amount of \$343,779.00 (the 2005 refund claim) and denied the application for refund by SCC and subsidiaries in the amount of \$2,183,747.00 (the 2006 refund claim).

28. On May 11, 2010, SDS and subsidiaries and SCC and subsidiaries, respectively, timely appealed the denials of their applications for refunds by filing petitions for review of the denials with the Division of Tax Appeals (DTA).

29. On July 28, 2010, the Division of Taxation timely filed its answers to the petitions of SDS and subsidiaries and SCC and subsidiaries.

30. On August 17, 2010, SDS and subsidiaries and SCC and subsidiaries each timely filed a reply to the Division's answers to the petitions.

31. In an effort to gather more information regarding the 2005 and 2006 refund claims, the Division of Taxation issued IDR Number F-1 on June 14, 2010. The Division received a partial response to IDR Number F-1 on August 2, 2010.

32. Based on a separate company audit of SHEMS for the 2005 and 2006 calendar years, the Division issued a notice of deficiency dated March 15, 2010, which asserted additional corporation franchise tax and interest for the 2005 calendar year in the amount of \$7,872.40.

33. On June 8, 2010, SHEMS timely appealed the notice of deficiency by filing a petition with DTA. The Division of Taxation timely filed its answer to the SHEMS petition on August 18, 2010, and SHEMS timely filed a reply to the Division's answer on September 7, 2010.

34. Based on a separate company audit of SIBI for the 2004, 2005 and 2006 calendar years, the Division issued a notice of deficiency dated November 15, 2010, which included the

assessment of additional corporation franchise tax, interest and penalties in the amount of \$992,737.86.

35. On February 14, 2011, SIBI timely appealed the notice of deficiency by filing a petition with DTA. The Division of Taxation timely filed its answer to SIBI's petition on May 18, 2011, and SIBI timely filed a reply to the Division's answer on June 7, 2011.

36. Based on a separate company audit of SDS for the 2004, 2005 and 2006 calendar years, the Division issued a notice of deficiency dated December 16, 2010, which included the assessment of additional tax, interest and penalties in the amount of \$1,158,872.67.

37. On March 16, 2011, SDS timely appealed the notice of deficiency by filing a petition with DTA. The Division of Taxation timely filed its answer to SDS's petition on May 18, 2011, and SDS timely filed a reply to the Division's answer on June 7, 2011.

38. The parties' stipulation of facts notes specifically that the following documents are included among the exhibits in these matters:

- a) a copy of SDS's 2006 Annual Report, SEC Form 10-K;
- b) a copy of SunGard Global Business Conduct & Compliance Program guidelines adopted August 15, 2002 and most recently revised in August 2005;
- c) a partial copy of the Guarantee Agreement between SunGard Holdco, LLC, SDS, Solar Capital Corp., certain subsidiaries of SDS and JPMorgan Chase Bank, N.A., with a partial copy of the Credit Agreement between Solar Capital Corp. and certain overseas borrowers, SunGard Holdco LLC, SDS and its lenders, both dated August 11, 2005;
- d) a copy of the Management Agreement between SDS, SCC, SunGard Capital Corp. II, SunGard Holding Corp., SunGard Holdco LLC and the Sponsors, dated August 11, 2005;

- e) copies of SIBI's Annual Audited Report, Form X-17A-5, filed with the U.S. Securities and Exchange Commission for the 2004, 2005 and 2006 calendar years; and
- f) a copy of SCC and Subsidiaries' 2006 Form 1120 spreadsheet.

39. The parties have stipulated to the following:

- a) For the 2005 calendar year, SHEMS (on a separate basis) is not liable for additional corporation franchise tax and is not entitled to a refund of corporation franchise tax;
- b) For the 2004, 2005 and 2006 calendar year, SDS (on a separate basis) is not liable for additional corporation franchise tax and is not entitled to a refund of corporation franchise tax; and
- c) For the 2004 and 2006 calendar years, SIBI (on a separate basis) is not liable for additional corporation franchise tax and is not entitled to a refund of corporation franchise tax.

40. The parties have further stipulated to the following:

- a) If it is finally determined that SDS should be permitted to file its corporation franchise tax return on a combined basis with all of its Subsidiaries for the tax period August 13, 2005 through December 31, 2005, then SDS and Subsidiaries is entitled to a refund of corporation franchise tax in the amount of \$376,577.00, plus interest;
- b) If it is finally determined that SCC should be permitted to file its corporation franchise tax return on a combined basis with all of its Subsidiaries for the 2006 calendar year, then SCC and Subsidiaries is entitled to a refund of corporation franchise tax in the amount of \$2,214,729.00, plus interest; and
- c) If it is finally determined that SDS should not be permitted to file its corporation franchise tax return on a combined basis with all of its Subsidiaries for the tax period August 13, 2005 through December 31, 2005, then SIBI (on a separate basis) is liable for additional corporation franchise tax in the amount of \$150,000.00, plus interest for the 2005 calendar year.

41. All of the matters appealed above were consolidated by the Division of Tax Appeals.

In turn, the parties have reached agreement and resolved all of the issues presented save for the

determinative issue of whether the SunGard Group should file its corporation franchise tax returns on a combined basis rather than on a separate company basis for the 2005 (short period) and 2006 tax years.

42. The SunGard Group included dozens of legal entities involved in similar and related lines of business. In 2005, SDS owned at least 80 percent of the capital stock of all of the entities within the Group. In 2006, SCC owned at least 80 percent of the capital stock of all of the entities within the Group. In 2005, there were 82 members in the SDS group, including SDS and 8 additional holding companies, 1 inactive corporation (MBM, Inc.), a sales corporation (Plaid Brothers Software, Inc.), a securities broker (SunGard Institutional Brokerage, Inc. [SIBI]), a cash management company (Portfolio Ventures, Inc.) and one company (Online Securities Processing, Inc. [OSP]), whose principal business activity is listed as computer services, but which had no receipts or sales of its own and listed revenues consisting only of the receipt of partnership income.<sup>1</sup> In 2006, the SDS group consisted of 58 members, including SCC, SDS and 11 additional holding companies, 2 inactive corporations (MBM, Inc. and SunGard Availability Services, Ltd.), and the same sales corporation, securities broker, cash management corporation and corporation whose revenues consisted only of the receipt of partnership income.<sup>2</sup>

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<sup>1</sup> The additional holding companies listed in 2005 are SunGard Investment Ventures, Inc., SIS Europe Holdings, Inc., SRS Development, Inc., SunGard Development Corporation, SunGard Canada Holdings, Inc., SunGard SAS Holdings, Inc., SunGard International Holding, Inc. and SunGard SAS Canada Holding, Inc.

