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 Fiscal Years Ended July 31, 1989 through July 31, 1992.	:	
	:	DETERMINATION DTA NOS. 815139 and 815140
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 Period January 1, 1991 through December 31, 1992.	:	

Petitioner, NewChannels Corporation, P.O. Box 4872, Syracuse, New York 13221-4872, 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 fiscal years ended July 31, 1989 through July 31, 1992.

Petitioner, Upstate Community Antenna, Inc., c/o Hollis Hyans, Esq., Morrison & Foerster, LLP, 1290 Avenue of the Americas, New York, New York 10104-0185, 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 period January 1, 1991 through December 31, 1992.

A consolidated hearing was held before Jean Corigliano, Administrative Law Judge, at the

offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 29, 1997 at 10:15 A.M., with all briefs to be submitted by October 15, 1997, which date began the six-month period for the issuance of this determination. Petitioners appeared by Morrison & Foerster (Paul Frankel, Esq., Hollis Hyans, Esq., and Craig Field, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Marvis A. Warren , Esq., of counsel).

ISSUE

Whether, during the years in issue, petitioners were principally engaged in the conduct of a transmission business within the meaning of sections 183 and 184 of the Tax Law.

FINDINGS OF FACT

1. Petitioner, NewChannels Corporation ("NewChannels"), filed corporation tax returns pursuant to Article 9 of the Tax Law for the fiscal years ended July 31, 1989 through July 31, 1991. Following a desk audit of those returns, the Division of Taxation ("Division") determined that NewChannels should have filed business corporation franchise tax returns pursuant to Article 9-A of the Tax Law and calculated its tax liability accordingly. As a result, the Division issued a Notice of Deficiency to NewChannels, dated January 28, 1994, asserting a corporation franchise tax deficiency of $4,816,307.00 plus penalty and interest for the fiscal years 1989, 1990 and 1991 (Notice No. L008428977). On May 9, 1994, the Division issued a Statement of Proposed Audit Changes to NewChannels, incorporating the period August 1, 1991 through July 31, 1992 into the audited period. The Division issued to NewChannels a Notice of Deficiency, dated June 20, 1994, asserting a corporation franchise tax deficiency of $2,928,599.00, plus penalty and interest for the 1992 fiscal year (Notice No. L008768672).

2. The Division conducted a desk audit of the corporation tax returns filed by Upstate Community Antenna ("Upstate") for the period January 1, 1991 through December 31, 1992. The Division determined that Upstate had erroneously filed its returns as a transmission company pursuant to Article 9 of the Tax Law and recalculated Upstate's tax liability pursuant to Article 9-A of the Tax Law. Consequently, it issued a Notice of Deficiency to Upstate, dated February 21, 1995, asserting a deficiency in corporation franchise tax for the audit period in the amount of $299,536.00 plus interest.

3. On July 12, 1995, a conciliation conference was conducted in the Bureau of Conciliation and Mediation Services ("BCMS") for both NewChannels and Upstate. At that conference, NewChannels and Upstate submitted business corporation franchise tax returns, calculating their tax liability for the audit years under Article 9-A of the Tax Law. These returns had been requested by the Audit Division during the course of the audit so that each petitioner could be given credit against the Article 9-A deficiencies determined by the Division for tax payments made by each petitioner under Article 9. As a result of the filing of those returns, the Division adjusted the asserted tax deficiencies, and those adjustments are reflected in the conciliation orders which were issued subsequently.

4. On March 22, 1996, BCMS issued a Conciliation Order to NewChannels reducing the total Article 9-A tax deficiencies asserted on both notices of deficiency (L008428977 and L008768672) to $4,163,994.00 plus interest. On the same date, a Conciliation Order was issued to Upstate reducing the Article 9-A tax deficiency asserted against it to $291,150.00 plus interest.

