STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of NEWCHANNELS CORPORATION for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 1985, 1986 and 1987.	:	DETERMINATION DTA NOS. 808420 AND 808458
In the Matter of the Petition of UPSTATE COMMUNITY ANTENNA, INC. for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 1985 and 1986.	:	

Petitioner NewChannels Corporation, c/o Paul Scherer & Company, 330 Madison Avenue, New York, New York 10017, 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 1985, 1986 and 1987.

Petitioner Upstate Community Antenna, Inc., c/o Paul Scherer & Company, 330 Madison Avenue, New York, New York 10017, 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 1985 and 1986.

At the request of the parties herein, the two above-captioned matters have been consolidated.

On November 18, 1991, the Division of Taxation by its representative, William F. Collins, Esq. (James Della Porta, Esq., of counsel), and on November 12, 1991, petitioner

NewChannels Corporation by Leo A. Calistri,president of said corporation, agreed to have the controversy determined on submission without hearing. All briefs were received by January 13, 1992.

On November 18, 1991, the Division of Taxation by its representative, William F. Collins, Esq. (James Della Porta, Esq., of counsel), and on November 12, 1991, petitioner Upstate Community Antenna, Inc. by Leo A. Calistri, president of said corporation, agreed to have the controversy determined on submission without hearing. All briefs were received by January 13, 1992. After due consideration of the record in both matters, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly determined that petitioners herein were corporations properly subject to corporation franchise tax pursuant to Article 9-A of the Tax Law.

FINDINGS OF FACT

On October 29, 1991, the parties entered into a stipulation of facts, one for each of the matters herein. However, said stipulations were identical and, as set forth below, applied to both matters. The stipulation is incorporated into the Findings of Fact below.

The parties to all matters herein stipulated that the business activity of Upstate Community Antenna, Inc. and NewChannels Corporation is identical in all material respects to the business activity described in Matter of Capitol Cablevision Systems, Inc. (Tax Appeals Tribunal, June 9, 1988).

Petitioners are domestic corporations formed in New York and during the years at issue had their sole places of business in New York State.

Petitioners' sole business during the years at issue was the provision of cable television service to customers, as more specifically described below.

Petitioners provide a monthly program package of television signals to their subscribers. This program package consists of, among other things, news, sports, movies, local origination

programming and importing of distant signals. Petitioners' monthly fee is based on the provision of a variety of television channels and substantially all of their gross receipts are derived from the subscriber fees.

Petitioners initiate some programming at their offices. Petitioners also make the decision as to what distant signals to obtain. However, petitioners exercise no control over the distant provider's broadcast. The television signals are received by petitioners 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.

Petitioners provide essentially the same type of product as that provided by broadcast television. However, since petitioners utilize approximately 35 channels, they can offer more variety than a network affiliate. Both petitioners and broadcast television stations transmit their product. Petitioners, however, transmit their product by cable, while broadcast television transmits its product through the airways. Petitioners' competition includes, 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 "black out" rules) and protection from competition from cable television.

Matter of NewChannels Corporation

On August 18, 1989, the Division of Taxation issued to NewChannels Corporation three statements of audit adjustment for the years 1985, 1986 and 1987. The statements contained the following information:

PERIOD ENDED	TAX DEFICIENCY	INTEREST	ADDITIONAL CHARGE	TOTAL
12/31/85	$ 826,597.00	$168,600.02	$108,134.11	$1,103,331.13
12/31/86	1,149,157.00	176,578.89	126,338.25	1,452,074.14
12/31/87	1,378,801.00	134,269.67	114,288.39	1,627,359.06

For each of the years in issue, credit was given for tax paid with returns filed pursuant to Tax Law Article 9, sections 183 and 184. Each of the three statements of audit adjustment also contained the following explanation:

> "Estimated Deficiency. The above estimated deficiency was issued since the reports requested in our correspondence dated November 1, 1988 were not received."

Also on August 18, 1989, the Division issued to NewChannels Corporation three notices of deficiency under Article 9-A of the Tax Law which set forth the same amount of tax, interest and additional charges as stated on the statements of audit adjustment. Credit was given for tax paid pursuant to Article 9, sections 183 and 184 of the Tax Law on each of the notices as well.

Petitioner and the Division executed a consent extending the period of limitation for assessment of franchise taxes under Article 9-A of the Tax Law with regard to the year 1985 permitting the Division to assess at anytime on or before September 15, 1989.

Consistent with petitioner NewChannels Corporation's position that it was an Article 9 transportation and transmission corporation, it filed Form CT-183, Franchise Tax Report on Capital Stock by Transportation and Transmission Corporations and Associations, and Form CT-184, Franchise Tax Report on Gross Earnings by Transportation and Transmission Corporations and Associations, for each of the years in issue, i.e., 1985, 1986 and 1987.

Matter of Upstate Community Antenna, Inc.

On June 14, 1989, the Division of Taxation issued to Upstate Community Antenna, Inc. two statements of audit adjustment which set forth the following:

PERIOD ENDED	TAX DEFICIENCY	INTEREST	ADDITIONAL CHARGE	TOTAL
12/31/85	$100,000.00	$18,380.00	$ -0-	$118,380.00
12/31/86	135,000.00	17,908.93	-0-	152,908.93

For each of the years in issue, a credit was given for tax paid by petitioner with its franchise tax report on capital stock, CT-183, and franchise tax report on gross earnings, CT-184, filed by transportation and transmission corporations and associations.

An explanation appeared on both statements, identical in content, as follows:

"The above deficiency is being issued for failure to send the tax forms requested in our correspondence dated 10/25/88 and 4/1/89."

Also on June 14, 1989, the Division of Taxation issued to Upstate Community Antenna, Inc. two notices of deficiency under Article 9-A of the Tax Law setting forth the identical amount of tax, interest, additional charge and total due as set forth on the statements of audit adjustment for the same tax years. Once again, credit was given for tax paid by petitioner with its CT-183 and CT-184 for the years in issue.

The parties herein executed a consent extending the period of limitation for assessment of corporation tax under Article 9 of the Tax Law for the year 1985 permitting the Division to assess said tax at any time on or before June 15, 1989.

On February 28, 1989, the Division of Taxation received a claim for credit or refund of corporation tax paid on behalf of Upstate Community Antenna, Inc. for the year 1985. Petitioner explained that it was filing this refund application as a precautionary measure in case the State prevailed in its position that the taxpayer was subject to franchise tax under Article 9-A.[1]

SUMMARY OF THE PARTIES' POSITIONS

Petitioners argue that they should be deemed transmission companies because "transmission" is not incidental to petitioners' business, rather it is the central focus of petitioners' business.

Petitioners urge that the Capitol Cablevision case decided by the Tax Appeals Tribunal should be distinguished from the case at hand. Petitioner in Capitol Cablevision argued that it was an Article 9-A corporation, not a transmission corporation. Furthermore, because the Tribunal found that the statute in question was "vague" in Capitol Cablevision, petitioners contend that a vague statute should be construed in their favor, thus allowing them to file as transmission corporations.

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[1]It is noted that the package of submitted documents does not contain the Form CT-183 for the year 1985, the franchise tax report on capital stock. However, neither party has raised this omission as an issue.

The Division argues that Capitol Cablevision Systems, Inc. (supra) and Manhattan Cable Television, Inc. v. New York State Tax Commission (137 AD2d 925, 524 NYS2d 889) are controlling herein and support the determination of the Division of Taxation with regard to Upstate Community Antenna, Inc. and NewChannels Corporation.

CONCLUSIONS OF LAW

A. Article 9-A of the Tax Law imposes a tax on every domestic or foreign corporation for the privilege of exercising its corporate franchise (Tax Law § 209[1]). The tax is based on entire net income of the corporation or one of three other alternative bases. Specific corporations enumerated in subdivision (4) of section 209 are not subject to the tax under Article 9-A. These include particular corporations liable for tax under sections 183 and 184 of Article 9 of the Tax Law.

Tax Law § 183(former [1]) states, in pertinent part, as follows:

> "For the privilege of exercising its corporate franchise, or of doing business...every other domestic corporation formed for or principally engaged in the conduct of...telegraph, telephone... business...and every other domestic corporation principally engaged in the conduct of a transportation or transmission business...shall pay...an annual tax...."

Tax Law § 184(former [1]) states, in pertinent part, as follows:

> "[E]very other corporation...formed for or principally engaged in the conduct of a transportation or a transmission business...for the privilege of exercising its corporate franchise, or of doing business...shall pay a franchise tax...."

Since the parties hereto, both petitioners and the Division of Taxation, agree that both petitioners' business activity is identical in all material respects to the business activity described in the Tribunal case of Matter of Capitol Cablevision Systems, Inc. (supra), it is not possible to distinguish these matters from the Capitol Cablevision case.

B. In Capitol Cablevision, the Tribunal held that cable television is not one of the businesses specifically enumerated in sections 183 and 184 because it did not exist when the statute to tax transportation businesses, including telephone and telegraph companies, was

originally enacted by the Laws of 1880, nor when the statute was amended in 1935. The Tribunal specifically found that Capitol Cablevision, whose business activity has been equated with petitioners' business activities, was not principally engaged in the conduct of a transmission business.

The Tribunal stated:

> "It is well established that classification for corporation tax purposes is to be determined by the nature of the taxpayer's business and not by the words in its certificate of incorporation, nor by focusing on one aspect of its business operations. The business must be viewed in its entirety and from the perspective of its customers -- what they buy and pay for (Quotron Systems, Inc. v. Gallman, 39 NY2d 428; Matter of Holmes Electric Protective Company v. McGoldrick, 262 AD 514, affd 288 NY 635; Matter of McAllister Brothers v. Bates, 272 AD2d 511).
>
> Capitol Television has already been subjected to this type of analysis, for sales tax purposes, in New York State Cable Television Association v. State Tax Commission (59 AD2d 61, affg 88 Misc 2d 601) where it was concluded that the nature of cable television service was entertainment, not telephony or telegraphy which was characterized as an incidental aspect of the service provided.
>
> Therefore, we conclude that petitioner's business is selling television entertainment to its subscribers by packaging television signals which in its judgment represent the best blend of channels and subject matter to achieve its goal of attracting and keeping subscribers. Petitioner originates programming towards this same goal. Transmission is merely a means by which petitioner conveys its product to its customers, it is not the petitioner's business." (Matter of Capitol Cablevision Systems, Inc., supra.)

The Tribunal went on to say that the statute was vague because there was no statutory or regulatory definition of "principally engaged in the conduct of a transmission business". Combined with the lack of a legislative history or precedent to add meaning to the phrase, a finding for petitioner was warranted. Petitioners argue that the same vagueness supports their contention that they are transmission corporations. They overlook, however, the Tribunal's finding that cable companies like petitioners are not in the transmission business and are unequivocally excluded from those "principally engaged in the conduct of a transmission business."

Just as the Tribunal decided in 1988 that Capitol Cablevision would be subject to Article 9-A franchise tax for the years 1976 through 1979, it was proper for the Division of Taxation to determine that Upstate Community Antenna, Inc. and NewChannels Corporation be deemed

Article 9-A corporations for the years 1985, 1986 and 1987 (Manhattan Cable Television, Inc. v. New York State Tax Commission, supra, 524 NYS2d at 891). Furthermore, once retroactive application has been chosen for any new rule (categorization of cable companies as Article 9-A companies) it has been chosen for all those who might seek its prospective application (Duffy v. Wetzler, 174 AD2d 253, 579 NYS2d 684, 689).

C. The petition of NewChannels Corporation is denied and the three notices of deficiency issued on August 18, 1989 for the years 1985, 1986 and 1987 are sustained. The petition of Upstate Community Antenna, Inc. is denied and the two notices of deficiency dated June 14, 1989 for the years 1985 and 1986 are sustained.

DATED: Troy, New York
July 16, 1992

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