<sup>2</sup> The additional holding companies listed for 2006 are SunGard Capital Corp. II, SunGard Holding Corp., SIS Europe Holdings, Inc., SRS Development, Inc., SunGard Development Corporation, SunGard Canada Holdings, Inc., SunGard SSF Canada Holdings, Inc., SunGard SAS Holdings Co., ASI Australia Holdings Co., SunGard SAS Canada Holdings, Inc., SunGard International Holdings, Inc. and SunGard i Works Holdings, Inc.

43. The SunGard Group's primary line of business is providing information technology sales and services, including data processing, information availability, software solutions and software licensing, through four main business segments, as follows:

- a) The Financial Systems (FS) business segment that provides data processing services for customers in the financial services industry, such as investment banks, broker-dealers and insurance companies;
- b) The Public Sector (PS) business segment that provides data processing services for public sector entities, including government agencies, nonprofit agencies, nonprofit entities and municipal organizations;
- c) The Higher Education (HE) business segment that provides data processing services for colleges and universities; and
- d) The Availability Services (AS) business segment that provides systems management, business continuity, data protection and disaster recovery services for customers in all sectors of the economy and for entities and other business segments within the SunGard Group.<sup>3</sup>

Their annual SEC Forms 10-K describe petitioners as offering "a huge number of products in complicated businesses," and as providing "software and processing solutions to institutions throughout the financial services industry, higher education and the public sector, and help[ing] enterprises of all types to maintain the continuity of their business through information availability services."

44. The FS segment provides software and processing solutions that automate the many detailed processes associated with trading securities, and managing and accounting for investment assets. The FS segment had revenue of \$1.9 billion in 2005 and \$2.1 billion in 2006. Comprised of more than 50 business units and offering more than 50 brands, the FS segment serves financial services companies, corporate and government treasury departments and energy

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<sup>3</sup> Petitioners' SEC filings describe only three business segments by presenting the HE and PS business segments as one (HEPS).

companies. The FS segment included “three registered brokers that facilitate enhanced straight-through processing by providing the following services using [its] financial systems solutions: (1) a clearing broker that provides order routing, execution and clearing for professional traders; (2) a full-service equities trading desk for institutional investors; and (3) a New York Stock exchange member that executes trades for institutional investors.” SIBI, one of the FS segment’s brokers, is an SEC registered and regulated broker-dealer that provides trading activities on behalf of its customers (introducing securities transactions, offering an electronic routing network for placing securities trades and providing an interactive trading link through the National Securities Clearing Corporation).<sup>4</sup> SIBI’s customers are principally investment advisors. SIBI generates commissions and other income from introducing securities transactions on behalf of its customers who use various portfolio and investment management systems and databases provided by different SunGard Group subsidiaries and third parties. SIBI had gross receipts of about \$36.8 million in 2005 and \$56.5 million in 2006. SIBI and the other brokerage businesses were more highly regulated and riskier than the other businesses in the SunGard Group.

45. The HEPS segment, comprised of 8 business units and offering 30 to 40 products, provides “specialized enterprise resource planning and administrative solutions” for institutions of higher education, school districts, state and local governments and not-for-profit organizations. Such software and data processing solutions include accounting, personnel, fund-raising, grant and project management, student administration, and reporting for educational and not-for-profit organizations and accounting, personnel, utility billing, land management, public

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<sup>4</sup> SIBI merged with SunGard Investment Products, Inc. and Precient Markets, Inc. on October 31, 2006.

safety and justice administration for governments. The HEPS segment had revenue of \$788 million in 2005 and \$870 million in 2006.

46. The AS business segment provides a “[portfolio] of ‘always ready’ standby services, as well as advanced recovery and ‘always on’ production services that help businesses maintain uninterrupted access to their critical information and computer systems.” AS provides its services to companies of all sizes throughout nearly all industries and has more than three million square feet of secure facilities and a more than 25,000 mile global network. The AS segment had revenue of \$1.308 billion in 2005 and \$1.36 billion in 2006.

47. In addition to the services that it provides to unrelated third-party customers, AS provides its resources and significant services to the whole SunGard company, though the extent of such services provided was not specified or quantified in terms of dollar value. AS provides systems management services for the SunGard Group, manages the Group’s infrastructure and network, and provides tracking and allocating data processing resources among the entities and business segments in the Group to ensure the most efficient use of the Group’s nation-wide data processing centers. AS provides the Group with disaster recovery and facilities management services, and maintains and supports hardware used by the Group. AS manages the utilities and resources of the headquarters facility in Wayne, Pennsylvania.

48. SDS incurred \$65,188,980.00 for 2005 and \$66,339,049.00 for 2006 in costs for providing centralized corporate-level functions and services on behalf of all entities and business segments within the SunGard Group. Such costs were related to SDS’s corporate oversight function. None of these costs were allocated or charged back to the individual entities or business segments in the Group (with the exception of certain legal services that are performed

for and charged to specific entities). SDS reported total deductions of approximately \$833 million and \$1.454 billion, respectively, on its 2005 and 2006 calendar year federal corporate income tax returns.

49. SDS managed the SunGard Group's budgetary matters. SDS directed the SunGard Group's centralized cash flow management system to enable the allocation of funds from profitable business operations to underfunded business operations within the SunGard Group on an as-needed, interest-free basis. SDS managed the SunGard Group's debt, which is secured by the assets of substantially all members of the Group.