5. The only issue in this proceeding is whether NewChannels and Upstate are principally engaged in a transmission business and properly taxed under sections 183 and 184 of Article 9 of

the Tax Law, as petitioners assert. Although NewChannels and Upstate (or "petitioners") are affiliated corporations, Upstate is operated and managed as a division of NewChannels, rather than a separate affiliated corporation. Petitioners' witnesses consistently used the name NewChannels to refer to both corporations. To be consistent with their testimony, the name "NewChannels" will be used in this determination to describe the business operations of both petitioners.

6. Until the Tax Appeals Tribunal issued its decision in ***Matter of Capitol Cablevision Systems*** (Tax Appeals Tribunal, June 9, 1988), all cable television companies doing business in New York were taxed as transmission companies pursuant to Article 9. In that decision, the Tribunal held the petitioner, a cable television company, was properly taxed under the business corporation franchise tax provisions of Article 9-A because it was principally in the business of selling television entertainment to its subscribers and merely utilized transmission as a means of delivering its product. (***See, Matter of Cablevision Sys., supra***.) Thereafter, the Division changed its long-standing policy of classifying cable television companies as transmission companies subject to the taxes imposed under Article 9 and began classifying them as business corporations subject to the tax imposed under Article 9-A. This change in classification brought about the assertion of the tax deficiencies in issue. To establish that they properly filed tax returns under Article 9 of the Tax Law because they were, in fact, transmission companies during the audit period, petitioners presented a brief history of the cable television industry; a simplified technical explanation of cable transmission; a description of petitioners' own business operations and the testimony of expert witnesses regarding the nature of NewChannels' business operations.

7. Legend has it that an appliance salesman in a mountainous region of Pennsylvania invented cable television in the late 1940s. Potential customers were showing little interest in purchasing television sets from him because television reception in the area near his store was poor. The salesman overcame this problem by installing on top of a nearby mountain an antenna that picked up the signals of local television broadcast stations. The signals were then delivered by cable to television sets displayed in his store, and he offered cable connections to customers who purchased televisions from him. This was the first cable television system, but soon similar cable systems sprouted up in communities throughout America. The only business of these early cable systems was the receipt of broadcast television signals by antenna and the retransmission of these signals to subscribers within a community, thus they acquired the name Community Antenna Television and were generally known by the acronym, CATV.

8. As this history suggests, the first cable systems were installed in rural or mountainous areas where reception of broadcast television signals was poor, and the primary purpose of those systems was to transmit clear signals of local television broadcast stations. As microwave technology developed it became possible to transmit a television signal across a 40-mile path and a straight line of sight. This enabled cable companies to receive broadcast signals from cities at a further distance from their receiving antennas and to offer the additional channels to their customers. Cable companies proliferated and grew throughout the 1950s creating markets for their services in New York City (where an antenna was placed atop the Empire State Building) and other metropolitan areas.

9. In 1965, the Federal Communications Commission ("FCC") began asserting jurisdiction over the cable television industry with the issuance of its First Report and Order by which it

adopted rules which required microwave-served CATV systems to carry the signals of all local television stations and to refrain from duplicating the programs of local commercial stations, either simultaneously or within 15 days before or after local broadcasting. These became known as the "must carry rules", and they remain in effect. The FCC Rules were designed to protect local broadcast stations from what was perceived as unfair competition from cable operators. In 1966, the FCC issued its Second Report and Order which imposed uniform regulations on all cable systems, whether microwave fed or not.

10. With the advent of satellite transmission, cable operators began transmitting the signals of distant television stations. For example, Ted Turner began transmitting the signal of an independent Atlanta, Georgia television station to a satellite where the signal could be received and retransmitted by cable companies on the other side of the continent. These technological advances provided cable television companies with the potential to receive and distribute a large number of channels and stimulated the growth of specialty programming (channels devoted to news, weather, sports, etc.), "premium" television services (such as Home Box Office and the Disney Channel) and "pay per view". There are presently about 100 companies which were formed to produce programs exclusively for cable television, including CNN, USA, Nickelodeon, C-Span, Cinemax, Showtime, MTV, A&E and the Discovery Channel. These companies are known in the cable industry as cable programmers.

