

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CAPITAL CABLEVISION SYSTEMS, INC. : DETERMINATION
for Redetermination of a Deficiency or for :
Refund of Franchise Tax on Transportation and :
Transmission Corporations under Article 9 of :
the Tax Law for the Years 1976 through 1979. :

Petitioner, Capital Cablevision Systems, Inc., 130 Washington Avenue Extension, Albany, New York 12203, filed a petition for redetermination of a deficiency or for refund of franchise tax on transportation and transmission corporations under Article 9 of the Tax Law for the years 1976 through 1979 (File No. 31521).

A hearing was commenced before Frank Barrie, Hearing Officer, at the offices of the State Tax Commission, W. A. Harriman State Office Building Campus, Albany, New York on February 9, 1983 at 9:30 A.M., continued at the same offices before Arthur Bray, Hearing Officer, on June 23, 1986 at 9:15 A.M. and concluded at the same offices before Arthur Bray on June 25, 1986 at 9:15 A.M., with all briefs to be submitted by November 14, 1986. Petitioner appeared by O'Connell and Aronowitz, P.C. (Neil H. Rivchin, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Harry Kadish, Esq., of counsel) at the hearing on February 9, 1983 and by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel) at the hearings on June 23, 1986 and June 25, 1986.

ISSUES

I. Whether the Audit Division properly determined that petitioner, a provider of cable television programming, was subject to corporation franchise tax under Article 9 of the Tax Law rather than under Article 9-A of the Tax Law. II. Whether it was permissible for the Audit Division to reclassify petitioner from a corporation taxable under Article 9-A of the Tax Law to a corporation taxable under Article 9 of the Tax Law.

III. Whether sections 183 and 184 of the Tax Law, as applied to petitioner, are unconstitutional.

FINDINGS OF FACT

1. During the years in issue, petitioner, Capital Cablevision Systems, Inc., filed State of New York franchise tax reports pursuant to Article 9-A of the Tax Law. Petitioner listed its principal business activity on this report as "CATV Signal & Service". On its corresponding U.S. corporation income tax returns, petitioner listed its business activity as "Community Antenna TV".

2. On September 12, 1980 the Audit Division issued four notices of deficiency pursuant to Article 9 of the Tax Law to petitioner as follows:

<u>Section 183</u>				
<u>Period Begun</u>	<u>Tax</u>	<u>Interest</u>	<u>Total Due</u>	
1/1/77	\$686.68	\$203.74	\$890.42	
<u>Section 184</u>				
<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Credit</u>	<u>Total Due</u>
3/31/76	\$2,815.70	\$ -0-	\$2,815.70	\$ -0-
6/30/76	2,815.70	570.16	1,169.30	2,216.56
12/31/76	5,631.39	1,670.83	-0-	7,302.22

3. On October 23, 1980, the Audit Division issued four notices of deficiency pursuant to Article 9 of the Tax Law to petitioner as follows:

<u>Section 183</u>			
<u>Period Begun</u>	<u>Tax</u>	<u>Interest</u>	<u>Balance Due</u>
1/1/78	\$ 862.60	\$ 192.83	\$ 1,055.43
1/1/79	1,219.60	168.97	1,388.57
<u>Section 184</u>			
<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Balance Due</u>
12/31/77	\$ 8,930.73	\$1,996.42	\$10,927.15
12/31/78	14,387.95	1,993.36	16,831.31

4. Each of the notices of deficiency was premised on the Audit Division's position that petitioner was subject to the provisions of Article 9 of the Tax Law rather than Article 9-A of the Tax Law. In reaching this conclusion, the Audit Division relied upon petitioner's description of

its activities on its tax returns and upon an opinion of Deputy Commissioner Kassell, dated October 8, 1953, which stated, in part, that:

"[A] corporation principally engaged in the erection and maintenance of a centrally located antenna to pick up and relay television signals by cables to television receivers of its subscribers is engaged in a transmission business subject to tax under section 183 of the Tax Law."

5. On or about April 14, 1966 petitioner was incorporated in the State of New York pursuant to the Transportation Corporations Law for the purpose of becoming a community antenna television company.

6. Paragraph "Second (a)" of petitioner's certificate of incorporation described the purpose for which petitioner was formed as:

"To construct, own, use, erect, operate and maintain poles, wires, cable, conductors, ducts, conduit, vaults, manholes, amplifiers, appliances, attachments, antenna, equipment and other property as may be necessary and pertinent to a community antenna television system wholly within the State of New York and to acquire and own, or lease any interest in such line or lines or any grants therefor or for any and all such purposes."

7. Paragraph "Second (b)" of petitioner's certificate of incorporation described the purpose for which petitioner was formed as:

"To broadcast, receive or transmit through the air by wireless, radio, television, telephone, or any other medium of communication now known or employed, or hereafter invented or discovered, communications of any kind, including, but not by way of limitation, any news reports, speeches, information, operas, music, concerts, singing, communication, speaking, or any other sounds whatsoever, any photographs, images, visual objects, color, or any other object or means of creating impressions on the human senses."

8. Paragraph "Second (c)" of petitioner's certificate of incorporation described the purpose for which petitioner was formed as:

"To create, develop, acquire, own, produce, reproduce, generate, control, transmit, record, sell, lease and distribute sound, energy, force, signals, waves, images, and communications of all sorts, now or hereafter invented or devised or discovered."

9. Petitioner provides a monthly program package of television signals to its subscribers. This program package consists of, among other things, news, sports, movies, local origination programming and importing of distant signals. During the period in issue, petitioner provided its

subscribers approximately 27 stations.

10. Petitioner's monthly fee is based on the provision of a variety of television channels. All of petitioner's gross receipts are derived from subscriber fees.

11. Petitioner initiates some programming at its offices.

12. Petitioner makes the decision as to what distant signal to obtain. However, petitioner exercises no control over the distant provider's broadcast.

13. Petitioner receives its television signals at a "head end" which is a location containing towers and satellite receiving dishes. The signals are then converted into the appropriate channel number and sent to the location of the subscriber through a series of trunk and distribution cables.

14. Petitioner provides essentially the same type of product as that provided by broadcast television. However, since petitioner utilizes approximately 27 channels, it can offer more variety than a network affiliate.

15. Both petitioner and broadcast television stations transmit their product. However, petitioner transmits its product by cable while broadcast television transmits its product through the airwaves.

16. Petitioner's competition consists of, among other things, broadcast radio and television, video cassettes, satellite dishes, professional sporting events, theaters, movie houses, magazines and other forms of entertainment. Broadcast television and professional sports interests perceived the competition from cable television to be so great a threat to their respective audiences that they sought protection from the FCC in the form of "must-carry" rules, "syndication exclusivity" rules, and "blackout" rules as protection from competition from cable television.

CONCLUSIONS OF LAW

A. That, in general, sections 183 and 184 of Article 9 of the Tax Law impose a franchise tax and additional franchise tax upon domestic corporations principally engaged in the conduct of a transportation or transmission business.

B. That whether a corporation is properly classified and held subject to taxation under Article 9 or Article 9-A of the Tax Law is to be determined from an examination of the nature of its business activity (see ___ Matter of McAllister Bros. v. Bates, 272 App Div 511, 517, lv denied 297 NY 1037). Neither the law under which petitioner was incorporated nor the provisions of petitioner's certificate of incorporation are controlling factors (see ___ Matter of McAllister Bros. v. Bates, supra; Matter of Holmes Electric Protective Co. v. McGoldrick, 262 App Div 514, affd 288 NY 635).

C. That upon all of the facts and circumstances presented, it is concluded that petitioner's business activities are functionally the same as broadcast television stations. Therefore, like broadcast television stations, petitioner is subject to tax under Article 9-A of the Tax Law (see e.g., Matter of Capital Cities Communications, Inc. v. State Tax Commn., 65 AD2d 25 [regarding the computation of the franchise tax on broadcast stations under Article 9-A of the Tax Law]). In reaching this conclusion it is noted that the applicable sections of Article 9 of the Tax Law do not distinguish between transmission by coaxial cable and those by radio waves.

D. That in view of Conclusion of Law "C", the remaining issues are moot.

E. That the petition of Capital Cablevision Systems, Inc. is granted and the notices of deficiency issued September 12, 1980 and October 23, 1980 are cancelled.

DATED: Albany, New York
October 1, 1987

ADMINISTRATIVE LAW JUDGE