50. SDS managed all of the SunGard Group's insurance matters concerning property, workers' compensation, general liability, criminal matters, professional liability and officers' and directors' insurance coverage. SDS acted as the SunGard Group's single contact regarding banks and bondholders.

51. SDS performed financial, accounting and information security audit functions for the SunGard Group, set controls, and ensured that the members of the SunGard Group followed company guidelines.

52. On behalf of the entire SunGard Group, SDS prepared SEC and other public documents, prepared accounting books and records and other accounting and finance services and set accounting and financial reporting policies and standards to ensure that all members of the SunGard Group provided consistent accounting and financial information.

53. SDS prepared domestic and international tax reports for the SunGard Group and ensured that the Group complied with tax laws.

54. SDS provided the SunGard Group with legal services, including the preparation of consistent Group-wide legal documents, and the management of all legal matters for the SunGard Group, including commercial, regulatory, litigation, securities, employment and other legal matters.

55. SDS provided the SunGard Group with employee management services by directing the Group's employee activities in a variety of areas, including records retention, the protection of confidential information, the use of electronic communications resources, the adherence to securities, antitrust and other areas of corporate law, the avoidance of conflicts of interest, political activities, avoidance of discrimination and harassment and the use of the SunGard Group's property.

56. Efficiencies within the SunGard Group were further enhanced when a consortium of private equity investment funds (Sponsors or Investors) acquired the SunGard Group in the LBO on August 11, 2005 (*see* Finding of Fact 10). In this regard, pursuant to the restructuring that followed the LBO, many of the operating subsidiary corporations within the SunGard Group were converted to DREs and other subsidiary corporations were merged into other entities. As a result of the conversion to DREs, the income and attributes of those entities were combined and they were treated as one New York taxpayer with their parent corporation.

57. One of the reasons for the restructuring was that the Investors wanted to further integrate the management of the SunGard Group and exploit intra-Group synergies leading to increased intercompany services and transactions among the SunGard Group members.

58. SDS financed the LBO and its working capital requirements in part by credit agreements, including a \$3.69 billion term loan and a \$1 billion revolving credit agreement. In

addition, the LBO was partially financed by senior notes, with a \$3 billion dollar aggregate principal amount, that are due from 2009 through 2015. Further, the LBO was partially financed with receivables securitization arrangements through which entities from all business segments of the SunGard Group sell their uncollected accounts receivables to a third-party conduit entity, thus accessing approximately \$450 million in funding and increasing the SunGard Group's liquidity. By pooling together accounts receivables into the receivables securitization arrangements, SDS is able to decrease the overall interest rate on the long-term debt incurred from the LBO. Subsequent to (and notwithstanding) the sales of receivables as part of the receivables securitization arrangements, the SunGard Group continues to service and collect the accounts receivables on behalf of the third-party conduit entity.

59. The terms of the LBO's various financing agreements restrict the SunGard Group's ability to incur additional indebtedness or issue certain preferred shares. The terms of the agreements also include restrictions on the SunGard Group's ability to pay dividends on, repurchase or make distributions in respect of capital stock or make other restricted payments. The agreements further restrict the SunGard Group's ability to make certain investments, sell certain assets and create liens. The agreements restrict the SunGard Group's ability to consolidate, merge, sell or otherwise dispose of all or substantially all of the SunGard Group's assets, and restrict the Group's ability to enter into certain transactions with affiliates.

60. The various restrictions (Covenants) within the terms of the LBO's various financing agreements apply to the entire SunGard Group. The terms of the financing agreements specifically require SDS to prevent other SunGard Group members from failing to comply with the Covenants, and a failure by any company within the Group to comply with the Covenants has

the potential to lead to termination of the financing agreements and any attendant benefits afforded the Group therefrom.

61. Under the terms of the LBO's various financing agreements, the SunGard Group is required to satisfy and maintain specified financial ratios and other financial condition tests. The financial ratios and financial condition tests examine the SunGard Group as a single entity.

62. Domestic companies acquired or formed by the SunGard Group subsequent to the LBO are generally required to become immediately subject to the terms of the LBO's various financing agreements.

63. SDS is charged with managing all of the requirements of the LBO's financing agreements on behalf of the entire SunGard Group. SDS paid approximately \$600 million of interest expense resulting from the LBO's various financing agreements. The LBO's financing agreements are unconditionally guaranteed, jointly and severally, by SDS and substantially all of the wholly-owned domestic subsidiary corporations. SIBI is not such a subsidiary guarantor.

64. Following the LBO, the SunGard Group's purchasing services, including the negotiation of vendor agreements and consolidation of common purchases for the entire SunGard Group were further consolidated within SDS, resulting in significant discounts and reduced costs. The SunGard Group's human resources and benefits services, including the management of the Group-wide common benefit plans such as retirement benefits, HMO, medical, dental and vision insurance plans, were further consolidated within SDS.

65. Following the LBO, the SunGard Group's marketing services, including the establishment and implementation of marketing policies and guidelines for the SunGard Group, branding the "SunGard" name, the maintenance of a consistent marketing message and the

generation and approval of all external communications and press releases for the Group were further consolidated within SDS.

66. Following the LBO, the SunGard Group's technology services, including the maintenance and support of SunGard Group-wide document, email, teleconferencing and web-conferencing systems for all business segments and entities in the SunGard Group, were further consolidated within SDS. In addition, following the LBO, other shared services of the SunGard Group, including the formation of shared service centers to streamline various administrative functions, were further consolidated within SDS.

67. Pursuant to an agreement made at the time of the LBO, SDS pays a quarterly management fee to the Investors based on the combined earnings of the SunGard Group. SunGard Group members SDS, SCC, SunGard Capital Corp. II, and SunGard Holding Corp. are jointly and severally liable for the quarterly management fee. SDS pays the quarterly management fee and does not charge SunGard Group members for any portion of that fee.

68. In exchange for the quarterly management fee, the Investors provide certain financial, managerial and operational advice and services with respect to the development and implementation of strategies for improving the operating, marketing and financial performance of the SunGard Group.

69. The SunGard Group has implemented the Value Creation Plan (VCP), a documented plan developed at the highest levels within the SunGard Group to increase corporate efficiencies through the consolidation and allocation of resources and to increase cross-segment business development. The VCP covers nine disciplines, and progress is monitored on a periodic basis

with regard to compliance, cost savings, cross-selling success and other measurable criteria. The VCP was implemented following the LBO.

70. The SunGard Group customer list includes dozens of large customers who purchase numerous SunGard services from different SunGard business segments. The SunGard Group created the Global Account Management (GAM) group at the corporate level to efficiently manage the SunGard Group's large customer accounts and to act as a single point of contact for these large customers. The GAM group aims to increase the diversity of the SunGard Group services purchased by its large customers. The record does not indicate when the GAM was implemented. The record does show, however, that the GAM was in place in 2005.

Additionally, SDS's SEC 10-Ks for the years ended December 31, 2005 and December 31, 2006 refer to maximizing cross-selling opportunities as part of the Group's business strategy. It does not appear, however, that any metrics designed to measure the Group's cross-selling efforts were implemented until after the audit period.

71. The SunGard Group created the Business Development Group (BDG), a corporate-level group whose purpose is to promote cross-selling within the SunGard Group to develop new business. The goal of the BDG is to leverage existing customer relationships of entities in the SunGard Group to develop new business for other entities in the Group. The BDG was not fully functional until after the audit period.

72. Salesforce.com, a third-party service provider, and its Cross Product Referral Program are used to assist with tracking and monitoring sales and opportunities to facilitate the BDG. The BDG has instituted an initiative whereby SunGard Group salespersons are expected to refer sales opportunities to other Group members. The BDG also promotes sales of SunGard

Group products and services to other unrelated companies in the Investors' portfolios. Sales resulting from this (and other) cross-selling initiatives are booked by the particular entity making the sale.

73. The SunGard Group is managed as a single business enterprise from a strategic corporate planning perspective. Many corporate officers have responsibilities for multiple entities within the Group, and a number of them are also executive officers of SDS who are responsible for the high-level management, direction and control of the entire SunGard Group.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge first reviewed the statutory and regulatory standards for the filing of combined reports for corporation franchise tax as in effect during the period at issue. Pursuant to such standards, combined filers must meet certain requirements regarding capital stock ownership, engagement in a unitary business, and distortion resulting from separate filings. The Administrative Law Judge noted that the capital stock requirement is not at issue in the present matter.

With respect to the unitary business requirement, the Administrative Law Judge concluded that petitioners were not engaged in a unitary business during the period at issue. He acknowledged that all SunGard Group members were engaged in the business of technology solutions, sales and services. He found, however, that a closer review of the products and services sold by the business segments revealed many differences. The Administrative Law Judge also found that, while senior management and the Sponsors provided general oversight and strategic guidance to their subsidiaries, there was no evidence that senior management or the Sponsors provided centralized management based on operational expertise. The Administrative

Law Judge specifically found that, with respect to the Sponsors' management fee, there was no evidence that the Sponsors provided any direct services to any of their subsidiaries during the period at issue. Additionally, the Administrative Law Judge noted the centralization of certain functions, such as human resources and accounting, but concluded that such centralization does not indicate operational expertise in the subsidiaries' businesses, functional integration or a flow of value. The Administrative Law Judge also discounted the Group's structural simplification, made by converting subsidiary corporations into DREs, as not necessarily indicative a unitary business. The Administrative Law Judge also found that petitioners failed to establish that the holding companies, inactive companies and companies with little or no income or expenses included in the Group were engaged in a unitary business with petitioners. The Administrative Law Judge further determined that the brokerage businesses in the Group had certain characteristics distinct from other Group members. As such, while they may have used FS and AS products and services, the brokerage businesses were no more engaged in a unitary business with petitioners than any other FS or AS customers. Additionally, noting that Online Securities Processing, Inc. had revenues consisting only of the receipt of partnership income, the Administrative Law Judge found a lack of evidence as to the operation of such partnership. Finally, the Administrative Law Judge found a lack of evidence of functional integration, centralized management or economies of scale, and thus a lack of evidence of a unitary business, with respect to the entities acquired by the Group in 2005 and 2006. The Administrative Law Judge also found that the Group had few cross-selling or intercompany transactions during the period at issue and further determined that the various programs designed to develop cross-selling were not initiated until after the relevant period.

The Administrative Law Judge also determined that petitioners failed to meet the distortion requirement. The Administrative Law Judge found that the Group's subsidiaries received no quantifiable benefit from the debt incurred by SDS to finance the LBO. Accordingly, the lack of any reimbursement from the subsidiaries for SDS's interest expense was not distortive. The Administrative Law Judge further determined that petitioners did not show that the restrictions on the subsidiaries arising from the LBO debt caused distortion. With respect to the unreimbursed services provided by SDS to its subsidiaries, the Administrative Law Judge found that, under the circumstances, such unreimbursed expenses were neither substantial nor distortive. The Administrative Law Judge also concluded that SDS's payment of management fees to the Sponsors was not distortive because the record lacked evidence of direct support to the subsidiaries and also lacked evidence that the fees were not properly payable by SDS. The Administrative Law Judge also noted that the sharing of the fees among the 60 to 80 members of the Group would not likely result in a significant change to incomes and thus not likely result in distortion. The Administrative Law Judge also determined that the cash management system did not support a finding of distortion because the record lacked evidence of the extent of the cash sweep or the extent of any benefit to members of the Group resulting from the sweep.

Pursuant to the foregoing discussion, and in accordance with the parties' stipulation (*see* Findings of Fact 39 and 40), the Administrative Law Judge effectively denied in part and granted in part the petitions herein. As relevant to this exception, the Administrative Law Judge sustained the Division's April 16, 2010 denials of petitioners' refund claims (*see* Finding of Fact 27), both of which were premised on the SunGard Group's combined filing of returns for the two

reporting periods at issue. As a consequence of such denials, and in accordance with the stipulation, the Administrative Law Judge also sustained the November 15, 2010 notice of deficiency issued to SIBI on a separate basis, as modified pursuant to Finding of Fact 40 (c).

***ARGUMENTS ON EXCEPTION***

Petitioners contend that they met both the unitary business and distortion requirements and that, accordingly, the Administrative Law Judge erred in ruling against their request to file combined returns for the period at issue.

In arguing in favor of a unitary business, petitioners emphasize that all four of their business segments are engaged in the provision of information technology services. Petitioners note that the entities that conduct the AS business segment, substantially all of which are DREs included in the separate company return of SDS, provide significant services, including systems management, maintenance and support of hardware, and disaster recovery services, to the entire SunGard Group (*see* Finding of Fact 47). Petitioners also note that SDS provides centralized corporate level functions and services for all entities in the Sungard Group and that SDS did not seek reimbursement of such expenses, which totaled about \$65 million in 2005 and \$66 million in 2006. Petitioners also note that SDS managed the Group's budgetary matters, its debt, and also directed the Group's centralized cash management system that allocated funds to underfunded entities on an as-needed, interest-free basis.

Petitioners also contend that the restructuring of the Group following the LBO, by which many former C corporations in the Group were converted to SDS-owned DREs, supports a unitary business finding. Petitioners note that the purpose of such restructuring was to further integrate the management of the Group and to increase intercompany services and transactions

(*see* Finding of Fact 57). Consistent with the purpose of the restructuring and also indicative of a unitary business, petitioners note that, following the LBO, purchasing services, human resources and benefits, marketing, technology, and other shared services were further consolidated within SDS.

Petitioners also cite the securitization arrangement as supportive of a finding of a unitary business because this arrangement helped the Group to decrease its overall interest expense.

Petitioners assert that the LBO's numerous financing agreements that impose various covenants and restrictions upon substantially all members of the Group are also indicative of a unitary business.

Additionally, petitioners contend that the management fee paid by SDS to the Investors is evidence of a unitary business. Petitioners note that, although the fee is based on the combined earnings of the Group and certain entities of the Group are liable for the fee, SDS did not seek reimbursement from any other entities within the Group for any part of the fee.

Petitioners also argue that the Group's cross-selling initiatives, such as the Value Creation Plan, the Business Development Group, and the Global Account Management Group, further demonstrate a unitary business.

Considering all of the facts noted above, petitioners contend that the mutual interdependence and flow of value among the entities of the SunGard Group exist to a greater degree than in previous cases wherein this Tribunal determined that a unitary business existed.

Given the extent of interdependence and integration among the entities that comprise the SunGard Group as noted above, petitioners further contend that filing on a separate basis will result in distortion. As specific distortive transactions, petitioners cite the interest expense paid

by SDS in connection the LBO financing for which SDS did not seek reimbursement; SDS's unreimbursed expenses for performing management and corporate-level services to the members of the Group; SDS's unreimbursed payment of the management fee to the Investors; SDS's administration of the centralized cash management system; the interest-free loans to members of the Group that obtained working capital loans through the cash management system; and cross-selling that resulted in a mismatch in income and expenses when one entity incurred expenses to sell products and services on behalf of other entities.

Petitioners also contend that distortion results from the disparate tax reporting among the entities of the SunGard Group. Specifically, petitioners note that about 25 of the entities in the Group are DREs and thus report their activity on one return with SDS, and the various inter-entity transactions noted above are thus combined on a single return. At the same time, if the Division prevails herein, the remaining approximately 26 entities that are engaged in an assertedly unitary business with the DREs will report their activity on separate company returns. As a consequence, the various inter-entity transactions will not be combined. Petitioners assert that such separate company reporting yields distortion.

The Division continues to argue on exception that petitioners have not shown either that the members of the proposed combined group were engaged in a unitary business or that separate reporting by such members results in distortion. The Division thus contends that the Administrative Law Judge's determination should be sustained.

Specifically, the Division asserts that petitioners' business segments are discrete operations, emphasizing, like the Administrative Law Judge, the specific products and services that each segment offers. The Division acknowledges that petitioners centralized certain

administrative functions, but echoes the Administrative Law Judge by asserting that such centralization does not rise to the level of a unitary business. The Division notes that the business units retained some administrative functions and notes further that SDS was not involved in the day-to-day operations of the subsidiaries.

The Division also asserts that some of the cross-selling initiatives, such as the Business Development Group, were not fully implemented until after the audit period and thus were not a significant factor in the Group's operations during the audit period.

Contrary to petitioners' contention, and consistent with the Administrative Law Judge's conclusion, the Division contends that the structural simplification resulting from the conversion of C corporations into DREs does not support a finding of functional integration or a flow of value.

On the question of centralized management, the Division asserts that, while petitioners' operations demonstrated management oversight, such operations do not show centralized management based on operational expertise; that is, a level of central control indicative of a unitary business.

The Division also echoes the Administrative Law Judge's finding that petitioners have not shown that certain specific members of the SunGard Group were engaged in a unitary business. The Division cites the holding companies, the inactive and minimally active companies, SIBI or any of the brokerage companies as examples of such members. The Division also contends that petitioners have not shown that businesses acquired in 2005 and 2006 were integrated into the Group.

With respect to the various transactions asserted by petitioners to give rise to distortion, the Division asserts that the interest expense incurred by SDS as a result of the LBO credit agreements are properly reflected in SDS's income because the subsidiaries received nothing in return with respect to the LBO except new ownership. The Division also asserts that petitioners failed to show any distortion resulting from the subsidiaries' covenants and guarantees arising from the LBO credit agreements.

As to the management fees paid by SDS to the Sponsors, the Division contends that the subsidiaries received no direct support from the Sponsors. Hence, there was no need for reimbursement.