11. NewChannels is a multiple system operator which means that it is able to pick up television signals transmitted in three different ways. It can pick up signals transmitted through the airwaves, known as off-the-air broadcast signals; microwave signals; and external satellite signals. NewChannels had the capacity to receive all three signals during the audit period.

12. NewChannels, like most cable companies, collects television signals (off-the-air, microwave and satellite) by receiving antennas at what is known as a headend. The signals are processed and assigned a channel frequency by NewChannels. The video signals are carried from the headend to a series of distribution points by trunk cable. Amplifiers are placed along the trunks at specific intervals to maintain or boost the signal strength. A series of coaxial feeder cables branch out from the trunk cable into local neighborhoods. The feeder cable is tapped by a coaxial drop cable which enters directly into the customer's home or other premises. The drop cables are connected directly to either a converter box or the customer's television set. During the audit period NewChannels transmitted television signals from the headend to the premises of its customers primarily through a system of coaxial cables. This system of coaxial cables is now being replaced by fiber optic cables. NewChannels serves the Syracuse, New York area and its vicinity.

13. The world of television generally can be divided into two groups: broadcasters (like ABC, Fox, and CBS) and their local affiliates which either produce or purchase television shows for transmission over the air and cable channel companies (like HBO, Lifetime and CNN) that produce or purchase television shows, primarily for transmission by cable. Within the cable industry, a cable company that produces programming is known as a cable programmer. A cable company that transmits broadcast and cable programs to its subscribers by cable is known as a cable operator. NewChannels and Upstate Antenna are cable operators.

14. During the audit period, NewChannels offered several levels of service to its subscribers. The lowest level of service was known as "Broadcast Basic". This entitled the subscribers to transmission of a small number of channels, most of which NewChannels was

required to transmit under the FCC's must carry rules, including: local broadcast stations; public, educational and government access stations, known by the acronym PEGS; and the local public television station. Every subscriber was required to purchase Broadcast Basic service at a charge of approximately $2.00 per month. NewChannels also offered Basic service, sometimes known as extended or expanded basic. This service consisted of the transmission of cable television programming, known more familiarly as cable channels (such as, CNN, ESPN, USA Network, and VH-1), for a charge of $16.75 per month. Finally, NewChannels sold Premium (Pay) TV service, offering HBO, the Movie Channel, the Disney Channel, Showtime and Cinemax at various rates depending on the number of premium channels selected. The total number of channels offered by NewChannels in 1992 was 42.

15. FCC regulations prevented NewChannels from setting charges by the length of the transmission. Whether its customer was 300 miles from the headend, or 1,600 miles, it was required to charge the same amount for service.

16. During the audit period, approximately 75 percent of NewChannels' revenues was from subscription fees for extended basic and premium TV service. The remainder of its revenues was from a variety of sources. NewChannels collected a separate charge for providing converter boxes, with and without remote controls, installation of cable service and for service to additional outlets within the same premises. It had a small amount of advertising revenue. NewChannels negotiated a contract term with some of the cable channels which allowed it to sell advertising time on that channel. It could not sell advertising on the local broadcast stations, the premium stations or the public television stations. There was little market for the sale of advertising on the PEG channel or the local origination channel produced by NewChannels.

Approximately, two percent of NewChannels' revenues was from advertising in the audit years. Through its coaxial cable system, NewChannels provided telephone services to a small number of companies in the Syracuse, New York area for a fee. It rented space on some of its antenna towers, primarily to cellular telephone companies, and it received commissions from the Home Shopping Network and QVC.

17. NewChannels did not collect sales tax on subscriber fees.

18. As a cable operator, NewChannels' largest single capital investment is in its cable plant. This includes the coaxial cables that carry the signals, amplifiers, line extenders and various other devices in the cable lines that run along the streets. Its second largest capital investment is in the cable converter boxes supplied to customers. Its third largest capital investment is in the headends. Currently, NewChannels' largest capital investments are for the conversion of the system from coaxial cable to fiber optic cables.

19. NewChannels' right to transmit cable programming is subject to the terms of contracts with the cable programmers. William Futera who was NewChannels' chief financial officer in 1992 testified that in that year almost all of NewChannels' operating expenses related to either the physical transmission of television signals or the cost of obtaining programming (copyright and licensing payments).

20. In all cases, NewChannels is obligated to transmit cable programming exactly as it receives it.[1] It cannot, for example, tape a movie transmitted by HBO for replay at another time or on a different channel. NewChannels' relationship with broadcasters is governed by law

---

[1] It does not transmit television signals exactly as it receives them. It may, and does, amplify those signals, remove ghosts and otherwise improve the quality of those signals as it transmits them through its system.

rather than contract, but for some purposes the result is the same. Under the FCC must carry rules, it must carry certain local broadcast stations, and it cannot control or interfere in any way with the programming transmitted by those stations.

21. In addition to the signals of commercial broadcast stations, NewChannels is required to carry the signal of the local Public Broadcast Station ("PBS"). It is prohibited by law from censoring or otherwise interfering with the programming of the local PBS. When NewChannels began operations in the Syracuse area, it was difficult to receive the PBS signal even with a UHF antenna (at the time, PBS transmitted its programming on a UHF frequency). PBS's audience increased by 30 to 60 percent after NewChannels began transmitting its programming.

22. During the audit period, the FCC required cable operators to provide channel capacity and some equipment to any member of the public who wanted to take advantage of the opportunity to address the cable television audience. These are the so-called "PEGS" referred to above. NewChannels carried PEG programming on channel 13. There was little public demand for the use of the PEG channel, however. NewChannels began to originate programming itself and carried that programming on channel 13 as well. These programs included local high school, college and university athletic competitions and related programming (e.g., Coaches Corner, Syracuse Sports Hall of Fame Dinner), Town Board meetings and events of interest to local residents (e.g., North Syracuse Memorial Day Parade). NewChannels carried PEG programming and local origination programming on channel 13 for 12 hours per day, and the remainder of the time, channel 13 was used by NewChannels to carry The Travel Station. Channel 13 is referred to as a "local origination channel", although it was not used exclusively for that purpose. The local origination programming was an expense not a source of revenue for NewChannels. It was

carried as a service to the community.

23. During the audit period, residents of the Syracuse area were able to receive the signals of only two local broadcast stations clearly and reliably. When NewChannels began doing business in that area, its advertising stressed the clarity of the reception provided by its cable system. The advertising now stresses the variety of choices that a viewer can obtain through cable. During the audit period, cable programs could be obtained in only two ways in the Syracuse area — by a subscription to NewChannels or by purchase and installation of a satellite dish at a cost of approximately $2,000.00.

24. NewChannels advertises through traditional methods: newspaper advertisements, billboards, direct mail and television advertisements. Sometimes, the logo of a cable channel, ESPN for example, appears in the advertising.

25. Petitioners' witnesses all agreed that during the audit period NewChannels was a transmission company. Edward Kearse, a former Executive Director of the New York State Commission on Cable Television testified that NewChannels' customers had two reasons to pay for NewChannels' services — to receive clear television signals and to receive a greater number of channels. William Futera, a former vice-president of finance and chief financial officer of NewChannels, testified that "NewChannels was a transmitter of programming and quality clear signals to its subscribers" (tr., p. 135).

26. In his testimony, Mr. Kearse expressed the opinion that cable operators are beginning to compete with telephone companies in the area of voice, data and image transmission. There is no evidence that NewChannels was in direct competition with any telephone company during the audit period.

