STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EXHIBITGROUP, INC.	:	DETERMINATION DTA NO. 811850
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Year 1988.	:	

Petitioner, Exhibitgroup, Inc., Dial Tower, Station 2212, Phoenix, Arizona 85077, 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 year 1988.

A hearing was held before Carroll R. Jenkins, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on May 10, 1994 at 9:15 A.M. The last day for filing of briefs was September 1, 1994. Both parties filed their briefs within the prescribed time. Petitioner appeared by Earle M. Dornan, Esq. The Division of Taxation appeared by William F. Collins, Esq. (John O. Michaelson, Esq., of counsel).

ISSUE

Whether, in the absence of prior permission granted by the Division of Taxation, petitioner may properly file a combined franchise tax report with its wholly-owned subsidiary, David H. Gibson Company.

FINDINGS OF FACT

Petitioner, Exhibitgroup, Inc.[1] ("Exhibitgroup" or "petitioner"), is incorporated in the State of Delaware with its corporate offices located at 2825 Carl Boulevard, Elk Grove Village, Illinois 60007. Exhibitgroup is a wholly-owned subsidiary of The Dial Corporation,

[1]Also referred to in the record as "Greyhound Exhibitgroup, Inc.".

1850 North Central Avenue, Phoenix, Arizona.

David H. Gibson Co. ("Gibson") is located in Texas with offices at 8401 Ambassador Row, Dallas, Texas. Gibson is one of six wholly-owned subsidiary divisions of Exhibitgroup. The other divisions are located in San Francisco, Los Angeles, Atlanta, Chicago and Edison, New Jersey.

During the 1988 tax year, Exhibitgroup conducted business, employed capital, owned or leased property or maintained offices in the Metropolitan Commuter Transportation District, State of New York.

Exhibitgroup is in the business of designing, constructing, installing, and later, removing and storing convention exhibits for its customers. Petitioner installs and dismantles the exhibits at convention sites and trade shows. It is a total "turn-key" operation, since all the customer has to do is arrive at the convention and the exhibit is ready for use. Gibson, out of its Texas office, is engaged in the same business and provides its customers the same product lines.

William Bloom, vice president of finance and administration for Exhibitgroup, testified for petitioner. Mr. Bloom stated that Gibson and the other divisions are an integral part of Exhibitgroup's network. Exhibitgroup's advertising includes the addresses and phone numbers for each

of its divisions across the country. Exhibitgroup uses the fact that it has this network of division offices in various parts of the country as a competitive advantage, since petitioner is in a position to assist its customers in any one of its division offices. Mr. Bloom noted that petitioner is only one of two companies in the United States that have this network capability. If a customer participated in multiple trade shows in cities like Los Angeles, Orlando, Dallas and New York, petitioner has the ability to design, construct, ship, install, dismantle and reship its exhibits from location to location.

The business functions of petitioner and Gibson are integrated. Thomas Urban, president of Gibson, reports to Charles Corzentino, president of Exhibitgroup. The presidents

of all of the other divisions also report to Corzentino. Exhibitgroup is charged with the responsibility of administering all of the business activities of each of its divisions, including Gibson. Exhibitgroup and its divisions share design and development of exhibits to reduce costs. Gibson cannot make capital expenditures without approval of petitioner. When Gibson takes on a new customer, a job order cannot be opened until a job number is assigned by Exhibitgroup after it has conducted a credit check. If one of the divisions, including Gibson, has problems collecting from a customer, collections are handled by Exhibitgroup's corporate headquarters. Exhibitgroup totally funds Gibson, including the local bank, for payroll and other accounts. Gibson has no independent lines of credit and could not function without petitioner.

Every year Exhibitgroup's management conducts a budget review where budgeted sales and expenses of the divisions, including petitioner, are agreed upon and approved.

Gibson provides storage and other services, where necessary, for customers of other divisions of petitioner. In transactions with other divisions of petitioner, Gibson receives a discount of 20 percent on labor and material and a 30 percent discount on installation and dismantling.

Gibson and the other divisions all share a common management at Exhibitgroup corporate headquarters (tr., p. 30). Gibson's administrative functions, including advertising, human resources and insurance claims, are handled by Exhibitgroup. Exhibitgroup, Gibson and the other divisions share a common profit-sharing plan all administered by petitioner.

William Bloom, petitioner's vice president for finance and administration, testified on cross-examination that Gibson is the only subsidiary division of petitioner that is not a corporation (tr., p. 35).[2]

The Division of Taxation ("Division") does not dispute that petitioner and its subsidiary divisions are engaged in the same type of business.

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[2]Petitioner's attorney, on redirect, did not ask the witness to explain or clarify this statement. While petitioner's attorney referred to Gibson as incorporated and doing business in Texas (tr., pp. 10-11), his unsworn statement is not evidence.

The Division concedes that the business activities of petitioner, Gibson and the other divisions are integrated with, dependent upon and contribute to each other.

The Division concedes that based on the unity of ownership, centralized management, functional integration and flow of value, services and goods between Exhibitgroup and Gibson, they are engaged in a unitary business (tr., p. 33).

Michel E. Mazakis, director of taxes for The Dial Corporation, testified for petitioner. Mr. Mazakis is responsible for all state and local taxes for The Dial Corporation and its subsidiaries, including Exhibitgroup.

The Division's Midwestern Regional District Office conducted a general verification field audit of Greyhound Exhibitgroup, Inc. (now "Exhibitgroup, Inc.") for tax years 1986 and 1987. At that time, petitioner was a wholly-owned subsidiary of the Greyhound Corporation. The audit report notes that Exhibitgroup had a warehouse in New York City which was used to sell exhibits and service its customers. This field audit is not the subject of this proceeding. Its significance is that there is no indication in this audit report of the two years previous to 1988 of any request by petitioner to file a combined franchise tax return, or that the question of combined reporting ever arose. Since the possibility of combined reporting never arose, petitioner's books and records were not audited with that purpose.

The Division did not conduct a field audit of petitioner's or Gibson's books and records for 1988.

Petitioner filed an application, dated March 14, 1989, for automatic six-month extension to file its 1988 franchise tax return.

For calendar year 1988, Exhibitgroup and Gibson filed a New York State Combined Franchise Tax Return ("CT-3-A") dated October 5, 1989. Prior to filing this combined return, petitioner admits that it had not requested permission from the Division to file on a combined basis.

The Division conducted a desk audit of petitioner's and Gibson's 1988 combined return.

Mr. Mazakis testified that in response to the combined return, he received a notice from the Division. This notice advised petitioner that since it had not requested prior permission to file on a combined basis, the combined filing was disallowed. This notice also raised the issue of interest on subsidiary capital (tr., p. 39).

Two statements of audit adjustment, both dated November 23, 1990, were issued to petitioner.[3] The first statement asserted additional franchise tax due of $60,505.00, plus interest, for calendar year 1988.[4] The second statement was issued to petitioner asserting additional Metropolitan Transportation Business Tax Surcharge ("MTBTS") of $10,286.00, plus interest, for the same period.

Two notices of deficiency, both dated January 23, 1991, were issued to petitioner asserting, respectively, additional franchise tax of $60,505.00, plus interest, and MTBTS of $10,286.00, plus interest.

Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services. This request raised two issues: (i) whether petitioner was entitled to file a combined return; and (ii) whether petitioner owed tax arising from interest on subsidiary capital. The conference was held on March 27, 1992. The advocate for the Division was James Doherty ("Doherty"), an auditor in the Division's Corporation Tax Unit. The conferee, Sareve Dukat, directed the parties to attempt to settle the matter.

Pursuant to the direction of the conciliation conferee, the Division's advocate made several requests for additional information from petitioner in furtherance of the effort to settle the matter. Petitioner, after some delays, provided the information.

Petitioner also sent Doherty a letter dated June 26, 1992 enclosing a partially-completed request for permission to file a combined report ("request") (Ex. "G"). The instruction on the first page of this request states that it must be filed with the Tax Commissioner no later than 30

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[3]Then named "Greyhound Exhibitgroup, Inc."

[4]There being no dispute over the computation, it has not been shown.

days after the close of the taxable year in accordance with the Department's regulations (20 NYCRR 6-2.4). None of the boxes are checked on page one of this request to show the purpose for which it is being filed or the tax year. Testimony in the record indicates that this request was intended to be filed for tax year 1988. Page 2 of the request names petitioner and Gibson as the companies covered by the request. The top of page 2 indicates that petitioner is included in the request and is a corporation taxable in New York State. Gibson is included in the request but, according to the form, is not taxable in New York State.

As a result of the conferee's request and the parties' efforts over a period of months, agreement was reached on the issue of interest on subsidiary capital.

A Conciliation Order (CMS No. 113357) dated February 5, 1993 was issued to petitioner reducing the tax deficiency to $24,365.00, plus interest. This order does not indicate how this figure was arrived at or the amounts by which each Notice of Deficiency was reduced. All that is given is the combined total tax remaining due on both notices. Petitioner says that only the issue of subsidiary capital was resolved at the conference, so presumably, the issue of whether petitioner was entitled to file a combined report was denied sub silentio.[5]

SUMMARY OF THE PARTIES' POSITIONS

Petitioner equates the negotiations and exchange of information that went on between it and Mr. Doherty at the behest of the conciliation conferee as a "field audit". Accordingly, says petitioner, since the Division has had an opportunity to conduct a "field audit" of its books and records, it is entitled to file a combined franchise tax report for 1988.

The Division denies that attempts at settlement as part of the conciliation process can be equated with a field audit.

The Division argues that petitioner failed to request prior permission to file a combined return and, therefore, was not entitled to file a combined franchise tax return for 1988.

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[5]Petitioner's brief, at page 4, states that "The Bureau issued a Conciliation Order on or about February 5, 1993 denying Exhibitgroup's request to file a unitary report with D. H. Gibson . . . ."

CONCLUSIONS OF LAW

A. The filing of combined reports for corporation franchise tax purposes is authorized by Tax Law § 211(4), which provides, in part, as follows:

> "In the discretion of the commissioner of taxation and finance, any taxpayer, which owns or controls either directly or indirectly substantially all the capital stock of one or more other corporations, or substantially all the capital stock of which is owned or controlled either directly or indirectly by one or more other corporations . . ., may be required or permitted to make a report on a combined basis covering any such other corporations and setting forth such information as the commissioner may require . . . ."

B. Regulations promulgated under Tax Law § 211(4), effective for all taxable years ending on or after December 31, 1983, provide that combined reports shall be permitted where the corporations in the group meet the capital stock requirement (20 NYCRR 6-2.2[a]), unitary business requirement (20 NYCRR 6-2.2[b]) and the "other requirement" (20 NYCRR 6-2.3) set forth in the regulations (see, 20 NYCRR 6-2.1).

C. The regulation at 20 NYCRR 6-2.4 provides, in part, as follows:

> "(a) A taxpayer must make a written request for permission to file a combined report. The request must be addressed as follows: Department of Taxation and Finance, Central Office Audit Bureau, Corporation Tax Section, Building 9, State Campus, Albany, NY 12227. The request must be received by the Tax Commission not later than 30 days after the close of its taxable year. A report filed on a combined basis does not constitute a request for permission to file a combined report. A request to file a combined report must include the following information:
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> > "(1) the exact name, address, employer identification number and the state of incorporation of each corporation to be included in the combined report;
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> > "(2) information showing that each of the corporations meets the requirements of sections 6-2.2 and 6-2.3 of this Part for the current year;
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> > "(3) the exact name, address, employer identification number and the state of incorporation of all corporations (except alien corporations) which meet the capital stock requirement of subdivision (a) of section 6-2.2 of this Part for the current year, which are not to be included in the combined report;
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> > "(4) for at least the first nine months of the current year submit the following information:
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> > > "(i) the nature of the business conducted by each corporation included in paragraphs (1) and (3) of this subdivision;
> > >
> > > "(ii) the source and amount of gross receipts of each corporation

and the portion derived from transactions with each of the other corporations;

"(iii) the source and amount of total purchases, services and other transactions of each corporation and the portion related to transactions with each of the other corporations; and

"(iv) any other data that shows the degree of involvement of the corporations with each other; and

"(5) a statement providing details as to why a combined report which would include only the corporations listed in paragraph (1) of this subdivision will equitably reflect the New York State activities of the corporations which meet the capital stock requirement of subdivision (a) of section 6-2.2 of this Part and why the corporations in paragraph (3) of this subdivision should be excluded.

"(b) A written request for permission to include or exclude a corporation from an existing combined report must be received by the Tax Commission not later than 30 days after the close of the taxable year of the corporations filing the combined report. The information required by paragraphs (2), (4) and (5) of subdivision (a) of this section must be submitted with the request.

"(c) The Tax Commission's approval to file a combined report or to include or exclude a corporation from a combined report is tentative pending receipt of the final report and subject to revision or revocation on audit. If a combined report is submitted without the Tax Commission's permission, or if a corporation is included in a combined report without permission, the Tax Commission will compute and assess the tax of each taxpayer filing without permission on a separate basis. (See section 8-1.2 of this Title -- Limitation on Assessment.)

"(d) If a corporation has been required or has been permitted to report on a combined basis, the corporation must continue to file its reports on a combined basis until the facts materially change" (emphasis added).

Petitioner does not deny that it failed to make a request to file a combined return for 1988 in accordance with this regulation.

D. 20 NYCRR 6-2.2(b) provides the following guidance with respect to the unitary business requirement:

"Unitary business requirement. (1) In deciding whether a corporation is part of a unitary business, the Tax Commission will consider whether 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) The Tax Commission, in deciding whether a corporation is part of a unitary business, will also consider whether 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."

E. As noted earlier, the Division at hearing did not dispute that petitioner and Gibson were engaged in unitary business activity contemplated by this regulation (20 NYCRR 6-2.2[b]). There was an "umbrella of centralized management and controlled interaction" between the two entities (see, Exxon Corp. v. Wisconsin Dept. of Revenue, 447 US 207, 224, 65 L Ed 2d 66, 81) and through this centralized management, each engaged in activities related to the other (20 NYCRR 6-2.2[b][1]) and engaged in the same or related lines of business as the other (20 NYCRR 6-2.2[b][2]).

F. Turning next to the distortion of income requirement, the Division's regulations at 20 NYCRR 6-2.3 provide, in part, as follows:

"Other requirement. (a) If the capital stock and unitary business requirements described in section 6-2.2 of this Part have been met, the Tax Commission may permit or require a group of taxpayers to file a combined report if reporting on a separate basis distorts the activities, business, income or capital in New York State of the taxpayers. The activities, business, income or capital of a taxpayer will be presumed to be distorted when the taxpayer reports on a separate basis if there are substantial intercorporate transactions among the corporations.

* * *

"(c) In determining whether there are substantial intercorporate transactions, the Tax Commission will consider transactions directly connected with the business conducted by the taxpayer, such as:

"(1) manufacturing or acquiring goods or property or performing services for other corporations in the group;

"(2) selling goods acquired from other corporations in the group;

"(3) financing sales of other corporations in the group; or

"(4) performing related customer services using common facilities and employees."

G. Petitioner filed a combined franchise tax return dated October 5, 1989 for calendar

year 1988. Petitioner had not requested permission from the Division to file a combined report prior to filing this return. In a field audit of petitioner conducted for tax years 1986 and 1987, petitioner did not raise the issue of possibly filing combined reports. For this reason, the Division contends that petitioner's request of June 26, 1992 for permission to file on a combined basis should not be granted to retroactively authorize it to file a combined return for 1988. There are two Tax Appeals Tribunal cases relied upon by the parties in support of their respective positions that merit discussion.

In Matter of Autotote, Ltd. (Tax Appeals Tribunal, April 12, 1990), the Tribunal determined that the Division had abused its discretion under Tax Law § 211(4) by refusing to allow the petitioner in that case to file on a combined basis where the petitioner requested combined filing during the course of a field audit and where the facts determined on audit and stipulated to by the parties indicated that the petitioner met the conditions of the Division's regulations on combined reporting. In Autotote, the sole reason advanced by the Division for its refusal to grant permission to file combined reports was the petitioner's failure to timely request permission to file combined reports pursuant to 20 NYCRR former 6-2.4(a). The Tribunal rejected the Division's position as follows:

> "[T]he only ground advanced by the Division for not allowing petitioner to file on a combined basis is the failure to comply with the thirty-day rule. We find this position wholly untenable in this case. The purpose of the thirty-day rule would appear to be to permit the Division to establish the tentative filing status of a taxpayer prior to the time the returns are due. Although the Division reserves the right to require combination or decombine a taxpayer on audit (20 NYCRR 6-2.4[c]), the application and approval process allows the taxpayer to know how it should file and allows the Division to know from whom to expect a return. Even if there are other reasons for the thirty-day rule and the permission process, such reasons cannot be used to prohibit a taxpayer from filing on a combined basis where, as in the instant case, the Division, on its own initiative, has had the opportunity through the audit process to examine and scrutinize petitioner's business activities, in particular intercompany transactions" (Matter of Autotote, Ltd., supra; emphasis added).

The Division contends that the instant matter is factually distinguishable from Autotote. The Division contends that, in the instant matter, unlike Autotote, there was no in-depth field audit of petitioner's relationship with the subject affiliate. The Division's only opportunity in this regard was the information provided to it by petitioner in furtherance of settlement

negotiations after the conciliation conference.

In support of its position, the Division cited Matter of Chudy Paper Co. (Tax Appeals Tribunal, April 19, 1990). In Chudy Paper, the Tribunal denied a retroactive request for combination and applied the so-called 30-day rule where the taxpayer, having failed to make a timely request for combination, filed combined reports nonetheless. The Tribunal distinguished Autotote on the ground that no field audit of the taxpayer was conducted in Chudy Paper.

In support of its decision in Chudy Paper, the Tribunal cited Fuel Boss v. State Tax Commn. (128 AD2d 945, 512 NYS2d 595), wherein the court confirmed a determination of the former State Tax Commission which denied a taxpayer retroactive permission to file combined reports where the taxpayer had filed combined reports for those years without obtaining prior permission.

H. I agree with the Division that an opportunity to request that petitioner answer certain questions and to review some of petitioner's documents in furtherance of settlement negotiations cannot be equated with an in-depth field audit review of petitioner's complete books and records. Since petitioner made no effort to request permission to file a combined return prior to filing said return for 1988 and the Division had not conducted a field audit of petitioner, the Division properly rejected petitioner's combined return and retroactive request to file.

I. There is an even more compelling reason for rejecting petitioner's argument. As noted earlier, Tax Law § 211(4) provides, in pertinent part, with regard to the filing of combined reports for corporation franchise tax purposes as follows:

> "In the discretion of the commissioner of taxation and finance, any taxpayer, which owns or controls either directly or indirectly substantially all the capital stock of one or more other corporations, or substantially all the capital stock of which is owned or controlled either directly or indirectly by one or more other corporations . . ., may be required or permitted to make a report on a combined basis covering any such other corporations and setting forth such information as the commissioner may require . . ." (emphasis added).

Central to this provision is that the entities seeking to file a combined report both be "corporations". Petitioner's vice president testified that all of petitioner's subsidiaries were corporations except one. When asked which of petitioner's subsidiaries was not a corporation,

petitioner's vice president replied "David H. Gibson" (tr., p. 35). So while petitioner has shown that Gibson is a wholly-owned subsidiary of petitioner, it has not shown that Gibson is a corporation or that petitioner owns its "capital stock".

J. As noted earlier, the Division's regulations at 20 NYCRR 6-2.3 provide, in part, with respect to the distortion of income requirement, as follows:

> "Other requirement. (a) If the capital stock and unitary business requirements described in section 6-2.2 of this Part have been met, the Tax Commission may permit or require a group of taxpayers to file a combined report if reporting on a separate basis distorts the activities, business, income or capital in New York State of the taxpayers. The activities, business, income or capital of a taxpayer will be presumed to be distorted when the taxpayer reports on a separate basis if there are substantial intercorporate transactions among the corporations.
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> * * *
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> "(c) In determining whether there are substantial intercorporate transactions, the Tax Commission will consider transactions directly connected with the business conducted by the taxpayer" (emphasis added).

Petitioner has shown that it had intercompany transactions with Gibson. However, petitioner has failed to show by clear and convincing evidence that they were "intercorporate transactions" (20 NYCRR 6-2.3[c]) and, therefore, the distortion of income requirement is not satisfied.

K. Similarly, although the Division agrees that petitioner and Gibson are engaged in a unitary business activity, petitioner has not been shown that they are two corporations engaged in a unitary business activity (20 NYCRR 6-2.2[b]).

L. The petition of Exhibitgroup, Inc., is denied, and the notices of deficiency issued January 23, 1991 are sustained as modified by the Conciliation Order dated February 5, 1993.

DATED: Troy, New York
February 27, 1995

/s/ Carroll R. Jenkins
ADMINISTRATIVE LAW JUDGE