The Division pushes back against the unreimbursed costs for management and corporate level services provided by SDS to the other members of the Group by noting that SDS chose not to allocate such costs. This decision, according to the Division, does not support a finding that the amount of such costs are substantial or distortive. The Division notes further that the approximate \$66 million in such costs annually is not significant in the context of SDS's reported \$1.5 billion in expenses in 2006 and the fact that such expenses would be allocated to approximately 60 to 80 entities.

The Division also contends that petitioners have not established that distortion results from SDS's management of the cash management system or the availability of no-interest working capital loans through the cash management system. The Division asserts a lack of evidence as to the frequency, amount or extent of such no-interest loans and thus a failure to prove distortion.

**OPINION**

We reverse the determination of the Administrative Law Judge for the reasons stated herein.

Article 9-A of the Tax Law imposes a franchise tax on all domestic and foreign corporations doing business, employing capital, owning or leasing property, or maintaining an office in New York State (Tax Law § 209 [1]). Generally, “[e]very corporation is a separate taxable entity and shall file its own report” (20 NYCRR 6-2.1). During the period at issue, combined reporting with one or more corporations was required or permitted under Tax Law § 211 (former [4] [a]) where the corporations in the group met the substantial ownership requirement (20 NYCRR 6-2.2 [a]), the unitary business requirement (20 NYCRR former 6-2.2 [b]) and the “other” or “distortion” requirement (20 NYCRR former 6-2.3) as set forth in the regulations (*see* 20 NYCRR former 6-2.1).<sup>5</sup>

The issue in the present matter is whether the unitary business and distortion requirements have been met such that the proposed combined filings may be permitted.<sup>6</sup> Petitioners have the burden of proof (*see Matter of Mohasco Corp.*, Tax Appeals Tribunal, November 10, 1994).

The unitary business principle is the “linchpin of apportionability” for State income taxation of an interstate enterprise (*Mobil Oil Corp. v Commissioner of Taxes of Vt.*, 445 US 425, 439 [1980]). The principle holds that if an interstate enterprise is determined to be a unitary business, then a State may use an apportionment formula to tax that portion of the enterprise’s

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<sup>5</sup> For taxable years commencing subsequent to the period at issue, the rules for combined reporting have changed significantly (*see* L 2007, ch 60 and L 2014, ch 59).

<sup>6</sup> The substantial ownership requirement has been met and is not at issue (*see* Finding of Fact 42).

total income that is reasonably related to the enterprise's intrastate activity (*see e.g., Exxon Corp. v Wisconsin Department of Revenue*, 447 US 207, 223 [1980]).

The “prerequisite to a constitutionally acceptable finding of unitary business is a flow of value” between the subject entities (*Container Corp. of America v. Franchise Tax Bd.*, 463 US 159, 178 [1983], *reh denied* 464 US 909 [1983]). The “hallmarks” of a unitary relationship among businesses are “functional integration, centralized management and economies of scale” (*MeadWestvaco Corp. v Illinois Dept. of Revenue*, 553 US 16, 30 [2008]). These “essentials” may be shown, respectively, by “transactions not undertaken at arm’s length; a management role by the parent which is grounded in its own operational expertise and operational strategy; and the fact that the corporations are engaged in the same line of business” (*Allied-Signal, Inc. v Director, Div. of Taxation*, 504 US 768, 789 [1992]).

Federal unitary business doctrine is relevant in addressing unitary business issues arising under Article 9-A and is in harmony with the Division’s unitary business regulations (*see Matter of IT USA*, Tax Appeals Tribunal, April 16, 2014). Such regulations require consideration of the following factors in determining whether a group of corporations comprise a unitary business:

- “(1) [W]hether the activities in which the corporation engages are related to the activities of the other corporations in the group, such as:
  - (i) manufacturing or acquiring goods or property or performing services for other corporations in the group; or
  - (ii) selling goods acquired from other corporations in the group; or
  - (iii) financing sales of other corporations in the group.
- (2) [W]hether the corporation is engaged in the same or related lines of business as the other corporations in the group, such as:

- (i) manufacturing or selling similar products; or
- (ii) performing similar services; or
- (iii) performing services for the same customers” (20 NYCRR former 6-2.2 [b] renum 20 NYCRR 6-2.3 [e] eff. Jan. 2, 2013).

“[T]here is no single test for determining whether a unitary business exists; rather, there are a wide range of constitutionally acceptable variations of the unitary business theme” (*Matter of Medtronic*, Tax Appeals Tribunal, September 23, 1993, citing *Container Corp. of Am. v. Franchise Tax Bd.*). Accordingly, a unitary business analysis necessarily depends on the facts of each case.

Pursuant to the following discussion, we find that the facts in the present matter, taken together, establish that the entities that comprise the SunGard Group (with certain exceptions discussed below) were engaged in a unitary business during the period at issue.

Consistent with a unitary business, the Group’s various entities were engaged in the same or related lines of business within the meaning of the Division’s regulations and federal unitary doctrine. As stated in the facts, the Group “included dozens of legal entities involved in similar and related lines of business” (*see* Finding of Fact 42). Also, the Group’s “primary line of business is providing information technology sales and services, including data processing, information availability, software solutions and software licensing, through four main business segments” (*see* Finding of Fact 43). While, as the Administrative Law Judge correctly observed, there were differences between the FS and HEPS segments at the specific product and service level, both such segments were primarily engaged in the sale of software and processing services to institutional customers (*see* Findings of Fact 43 through 45). Accordingly, we conclude that these segments were engaged in similar lines of business for purposes of our unitary business

analysis. Additionally, the AS segment complemented the FS and HEPS segments both internally, by providing AS products and expertise to the other members of the group (*see* Finding of Fact 47; 20 NYCRR 6-2.3 [e] [1] [i]), and externally, as a cross-selling opportunity. We also find, contrary to the Administrative Law Judge's conclusion, that the FS segment's brokerage businesses complemented the FS segment's primary business of selling software and processing services.<sup>7</sup> Although the brokerages were obviously in a different line of business than the information technology and data processing lines of the other members of the SunGard Group, we find it significant that many of SIBI's customers were also customers of other Group entities (*see* Finding of Fact 44). The provision of services to the same customers by different members of a proposed combined group is an indicia of a unitary business under the Division's regulations (20 NYCRR 6-2.3 [e] [2] [iii]). We note further that this Tribunal has previously determined complementary businesses to be part of a unitary group (*see Matter of Heidelberg Eastern*, Tax Appeals Tribunal, May 5, 1994 [proposed combined group found to be engaged in a unitary business notwithstanding that the two businesses in the group sold "distinctly different products" where management of both companies "required certain skills common to international trade"]).

We also conclude that the business entities of the SunGard Group had functionally integrated central management consistent with a finding of a unitary business. Such central management included SDS's direction of the Group's cash management system, pursuant to which available funds could be allocated from one member of the Group to another as needed.

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<sup>7</sup> We note that the brokerage businesses generated a small percentage of the FS segment's revenues (e.g., SIBI's 2006 gross receipts of \$56.5 million amount to about 2.7% of the FS segment's 2006 revenue of \$2.1 billion [*see* Finding of Fact 44]).

The non-arm's length, interest-free component of the cash management system results in a flow of value. We have previously cited similar cash management systems as characteristic of a centrally managed unitary business (*see Matter of IT USA, Inc.; Matter of Heidelberg Eastern*), as have other courts (*see e.g., In re Envirodyne Industries*, 354 F 3d 646, 650 [7<sup>th</sup> Cir 2004]).

The Group's centralized management also included SDS's responsibility for all budgetary matters; its management of the Group's debt; and its role as the Group's single contact with banks and bondholders. SDS was also responsible for central office functions such as accounting, taxes, insurance, legal and human resources and benefits (*see Findings of Fact 50 through 55, 64*). Additionally, SDS was responsible for the Group's purchasing services, marketing services, and technology services, all of which were further consolidated within SDS following the LBO (*see Findings of Fact 64 through 66*). SDS's performance of these responsibilities resulted in a flow of value from SDS to the subsidiaries. We have previously determined that similar centralized administrative functions supported a unitary business finding (*see Matter of IT USA; Matter of Heidelberg Eastern*).

Central management is also demonstrated by the fact that the Group is run as a single business enterprise from a strategic corporate planning perspective by corporate officers with responsibilities for multiple entities within the Group, many of whom are responsible for the management, direction and control of the entire Group (*see Finding of Fact 73*). This single business enterprise approach is also demonstrated by the Investors' provision of certain advice and services with respect to the development and implementation of strategies for improving the operating, marketing and financial performance of the entire Group (*see Finding of Fact 68*).

Such a “clear centralization of basic business decisions” is consistent with a unitary business (*see Matter of Sears, Roebuck and Co.*, Tax Appeals Tribunal, April 28, 1994).

In our view, taken together, facts noted above demonstrate “a management role by the parent which is grounded in the parent’s own operational expertise and operational strategy” (*Allied-Signal, Inc. v Director, Div. of Taxation*, 504 US at 789). We note that, in clarifying the meaning of “centralized management” in the unitary business context by providing this more expansive definition, the *Allied-Signal* decision referred favorably to the facts present in *Container Corp. of Am. v Franchise Tax Bd.* as an example of such centralized management. The parent in *Container Corp.* provided general business guidelines, was involved in the subsidiaries’ decisions regarding capital expenditures, and also provided the subsidiaries with “sometimes uncompensated” technical assistance (*see* 463 US at 180, n. 19). In our view, the degree of centralization of management herein is greater than that present in *Container Corp.*, the source of the *Allied-Signal* definition. Moreover, the level of management present herein is clearly greater than the “occasional oversight . . . that any parent gives to an investment in a subsidiary” (*F.W. Woolworth Co. v Taxation and Revenue Dept. of State of N.M.*, 458 US 354, 369 [1982], *reh denied* 459 US 961 [1982])).

The absence of any reimbursement from the subsidiaries to SDS for providing centralized corporate-level functions and services on behalf of all entities and business segments within the SunGard Group (*see* Finding of Fact 48) is another indication of a unitary business in the present matter (*see Matter of IT USA*). Such non-arm’s length transactions result in an obvious flow of value. Similarly, the Group achieved economies of scale through the consolidation of its

purchasing services within SDS, a move that yielded “significant discounts and reduced costs” (*see* Finding of Fact 64). This, too, plainly resulted in a flow of value throughout the Group.

The various financing commitments and arrangements arising from the LBO also give rise to flows of value, here from subsidiary Group members to SDS, and further demonstrate the “mutual interdependence” among the members of the Group (*see Matter of Sears, Roebuck and Co.*). Specifically, substantially all of the Group’s wholly-owned domestic subsidiaries unconditionally guaranteed the debt incurred by SDS to enable the Sponsors to acquire the SunGard Group (*see* Finding of Fact 63). We note that debt guarantees were cited as indicative of a “decidedly close” relationship between the parent and subsidiaries in *Container Corp.* Additionally, the securitization arrangement, by which the subsidiaries’ sales of receivables to a third-party conduit entity had the effect of decreasing the overall interest rate on the debt from the LBO, also resulted in a flow of value from the members of the Group to SDS, the entity that incurred the debt (*see* Finding of Fact 58). The restrictions on additional indebtedness or the issuance of preferred shares arising from the LBO’s various financing arrangements (*see* Finding of Fact 59) further demonstrate similar mutual interdependence among Group members, as does the requirement that the Group, as a single entity, meet certain financial ratios and financial condition tests (*see* Finding of Fact 61).

Finally, we note that the Group’s cross-selling efforts also resulted in a flow of value between the various business segments and are thus also consistent with a unitary business. We note further, however, that the significance of this factor is limited by the lack of any metrics to quantify such efforts during the period at issue.

The above discussion notwithstanding, we find that petitioners have not established that certain members of the proposed combined group were engaged in the SunGard Group's unitary business as described.

Specifically, we concur with the Administrative Law Judge's conclusion that, except for corporate parents SDS and SCC, petitioners have not shown sufficient flows of value between and among the holding companies and the other members of the proposed combined group. As the Administrative Law Judge correctly noted, a holding company is not necessarily unitary with the corporation it owns (*see* 20 NYCRR 6-2.3 [e] [3]). Here, the record lacks evidence of each such holding company's specific function or role. We note that it does not appear from the record that such holding companies were engaged in any of the FS, HEPS or AS business segments. Accordingly, we find that the holding companies listed in footnotes 1 and 2 are not engaged in a unitary business with the other members of the proposed combined group during the period at issue.

Similarly, we find no flow of value between the two inactive corporations and the other members of the SunGard Group. We thus reject those two companies from inclusion in the proposed combined group herein.

Additionally, as also noted by the Administrative Law Judge, one member of the proposed combined group, Online Securities Processing, Inc. (OSP), had revenues consisting only of the receipt of partnership income (*see* Finding of Fact 42). There is no evidence in the record, however, of the activities of said partnership. We thus conclude that petitioners have not shown that OSP was engaged in a unitary business with the other members of the proposed combined group.

The final requirement to permit or require the filing of combined reports herein is a showing of distortion. During the period at issue, where, as here, there is no claim of “substantial intercorporate transactions” among the corporations, the distortion requirement is satisfied if “the filing of a report on a separate basis . . . results in a distortion of such taxpayer’s activities, business, income or capital . . .” (20 former NYCRR 6-2.3[d]).

As the Administrative Law Judge correctly noted, the concepts of unitary business and distortion are related (*see Matter of Autotote Limited*, Tax Appeals Tribunal, April 12, 1990). Hence, the same factors that indicate a unitary business may also give rise to or cause distortion of income (*see Heidelberg Eastern*). However, in order to establish distortion, petitioners must “identify with particularity the activities or transactions which [they claim] give rise to distortion and explain how distortion arises from those activities or transactions” (*Matter of Silver King Broadcasting of N.J.*, Tax Appeals Tribunal, May 9, 1996).

Upon review of the record, we find that petitioners have identified several activities or transactions involving those members of the proposed combined group determined herein to be engaged in a unitary business, which, taken together, give rise to a level of distortion sufficient to permit combined filing.

SDS’s uncompensated responsibilities for the Group in the areas of budget, debt management, banks and bondholders, all central office functions, purchasing, marketing and technology contributes to our finding of distortion herein. This arrangement relieved the other members of the Group from the substantial costs of providing such services (*see* Finding of Fact 48). We note that we have previously held that the provision of support services at cost by a parent to its subsidiaries resulted in distortion (*see Matter of IT USA; see also Matter of*

*Mohasco*). The lack of any reimbursement in the present matter necessarily results in greater distortion than was present in *IT USA* or *Mohasco*. We also find that the additional value gained by Group members through “significant discounts and reduced costs” resulting from the consolidation of the Group’s purchasing services is distortive because such reduced costs would not be available to Group members if they were engaged in discrete, stand-alone operations.

SDS’s management of the centralized cash management system is another area of activity resulting in distortion. SDS operated this system without compensation from the other Group members. The cash management system provided Group members with access to funds generated by other Group members on an as-needed, no-interest basis. Group members were thus spared the costs of maintaining separate cash management systems and they benefitted from a decrease in borrowing costs as a result of the availability of no-interest loans (*see Matter of Heidelberg Eastern*). Separate returns thus would not reflect the cost of maintaining a cash management system or arm’s length borrowing costs for stand-alone subsidiaries. We note that, contrary to the Division’s contention, we find sufficient evidence in the record to show that the cash management system resulted in distortion. In contrast to the circumstances present in *IT USA*, cited by the Division in support of its contention, there are no questions regarding the credibility or competence of the evidence related to the operation of the cash management system in the instant matter.

The securitization arrangement also contributed to distortion. Specifically, SDS’s interest costs in connection with its LBO debt obligations decreased as a result of this arrangement, by which all Group members sold their receivables to a third-party conduit entity. SDS did not compensate the other Group members for this benefit. The increased interest cost to a stand-alone SDS would not be reflected on separately filed returns.

In summary, we conclude that, except for those members of the proposed combined group determined not to be engaged in a unitary business (as previously noted), petitioners have met the capital stock, unitary business and distortion requirements necessary for permission to file combined franchise tax returns for the period at issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners herein is granted to the following extent:
  - a. The Division of Taxation is directed to permit petitioner SDS to file its corporate franchise tax return for the period August 13, 2005 through December 31, 2005 on a combined basis with all members of the proposed combined group, except for the additional holding companies listed in footnote 1 herein, MBM, Inc. and Online Securities Processing, Inc.;
  - b. The Division of Taxation is directed to permit petitioner SCC to file its corporate franchise tax return for the 2006 calendar year on a combined basis with all members of the proposed combined group, except for the additional holding companies listed in footnote 2 herein, MBM, Inc., SunGard Availability Services, Ltd., and Online Securities Processing, Inc.;
  - c. The exception is in all other respects denied;
2. The determination of the Administrative Law Judge is reversed to the extent indicated above;
3. The petitions herein are granted to the extent indicated above;
4. The March 15, 2010 notice of deficiency issued to petitioner SHEMS is canceled in accordance with the parties' stipulation (*see* Findings of Fact 32 and 39 [a]);
5. The November 15, 2010 notice of deficiency issued to petitioner SIBI is canceled in accordance with the parties' stipulation (*see* Findings of Fact 34, 39 [c], and 40 [c]);

6. The December 16, 2010 notice of deficiency issued to petitioner SDS is canceled in accordance with the parties' stipulation (*see* Findings of Fact 36 and 39 [b]);

7. The claim for refund of petitioners SDS and subsidiaries for the period August 13, 2005 through December 31, 2005, as modified and recomputed pursuant to paragraph 1 (a) above, is granted; and

8. The claim for refund of petitioners SCC and subsidiaries for the 2006 calendar year, as modified and recomputed pursuant to paragraph 1 (b) above, is granted.

DATED: Albany, New York  
May 19, 2015

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
Commissioner