27. The Division submitted 28 proposed findings of fact. Petitioners object to the adoption of proposed findings of fact “10", “11", “14", “15", and “24" on the ground that the Division mischaracterized testimony in the record by using the word “provide” to describe petitioners’ business where the word “transmit” would be more accurate. For example, proposed finding of fact “14" states: “Petitioners provide four (4) “must carry” channels - the local affiliates of CBS, NBC and ABC and the public broadcasting channel”. In fact, the witness identified the four “must carry” channels in response to the question: “What was a cable operator required to *transmit* between 1989 and 1992?” (Tr., p. 115.) Petitioners object to proposed finding of fact “13" on the ground that it is vague and therefore misstates the record. Petitioners object to proposed finding of fact “24" on the ground that it distorts the record by omitting information.

Petitioners submitted five proposed findings of fact in their reply brief, requesting the inclusion of certain facts not proposed by the Division.

Petitioners transmit television signals by cable. The evidence in the record supports that fact, and to avoid suggesting that transmission is an element of petitioners’ business operations distorts the testimony and evidence. Therefore, the wording of the Division’s proposed findings of facts has not been adopted; otherwise, all of its proposed findings of fact have been substantially incorporated into this determination. Likewise, the five proposed findings of fact submitted by petitioners have been substantially incorporated into these findings of fact without use of petitioners’ wording.

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 in New York State; however, corporations subject to the taxes imposed under sections 183 and 184 of the Tax Law are specifically excluded from the tax imposed under Article 9-A (Tax Law § 209[1]). As relevant here, Tax Law § 183 imposes a tax on every domestic corporation "principally engaged in the conduct of a . . . transmission business. . . ." Similarly, Tax Law § 184 imposes a franchise tax on "[e]very other corporation, joint-stock company or association formed for or principally engaged in the conduct of a . . . transmission business". When cable operators first began to appear in New York, former Deputy Commissioner Kassell of the Department of Taxation and Finance issued an opinion, dated October 8, 1953, which stated, in part:

> "[A] corporation principally engaged in the erection and maintenance of a centrally located antenna to pick up and relay television signals by cable to television receivers of its subscribers is engaged in a transmission business subject to tax under section 183 of the Tax Law." (Quoted in ***Matter of Capitol Cablevison Sys., Inc.***, ***supra***, Tax Appeals Tribunal, June 9, 1988.)

Cable operators, like NewChannels and Upstate, were taxed under Article 9 of the Tax Law from about that time until the Tax Appeals Tribunal issued its determination in ***Capitol Cablevision*** where it made the following determination regarding the proper classification of Capitol Cablevision:

> "[W]e 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 the means by which the petitioner conveys its product to its customers, it is not the petitioner's business." (***Id.***)

In a subsequent decision, ***Matter of NewChannels Corporation*** (Tax Appeals Tribunal, September 23, 1993), the Tax Appeals Tribunal reaffirmed its decision in ***Capitol Cablevision***.

Invoking the doctrine of *stare decisis,*[2] the Division maintains that the conclusion reached in ***Capitol Cablevision*** and reaffirmed in ***NewChannels*** is binding, not only on the petitioners in those cases, but on all cable operators in New York State leaving nothing to decide in this proceeding. Petitioners argue that the facts established in this proceeding are different from the facts of ***Capitol Cablevision*** and of ***NewChannels*** (where the parties stipulated that the business activity of the petitioners was identical in all material respects to the business activity described in ***Capitol Cablevision***[3]). Based on the alleged dissimilarities, petitioners contend that the Tribunal's decisions in those earlier cases are not binding here and that the proper classification of cable operators, like petitioners, has not been decided by the Tax Appeals Tribunal.

B. The facts in this case can be grouped roughly into five categories: the history of cable television; an explanation of how television signals are received and transmitted by petitioners; the nature of petitioners' capital investments and operating expenses; the source of petitioners' receipts; and a description of the programs and services sold by petitioners. Categorizing the facts in this way allows a comparison with the facts stated in the decision in ***Capitol Cablevision***. In that decision, there was no discussion of the history of cable television in general. There was very little explanation of the manner in which television signals were transmitted by the petitioner. The decision merely states that the petitioner received television signals at a "head end" and "sent" them to "the location of the subscriber through a series of

---

[2] The doctrine of *stare decisis* is not a rule of law but a matter of judicial policy ***(Heyert v. Orange & Rockland Utilities, Inc.**,* 17 NY2d 352, 360, 271 NYS2d 201, 207). It dictates that once a legal question is decided subsequent cases presenting similar facts should be decided in conformity with the earlier decision (***see***, ***Matter of Schulz v. State of New York***, 660 NYS2d 904).

[3] Abandoning an earlier argument, the Division concedes that "Petitioners' stipulations in the prior matters are irrelevant to the periods at issue and are not binding in the instant proceeding" (Division's brief, p. 11).

trunk and distribution cables." There were no facts regarding the petitioner's capital investments in buildings and equipment or its operating expenditures. Regarding the source of the petitioner's revenues, the ***Capitol Cablevision*** decision states that the petitioner charged a monthly fee "for the provision of a variety of television channels" and that all of the petitioner's "gross receipts are derived from the subscriber fees." There is no more explanation than that of the subscriber fees. Thus, two out of the five categories of factual information contained in the record of this proceeding do not appear in the ***Capitol Cablevision*** decision and two additional categories are referred to only in the briefest manner.

Only the remaining category, programming, received an extensive discussion in the ***Capitol Cablevision*** decision where the Tax Appeals Tribunal found the following facts:

> "Petitioner initiates some programming at its offices. Petitioner also makes the decision as to what distant signals to obtain. . . .
>
> * * *
>
> "Petitioner provides essentially the same type of product as that provided by broadcast television. However, since petitioner utilizes approximately 15 channels, it can offer more variety than a network affiliate. 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. Petitioner's 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 'blackout' rules as protection from competition from cable television."

Petitioners dispute the Division's contention that the facts of ***Capitol Cablevision*** (and of ***NewChannels***) establish that petitioners' business is indistinguishable from the business of Capitol Cablevision. They point out that the record in this proceeding establishes that there are

two types of cable television companies: cable programmers, like HBO and Discovery Network, and cable operators, like petitioners. In the scheme described by petitioners' witnesses, cable programmers are primarily engaged in providing entertainment, while cable operators are primarily engaged in a transmission business, i.e., transmitting the signals of cable and broadcast television channels. Regarding program production, petitioners' only expenses relate to the PEG and local origination channel, channel 13, and the level of activity related to this programming is so small as to be totally insignificant and not a basis for categorizing them as a cable programmer. Other than this, petitioners have no expenses related to producing or purchasing television shows. Petitioners' investments in capital expenditures are those of a transmission business not an entertainment business. It has created a physical network capable of receiving over-the-air television signals, microwave television signals and signals from satellite transmissions and retransmitting those signals to its customers by cable or fiber optic networks. There is no evidence of a substantial level of expenditures related to the creation or production of television shows. Petitioners' operating expenses are primarily for transmission and for licensing agreements which allow it to carry cable channels. The evidence shows that cable operators are at least capable of telephone transmission and competition with telephone companies. All of petitioners' witnesses testified that petitioners are primarily engaged in a transmission business. Thus, petitioners argue, the facts adduced in this proceeding are different from the facts set forth in the ***Capitol Cablevision*** and ***NewChannels*** decisions. The established standard for determining classification for corporation tax purposes is to view the business in its entirety and from the perspective of its customers — what they buy and pay for (***Matter of Quotron Sys. v. Gallman***, 39 NY2d 428). Petitioners' primary position is that application of this standard to the

facts concerning petitioners' business operations must result in classifying petitioners as transmission companies taxable under sections 183 and 184 of the Tax Law.

C. The flaw in petitioners' argument is the Tribunal's clear intention to categorize cable operators as business corporations, not transmission companies, as a general matter of policy. That intention is expressed in the decision in ***NewChannels***. One of the issues in that decision was whether the Tribunal's earlier decision in ***Capitol Cablevision*** should be applied on a retroactive basis. In its discussion of that issue, the Tribunal made the following statements:

> "[T]he issue in Capitol Cablevision, i.e., the proper filing status of cable television companies, was one of first impression for the Tax Appeals Tribunal (hereinafter the 'Tribunal'). Our decision overruled a long-standing policy of the Division, rooted in a 1953 Opinion of Counsel, that cable television companies were taxable as transmission companies under Article 9 of the Tax Law.
>
> * * *
>
> "Our decision in Capitol Cablevision established a new filing status for cable television companies different from that which the Division had enforced for over thirty-five years."

Although the Tribunal refers in these paragraphs to "cable television companies", rather than cable operators, its intention to subject all cable television companies, programmers and operators alike, to the tax imposed by Article 9-A of the Tax Law is plainly stated. Moreover, the facts in ***Capitol Cablevision*** and ***NewChannels*** establish that the petitioners in those cases were cable operators, as petitioners have defined that term. The Tribunal found that the petitioners in those cases received all of their gross receipts from subscriber fees which were paid to the petitioners for providing "a monthly package of television signals to [their] subscribers." The television signals provided were received by the petitioners at a "headend" and transmitted by the petitioners to their subscribers through a network of trunks and cables. Using petitioners'

own system of categorizing cable television companies, the only conclusion supported by the facts of ***Capitol Cablevision*** and ***NewChannels*** is that the petitioners in those proceedings were cable operators.

There is no question that a cable operator provides two services to its customers: the transmission of clear reliable signals (of both broadcast and cable television companies) and the provision of a wide variety of program choices made possible by the cable operator's ability to transmit a large number of channels. These two aspects of a cable operator's business, transmission and entertainment, are so entwined as to be inseparable when viewed from the customer's point of view; so the application of the usual standard for categorizing corporations under the Tax Law, what the customer buys and pays for (***Matter of Quotron Sys., Inc. v. Gallman***, ***supra***) yields equivocal results. But the Tax Law does not allow for ambiguity in the classification of corporations. A cable operator must be classified as a transmission business or not. While the extensive factual record in this proceeding might yield a different result from that reached in ***Capitol Cablevision***, the Tribunal's decision in ***NewChannels*** leaves no room to argue for case-by-case adjudication of the proper classification of cable operators in New York. In short, I agree with the Division that the classification of cable operators for corporation franchise tax purposes has been decided.

In ***City of Buffalo v. Cargill*** (44 NY2d 7, 18, 403 NYS2d 473, 479), the Court stated: "Adherence to precedent is particularly applicable to interpretations of tax statutes which may effect and influence major decisions that taxpayers must make." The Tribunal's decision in ***Capitol Cablevision*** resulted in the reversal of a long-standing policy of classifying cable operators as transmission businesses and a new requirement that all cable operators file business

corporation franchise tax reports under Article 9-A of the Tax Law. Because of the broad impact of the Tribunal's decision, it is especially appropriate to apply the doctrine of *stare decisis* and follow the rule announced in ***Matter of Capitol Cablevision*** (***supra***) and reaffirmed in ***Matter of NewChannels*** (***supra***).

D. Petitioners argue, in the alternative, that if the ***Capitol Cablevision*** decision is not distinguishable then the decision in that case should be overruled because all cable operators are transmission companies. This argument is preserved for exception to the Tax Appeals Tribunal. Because this determination is based on the doctrine of *stare decisis* and the Tribunal's decisions in ***Matter of Capitol Cablevision*** (***supra***) and ***Matter of NewChannels*** (***supra***), the other arguments made by the parties concerning the proper classification of petitioners for corporation franchise tax purposes need not be addressed.

E. The petition of NewChannels Corporation is denied and the notices of deficiency (notice numbers L008428977 and L008768672), as adjusted by a Conciliation Order issued on March 22, 1996, are sustained.

F. The petition of Upstate Community Antenna, Inc. is denied, and the notice of deficiency issued February 21, 1995, as adjusted by a Conciliation Order issued on March 22, 1996, is sustained.

DATED: Troy, New York
April 2, 1998

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE