STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GENERAL ELECTRIC PROPERTY MANAGEMENT CO., INC.	:	DETERMINATION DTA NO. 808039
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 1983 and 1984.	:	

Petitioner, General Electric Property Management Co., Inc., 1044 Lincoln Street, Denver, Colorado 80203, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1983 and 1984.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 16, 1994 at 9:15 A.M., with all briefs filed by August 15, 1994. Petitioner appeared by E. Parker Brown, II, Esq., and Gerald F. Stack, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly adjusted petitioner's entire net income pursuant to Tax Law § 208.9(d) to include the gain from the sale of certain radio and television stations, involuntarily converted, for the taxable year ended December 31, 1983.

II. Whether the Division of Taxation properly adjusted petitioner's business allocation percentage pursuant to Tax Law § 210.8 to include thereceipts from the gain on the sale of the radio and television stations mentioned above, for the taxable year ended December 31, 1983.

III. Whether petitioner is entitled to a refund with respect to that portion of the gain on the sale of the stations referred to above that was included by petitioner in its 1983 New York taxable income because it had not yet acquired qualified replacement property.

FINDINGS OF FACT

At all times pertinent herein, General Electric Property Management Co., Inc. (hereinafter "Property Management" or "petitioner") was a New York corporation incorporated under the laws of the State of New York on March 11, 1963.

Formerly known as General Electric Broadcasting Company, Inc., petitioner changed its name to General Electric Property Management Co., Inc. in 1983.

During the years in issue, Property Management was a wholly-owned subsidiary of the General Electric Company, with whom it filed on a consolidated basis.

During 1983, Property Management disposed of six of its radio and television broadcasting stations, specifically:

Station	Location
WRGB Television	Schenectady, New York
WGY/WGFM Radio	Schenectady, New York
WNGE Television	Nashville, Tennessee
WSIX Radio	Nashville, Tennessee
WJIB Radio	Boston, Massachusetts
KFOG Radio	San Francisco, California

Of the six stations, two were sold pursuant to certificates issued by the Federal Communications Commission ("FCC"), specifically WRGB Television and WNGE Television. These certificates were issued by the FCC based on its determination that the sales would further the FCC's rules against the cross-ownership of radio and television stations serving the same market. The remaining four stations, i.e., WGY/WGFM Radio, WSIX Radio, WJIB Radio and KFOG Radio, were sold without FCC certificates.

On June 30, 1983, the FCC granted its consent for Property Management to assign its license for WRGB. The actual sale was consummated on August 28, 1983. A similar consent was granted by the FCC with respect to WNGE on September 29, 1983. This sale was consummated on November 28, 1983.

On or about May 15, 1984, General Electric Company filed its consolidated Federal tax return for calendar year 1983 pursuant to an extension agreement. This return included the 1983 activity for Property Management together with the activities of General Electric

Company and its other affiliates. Since it was part of a consolidated group, a separate return was not filed for Property Management for Federal purposes with respect to its 1983 activity.

On October 15, 1984, Property Management filed its New York Form CT-3, Corporation Franchise Tax Report, for 1983. Attached to the Form CT-3 was a separate Federal Form 1120, U.S. Corporation Income Tax Return. This return reported the separate activity for Property Management for the year 1983 and contained the same activity for Property Management that was included in General Electric Company's 1983 consolidated tax return described above.

The Property Management Form 1120 attached to the 1983 CT-3 disclosed the sale of all six of the radio and television stations described above. Specifically, the following information was disclosed, along with additional information, with respect to the four stations sold without FCC certificates:

Station	Sales Price	Adjusted Basis	Gain Realized
WGY/WGFM	$ 6,889,560.00	$ 12,703.00	$ 6,876,857.00
WSIX	5,897,747.00	389,875.00	5,507,872.00
WJIB	6,392,500.00	3,480,000.00	2,912,500.00
KFOG	4,432,500.00	1,370,000.00	3,062,500.00
	~~$23,612,307.00~~	~~$5,252,578.00~~	~~$18,359,729.00~~

The entire amount of the $18,359,729.00 gain was included in General Electric Company's consolidated Federal taxable income for 1983, $16,211,933.00 as capital gain and $2,147,796.00 as ordinary income. The gain was similarly included in its entirety in Property Management's 1983 Corporation Franchise Tax Report.

In addition to the above, the following information was disclosed, along with additional information, with respect to the two stations sold with FCC certificates:

Station	Sales Price	Adjusted Basis	Gain Realized
WRGB	$34,416,013.00	$ 3,250,788.00	$31,165,225.00
WNGE	37,288,155.00	8,826,925.00	28,461,230.00
	~~$71,704,168.00~~	~~$12,077,713.00~~	~~$59,626,455.00~~

However, these stations were afforded slightly different tax treatment.

Included within General Electric Company's 1983 consolidated Federal tax return and submitted into evidence was an election to treat the sales of WRGB and WNGE as involuntary

conversions pursuant to section 1033 of the Internal Revenue Code. Pursuant to the same election form, General Electric Company also elected to reduce the basis of Property Management's remaining depreciable property by the amount of gain that would otherwise be recognized under section 1033. The election stated, in part:

> "Pending the possible purchase within two years of like properties qualifying under [IRC] § 1033, taxpayer in this return is applying the F.C.C. certificated gains to reduce the basis of all of its depreciable properties in existence immediately after the dispositions and properties acquired on or prior to December 31, 1983."

A copy of this election was included in Property Management's Form 1120 attached as part of its 1983 Form CT-3. The election pursuant to IRC § 1071 to reduce the basis of depreciable property was necessary because Property Management had not yet purchased "replacement property" as of the end of the 1983 calendar year.

As a result of this election, General Electric Company excluded a portion of the gain realized on the sale of WRGB and WNGE in determining its 1983 consolidated Federal taxable income. The amount of the excluded gain was calculated as follows:

Gain realized on sale of stations with FCC certificates	$59,626,455.00
Basis of Property Management's remaining depreciable property	46,624,118.00
Portion of Gain Included	~~$13,002,337.00~~
Portion of Gain Excluded	~~$46,624,118.00~~

Of the gain included, $5,533,848.00 was capital gain and $7,468,489.00 was ordinary income. Property Management applied the same treatment in connection with the preparation of the Form 1120 attached to its 1983 Form CT-3.

Property Management realized a total gain of $77,986,184.00 on the sale of the six stations. Of this amount, a total of $31,362,066.00 was recognized for both Federal and New York State purposes in 1983 ($18,359,729.00 from the four non-certificated sales plus $13,002,337.00 from the sales pursuant to FCC certificates). The balance of $46,624,118.00 was temporarily deferred through the reduction of the basis of other depreciable property owned by Property Management as of the end of 1983.

Of the $31,362,066.00 recognized by petitioner for Federal and State tax purposes on

the sale of the six stations, $9,663,091.00 was entered on line 9 of the Federal Form 1120 (as entered on Form 4797, "Supplemental Schedule of Gains and Losses") and $21,745,781.00 was entered on line 8 of the Federal Form 1120 as capital gain. These amounts were combined with the other amounts of income reported by Property Management and included within the $28,986,053.00 of taxable income before net operating losses shown on line 28 of Property Management's Form 1120. This $28,986,053.00 was carried over to and reported on line 17 of Form CT-3.

As stated, the reduction in the basis of the depreciable property was designed to be a temporary measure until suitable replacement property could be obtained. Under section 1071 of the Internal Revenue Code, Property Management had a two-year period within which to obtain replacement property. However, this two-year period could be extended with the permission of the Internal Revenue Service.

On December 20, 1985 (prior to the end of the two-year period for acquiring replacement property), General Electric Company filed a request with the Internal Revenue Service on behalf of Property Management to extend for one additional year the two-year period during which property could be acquired to replace WRGB and WNGE. At the time the request was filed, General Electric Company was actively pursuing the acquisition of RCA Corporation ("RCA"). On April 30, 1986, the request was granted and the deadline was extended to December 31, 1986.

In 1986, General Electric Company successfully consummated the acquisition of RCA. This included one of RCA's subsidiaries, National Broadcasting Company, Inc. ("NBC"). In December 1986, Property Management acquired a portion of one of the subsidiaries owned by NBC, specifically, NBC Subsidiary (KNBC-TV), Inc. ("KNBC-TV") (formerly known as NBC Subsidiary, Inc.). The purchase was effectuated in the form of the purchase of 72 shares of stock of KNBC-TV at a price of $72,000,000.00.

KNBC-TV owns a television station located in Los Angeles, California. As such, the stock of this subsidiary qualified as replacement property under IRC § 1033. As a result, in

1986 General Electric Company reversed the $46,624,118.00 reduction of the basis of Property Management's property pursuant to the IRC § 1071 election discussed above. Instead, the shares of KNBC-TV were treated as the replacement property. Since the purchase price of the replacement property ($72,000,000.00) exceeded the amount realized on the sale of WRGB and WNGE ($71,704,168.00), General Electric Company reduced the $13,002,337.00 gain originally recognized in its 1983 consolidated Federal tax return to zero. This treatment was reported to the Internal Revenue Service by General Electric Company in its 1986 consolidated Federal tax return. General Electric Company was given credit for the $13,002,337.00 reduction in taxable income in connection with the examination of its prior year's return. (An amended return claiming a refund for 1983 was not filed with New York State. Instead, a refund was formally requested by Property Management at the hearing held on February 16, 1994).

In 1988, the Division of Taxation ("Division") performed a general verification field audit for the years 1983, 1984 and 1985. Property Management's Forms CT-3 for 1984 and 1985 were examined. Consents extending the period of limitation on assessment of corporation franchise tax under Article 9-A of the Tax Law were executed by the parties on August 28, 1987 and June 13, 1988 extending the time to issue assessments for those years to March 31, 1989.

On or about December 9, 1988, the Division issued to petitioner two notices of deficiency for additional corporation franchise tax for the years 1983 and 1984. The first notice asserted tax for the year 1983 in the sum of $2,553,180.00, plus interest, and the second asserted tax for the year 1984 in the sum of $299.00, plus interest.

The basis for these deficiencies was set forth in the audit report as follows:

> "Entire Net Income - For 1985 entire net income was accepted as filed. For 1984 and 1983 interest to stockholders has been added back to entire net income at 90% on loans from affiliates. In 1983 an adjustment has been made in accordance with New York State Tax Law Section 208, subdivision 9 (d) which permits recognition of income in a year other than it was recognized for federal purposes if entire net income is not properly stated. It is recommended that deferred portion of the gain for federal purposes be recognized in the year of the transaction due to a substantial change in the corporation's name, business, purpose, group code and operations.

> For federal purposes the deferred portion of the gain is effectively taxed in subsequent years due to the provision of the code which provides for an adjusted taxbase [sic] of zero for the converted property which results in a loss of tax depreciation which would have been allowed under ordinary circumstances. Prior to the name change and change in operations the company's primary source of income was derived from broadcasting revenue, subsequently the primary source of income is rental income. A distortion exists as the gain will be taxed in a period where the business allocation will be substantial [sic] less. It is also quite possible that New York State will never recoup a portion of this gain if GE Property Management ceases to do business in New York State or reinvests in a manner so as to prevent New York State from getting an equitable share of the gain.
>
> "Business Allocation Percentage - For each year under audit the business allocation percentage was accepted as filed with one exception. In 1983 the taxpayer included the converted property mentioned above in the allocation. This property should not be used to measure the income earned in 1983 as it was acquired on 12/31/83 and should not be used as a measurement of income until 1984. The average value of the property has been removed in accordance with Section 210, Subdivision 8. Also, receipts from the gains have been included in the receipts factor.
>
> "Recommendations - It is recommended that the taxpayer be assessed for additional tax plus interest due in accordance with the attached schedules."

Specifically, the Division's auditor adjusted the property factor and the receipts factor. The property factor as reported on the CT-3 filed by petitioner for the year 1983 included the full value of the converted property ($40,000,000.00) even though the property was acquired on December 31, 1983, the last day of the taxable year. The Division concluded on audit that the business allocation percentage did not properly reflect petitioner's activity, business, income or capital in New York State as the converted property was acquired on the last day of the 1983 taxable year. The Division therefore adjusted the property factor to exclude the value of the converted property for 1983. Subsequently, as a compromise, half of the value of the property was allowed for the purpose of computing the denominator of the property factor of the business allocation percentage for 1983.

As stated above, the Division also adjusted petitioner's receipts factor for 1983. The Division adjusted the receipts factor by including the total gain on all the sales of the broadcasting facilities.

Property Management challenged the Division's conclusion that it should have reported the full amount of the gain on the sale of the two stations sold in 1983 pursuant to the FCC certificates and the change in its business allocation percentage for 1983. The other items

mentioned in the audit report are not in dispute.

Since 1983, Property Management has continued to be organized under and to conduct business in the State of New York as well as continuing to file corporation franchise tax reports on an annual basis.

CONCLUSIONS OF LAW

A. Tax Law § 209 provides, in pertinent part, as follows:

> "1. For the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state, for all or any part of each of its fiscal or calendar years, every domestic or foreign corporation . . . shall annually pay a franchise tax, upon the basis of its entire net income base . . . ."

Tax Law § 208(9) defines "entire net income" as:

> "total net income from all sources, which shall be presumably the same as the entire taxable income (but not alternative minimum taxable income),
>
> > "(i) which the taxpayer is required to report to the United States treasury department . . . ."

The regulation at 20 NYCRR 3-2.2(a) essentially repeats this definition and subsection (b) of the same section states that Federal taxable income, as defined by section 63 of the Internal Revenue Code, is the starting point in computing entire net income.

Both parties cited Matter of Dreyfus Special Income Fund v. State Tax Commission (126 AD2d 368, 514 NYS2d 130, affd 72 NY2d 871, 532 NYS2d 356), albeit for different reasons. However, following the language cited above from Tax Law §§ 209(1) and 208(9), the Appellate Division stated (with regard to the taxable income of a regulated investment company):

> "Under the Internal Revenue Code (U.S.C. tit. 26), a tax is imposed for each taxable year on the taxable income of every corporation (see, Internal Revenue Code § 11), which is defined in various places throughout the Internal Revenue Code. Unlike respondent's regulation, Internal Revenue Code § 11 does not restrict the definition to the one contained in Internal Revenue Code § 63, which provides, in part:
>
> > 'For purposes of this subtitle, in the case of a corporation, the term "taxable income" means gross income minus the deductions allowed by this chapter' (Internal Revenue Code § 63[a]).

"Supreme Court concluded that Internal Revenue Code § 852(b)(2)(D) governs as to 'taxable income' of petitioner, as a regulated investment company, as adjusted.

* * *

"We concur with Supreme Court's conclusion that respondent was incorrect in applying the definition of 'taxable income' contained in Internal Revenue Code § 63. Tax Law § 208(9) is clear in its statement that the figure to be used for computing 'entire net income' shall be presumably the same as the 'taxable income' that the taxpayer is required to report to the Federal government. Since the Federal government would arrive at petitioner's taxable income by way of Internal Revenue Code § 852(b)(2), and Federal law controls for the purpose of defining 'entire net income' and is authorized by statute (see, Tax Law § 208[9]; Matter of Morton & Co. v. New York State Tax. Commn., 91 AD2d 1080, 1081, 458 NYS2d 91, affd 59 NY2d 690, 463 NYS2d 437, 450 NE2d 243), respondent's regulation is incorrect" (Matter of Dreyfus Special Income Fund v. NYS Tax Commission, supra, 514 NYS2d at 133).[1]

Similarly, in the instant matter, the taxable income that Property Management was required to report to the United States Treasury Department should be that amount the Federal government arrived at by way of IRC §§ 1033 and 1071.

During 1983, Property Management sold six of its radio and television stations at a gain of $77,986,184.00. Of this total gain, $31,362,066.00 was included in the consolidated Federal taxable income of General Electric Company and the balance of $46,624,118.00 was excluded and not recognized for Federal tax purposes pursuant to IRC §§ 1033 and 1071. Property Management's separate New York taxable income was computed in the same way.

IRC § 1071(a) provides as follows:

---

[1] Although the Dreyfus case concerned 20 NYCRR former 3.11, promulgated March 14, 1962, the predecessor to the current 20 NYCRR 3-2.2, the portions relevant to the instant matter are very similar. The notable change, and critical to both Dreyfus and the instant case, was the "starting point" for computation of New York entire net income, which previously was a very narrow and strict interpretation of IRC § 63, while it has now been relaxed by the addition of the adverb "generally": "Generally, federal taxable income means taxable income as defined in Section 63 of the Internal Revenue Code" (20 NYCRR 3-2.2[b]). The Court of Appeals agreed with the Appellate Division and said that the word "presumably" in Tax Law § 208(9) was not intended to afford the Division the freedom to vary the meaning of "entire net income" insofar as such income is equated with the income reported to the United States Treasury (Dreyfus Special Income Fund v. State Tax Commission, supra, 532 NYS2d at 356, 357).

> "NONRECOGNITION OF GAIN OR LOSS. -- If the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations, such sale or exchange
>
> shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of section 1033. For purposes of such section as made applicable by the provisions of this section, stock of a corporation operating a radio broadcasting station, whether or not representing control of such corporation, shall be treated as property similar or related in service or use to the property so converted. The part of the gain, if any, on such sale or exchange to which section 1033 is not applied shall nevertheless not be recognized, if the taxpayer so elects, to the extent that it is applied to reduce the basis for determining gain or loss on sale or exchange of property, of a character subject to the allowance for depreciation under section 167, remaining in the hands of the taxpayer immediately after the sale or exchange, or acquired in the same taxable year. The manner and amount of such reduction shall be determined under regulations prescribed by the Secretary. Any election made by the taxpayer under this section shall be made by a statement to that effect in his return for the taxable year in which the sale or exchange takes place, and such election shall be binding for the taxable year and all subsequent taxable years."

Clearly, the transaction in issue regarding the sale of the two stations pursuant to FCC certificates qualified for treatment under IRC § 1071. Property Management was faced with the options of including the entire amount of gain in its taxable income for 1983, electing to have the gain treated as an involuntary conversion pursuant to IRC § 1033 and to defer a portion of any gain in an amount equal to the cost of any qualified replacement property, or defer all or a portion of the gain by reducing the basis of the taxpayer's other depreciable property as provided for in IRC § 1071.

IRC § 1071(a) also permits a combination of deferring the gain in an amount equal to the cost of qualified replacement property and reducing the basis of other depreciable property.

As noted in the Facts, Property Management chose to treat the sale of the two stations in issue as involuntary conversions pursuant to IRC § 1033, which provides, in pertinent part, as follows:

> "(a) GENERAL RULE. -- If property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsorily or involuntarily converted --
>
> > "(1) CONVERSION INTO SIMILAR PROPERTY. -- Into property similar or related in service or use to the property so converted, no gain shall be recognized.

"(2) CONVERSION INTO MONEY. -- Into money or into property not similar or related in service or use to the converted property, the gain (if any) shall be recognized except to the extent hereinafter provided in this paragraph:

"(A) NONRECOGNITION OF GAIN. -- If the taxpayer during the period specified in subparagraph (B), for the purpose of replacing the property so converted, purchases other property similar or related in service or use to the property so converted, or purchases stock in the acquisition of control of a corporation owning such other property, at the election of the taxpayer the gain shall be recognized only to the extent that the amount realized upon such conversion (regardless of whether such amount is received in one or more taxable years) exceeds the cost of such other property or such stock. Such election shall be made at such time and in such manner as the Secretary may by regulations prescribe. For purposes of this paragraph --

"(i) no property or stock acquired before the disposition of the converted property shall be considered to have been acquired for the purpose of replacing such converted property unless held by the taxpayer on the date of such disposition; and

"(ii) the taxpayer shall be considered to have purchased property or stock only if, but for the provisions of subsection (b) of this section, the unadjusted basis of such property or stock would be its cost within the meaning of section 1012.

"(B) PERIOD WITHIN WHICH PROPERTY MUST BE REPLACED. -- The period referred to in subparagraph (A) shall be the period beginning with the date of the disposition of the converted property, or the earliest date of the threat or imminence of requisition or condemnation of the converted property, whichever is the earlier, and ending --

"(i) 2 years after the close of the first taxable year in which any part of the gain upon the conversion is realized, or

"(ii) subject to such terms and conditions as may be specified by the Secretary, at the close of such later date as the Secretary may designate on application by the taxpayer. Such application shall be made at such time and in such manner as the Secretary may by regulations prescribe."

An election was made under IRC § 1071 to defer a portion of the gain equal to the basis of petitioner's remaining depreciable assets as of December 31, 1983 in the sum of $46,624,118.00. The remainder of the gain was recognized for Federal purposes in 1983 since no qualified replacement property had been purchased by the end of 1983.

Property Management had until December 31, 1986 to purchase replacement property pursuant to IRC § 1033(a) and did, in fact, purchase property, namely, the 72 shares of stock in

KNBC-TV, thereby avoiding the recognition of gain on the sale of the two stations sold pursuant to the FCC certificates.

Although the Division concedes the technical propriety of the elections made by petitioner for Federal tax purposes, it argues that it has the discretion to allocate the nonrecognized gain from the sale of the two stations sold pursuant to the FCC certificates to the year ended December 31, 1983, pursuant to Tax Law § 208(9)(d), which states:

> "The tax commission may, whenever necessary in order properly to reflect the entire net income of any taxpayer, determine the year or period in which any item of income or deduction shall be included, without regard to the method of accounting employed by the taxpayer . . . ."

The Division refused to accept the Federal treatment of the gain on the sale of the two stations on the basis that it did not properly reflect petitioner's entire net income for the year 1983. It is determined that the Division erred.

The Division has the right to determine the year in which an item of income may be included to properly reflect a taxpayer's entire net income, but that "item of income" must have been included in gross income as that term is defined at IRC § 61,[2] since New York entire net income has been defined as total net income from all sources, which shall be presumably the same as Federal entire taxable income (Tax Law § 208[9]).

Given the elections made by petitioner pursuant to IRC §§ 1071 and 1033(a), the gain from the sale of the two stations pursuant to the FCC certificates was not recognized and therefore not treated as an "item of income" for Federal purposes. Hence, petitioner properly accorded the gain the same treatment for New York tax purposes. As astutely pointed out by petitioner, the Division seeks to use the discretion accorded it by Tax Law § 208(9)(d), which

---

[2]IRC § 61(a) states, in part, as follows:

> "(a) GENERAL DEFINITION. - Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> "(3) Gains derived from dealings in property . . . ."

specifically addresses itself to when an item of income should be subject to tax to properly reflect a taxpayer's entire net income, to determine if the item of income is subject to tax at all.

The distinction is subtle but critical. Tax Law § 208(9)(d) grants the Division the discretion to include an item of income in an earlier or later period. In other words, discretion in the timing of the inclusion is the chief concern of section 208(9)(d). The section does not bestow authority on the Division to alter the definition of "entire net income" for purposes of New York Tax Law.

The regulations promulgated pursuant to Tax Law § 208(9)(d), fervently argued by both parties in support of their positions, clearly indicate the statute's intent to authorize the Division to change only the timing of when

an item of income should be recognized, not whether something is properly considered an item of income (see, generally, 20 NYCRR 3-2.7 and the example cited therein).

The issue is not one of timing for the reason that Property Management may never recognize the deferred income by selling the 72 shares of KNBC-TV stock and, therefore, the item of income simply may not exist for application to a prior year. The Division exceeded the authority granted to it in Tax Law § 208(9)(d).

B. The Division reasoned that the dramatic decrease in the business allocation percentage between 1983 and subsequent years justified its attribution of the gain to 1983. The Division reasoned that income and deductions from the stations sold were factored into that same business allocation percentage and that the percentage would be only a fraction of its 1983 value in the year the items of income were actually recognized. Therefore, it seems as though the Division had a concurrent reason for taxing the items of income in 1983 (regardless of their deferment), i.e., the State could maximize its tax if it forced recognition in 1983.

Even though Property Management remained a corporation existing under the laws of the State of New York, the Division was concerned that it would not receive its fair share of the gain on the sale of the two stations sold pursuant to the FCC certificates.

Both the auditor and petitioner argued that it was impossible to tell what petitioner's business allocation percentage would be in the year the replacement property is sold, but only Property Management noted the Division's ability to adjust that percentage when that recognition of gain occurred.

Tax Law § 210(8) states:

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

Further, the regulation at 20 NYCRR 4-6.1 echoes the discretion vested in the Division where fairness demands an adjustment to the business allocation percentage.

Property Management has virtually conceded that an adjustment could be warranted in the year the item of income is ultimately recognized, and agreed that it would concur with such an adjustment:

> "Since Property Management is a New York corporation any gain realized when the replacement property is sold will be included in Property Management's Form CT-3 Corporation Franchise Tax return for that year. At the present time it is impossible to know what Property Management's allocation percentage will be in the year of any potential sale. It is entirely possible that it will be higher than it was in 1983. (Transcript at p. 101). However, if by chance Property Management's allocation percentage is lower in the year of sale than it was in 1983, Tax Law Section 210(8) allows an adjustment to the allocation percentage to correct any inequity. Thus, Property Management is not requesting the State to forego collecting its revenues, but is requesting instead that it merely wait until the proper time" (Petitioner's brief, p. 23).

Therefore, Property Management is not seeking to escape liability, only have it assessed when the item of income is recognized and properly included in entire net income as that term is determined to be defined above.

Each party argued the Matter of Seidman-Soling Builders (State Tax Commission, March 9, 1984) in support of its position. Seidman-Soling was in the real estate business and sold a parcel of New York realty in 1968 on the installment basis for $2,000,000.00. In 1974, there was a prepayment of the balance of the installments for $1,800,000.00 and, coincidentally, the company relocated to the State of Connecticut. The result was that the business allocation percentage plummeted and the tax paid on the final installment was substantially lower than it would have been had the company not relocated. The Division exercised its discretion under Tax Law § 208(9)(d) and allocated the gain to 1973. The Commission rejected the Division's exercise of discretion under Tax Law § 208(9)(d) and said:

> "Rather than throwing the gain back to fiscal 1973, the Audit Division should have adjusted petitioner's business allocation percentage for fiscal 1974 by use of section 210.8 of the Tax Law to effect a fair and proper allocation of the income and capital reasonably attributable to New York. This could conceiveably [sic] have resulted in 100 percent of the gain being attributed to New York. The Audit Division erred by simply placing the gain in a year when petitioner's business allocation percentage was 100 percent."

This forum is well aware of the Tax Appeals Tribunal's pronouncement on the status of State Tax Commission decisions:

> "As decisions of a body of coordinate jurisdiction, the State Tax Commission decisions are not binding precedent for us, but are entitled to respectful consideration [citing Matter of Cruikshank's Estate, 169 Misc 514, 8 NYS2d 279]" (Matter of Racal Corporation and Decca Electronics, Tax Appeals Tribunal, May 13, 1993).

After careful consideration, there appears to be no reason to disregard the sound reasoning of Seidman-Soling, which supports Property Management's position and buttresses the reasoning herein that the Division should not have added the item of nonrecognized gain back to 1983, but should have waited until the gain was ultimately recognized and then adjust the business allocation percentage, if necessary, to achieve an equitable result.

C. At hearing, petitioner made an application for refund of the taxes paid on the gain from the sale of the two stations sold pursuant to the FCC certificates which could not be sheltered by a reduction in the basis of property held by the taxpayer immediately after the sale or exchange, or acquired in the same taxable year (IRC § 1071[a]). The amount of the gain

included in entire net income was $13,002,337.00, and Property Management seeks a refund of the taxes paid on this income.

Consistent with the determination made above regarding the application of IRC §§ 1071 and 1033 to the sale of the two stations, Property Management is entitled to the refund for which it applied.

Although a claim for refund of tax under Article 9-A usually must be applied for within the later of three years from the date the return was filed or two years from the date the tax was paid (Tax Law § 1087[a]), Tax Law § 1087 provides the following exception:

> "(f) effect of petition to tax commission. -- If a notice of deficiency for a taxable year has been mailed to the taxpayer under section one thousand eighty-one and if the taxpayer files a timely petition with the tax commission under section one thousand eighty-nine, it may determine that the taxpayer has made an overpayment for such year (whether or not it also determines a deficiency for such year). No separate claim for credit or refund for such year shall be filed, and no credit or refund for such year shall be allowed or made, except --
>
> "(1) as to overpayments determined by a decision of the tax commission which has become final; and
>
> "(2) as to any amount collected in excess of an amount computed in accordance with the decision of the tax commission which has become final; and
>
> "(3) as to any amount collected after the period of limitation upon the making of levy for collection has expired; and
>
> "(4) as to any amount claimed as a result of a change or correction described in subsection (c)."

All of the prescribed acts have taken place in the instant matter and with the qualified reinvestment of the gain in the 72 shares of KNBC-TV, all of the gain from the sale of the two stations pursuant to the FCC certificates qualifies for nonrecognition under IRC §§ 1071 and 1033. Therefore, the $13,002,337.00 should be subtracted from petitioner's 1983 income as reported and the tax paid thereon refunded.

Tax Law § 1087(f) limits the amount of the refund allowed pursuant to Tax Law § 1087(g) as follows:

> "Limit on amount of credit or refund. -- The amount of overpayment determined under subsection (f) shall, when the decision of the tax commission has become final, be credited or refunded in accordance with subsection (a) of section

one thousand eighty-six and shall not exceed the amount of tax which the tax commission determines as part of its decision was paid --

"(1) after the mailing of the notice of deficiency, or

"(2) within the period which would be applicable under subsections (a), (b) or (c), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the tax commission finds that there is an overpayment."

The Notice of Deficiency for 1983 herein was issued on December 9, 1988. Prior thereto, consents to extend the limitation on assessment were executed on August 28, 1987 and June 13, 1988. Tax Law § 1087(b) provides that said extensions apply to refund claims as well. Therefore, reading section 1087(b) and (g) together, if Property Management had filed a claim on the date of the Notice of Deficiency (December 9, 1988), it would have been timely. Since the first extension was executed within three years of October 15, 1984 (the date the 1983 return was filed), the claim is considered to have been timely, even within the terms of Tax Law § 1087(a).

As far as the amount to which petitioner is entitled, Tax Law § 1087(a) limits the amount to the tax paid within the three-year period plus any extension, which petitioner was granted in this case, for filing its CT-3 for 1983. Therefore, petitioner can obtain a refund for taxes paid or deemed paid on March 15, 1984, including all estimated payments for 1983, which are deemed paid on March 15, 1984 pursuant to Tax Law § 1087(i). In this case, that amount is $2,925,000.00. The Division is directed to recompute the tax due for the year 1983, taking into account the $13,002,337.00 reduction in income, and issue the appropriate refund.

The Division's additional arguments with respect to the restoration of basis are found to be without merit and immaterial to the two primary issues discussed above.

D. The petition of General Electric Property Management Co., Inc. is granted to the extent that the Notice of Deficiency dated December 9, 1988 for the year 1983 is cancelled, and a refund is granted as set forth in Conclusion of Law "C"; in all other respects, the petition is denied and the Notice of Deficiency dated December 9, 1988, for the year 1984, is sustained.

DATED: Troy, New York
February 10, 1995

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE