

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

Westinghouse Electric Corporation :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Corporation Franchise Tax :
under Article 9A of the Tax Law
for the Year 1972,1973. :

State of New York
County of Albany

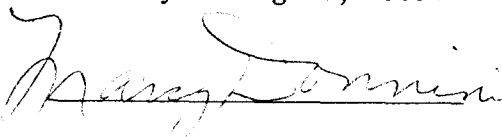
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 31st day of August, 1979, he served the within notice of Decision by certified mail upon Westinghouse Electric Corporation, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

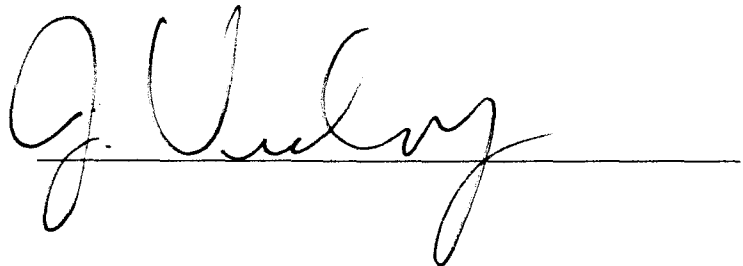
Westinghouse Electric Corporation
Westinghouse Bldg.
Pittsburgh, PA 15225

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
31st day of August, 1979.


Nancy Dominici


Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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Westinghouse Electric Corporation :

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for Redetermination of a Deficiency or a Revision :
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Corporation Franchise Tax :
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Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 31st day of August, 1979, he served the within notice of Decision by certified mail upon Henry W. DeKosmian the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

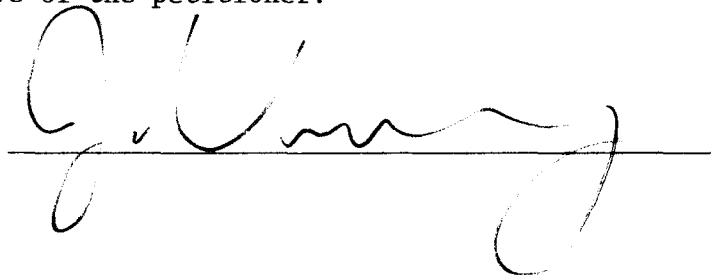
Mr. Henry W. DeKosmian
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, NY 10005

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
31st day of August, 1979.


Mary Donnan


Jay Vredenburg



STATE OF NEW YORK
STATE TAX COMMISSION
TAX APPEALS BUREAU
ALBANY, NEW YORK 12227

STATE TAX COMMISSION

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

August 31, 1979

Westinghouse Electric Corporation
Westinghouse Bldg.
Gateway Center
Pittsburgh, PA 15225

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

Robert Mulligan
Vg

cc: Petitioner's Representative
Henry W. DeKosmian
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WESTINGHOUSE ELECTRIC CORPORATION	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Franchise Tax on a Business	:	
Corporation under Article 9-A of the Tax Law	:	
for the Years 1972 and 1973.	:	

Petitioner, Westinghouse Electric Corporation, Gateway Center, Pittsburgh, Pennsylvania 15225, filed a petition for redetermination of a deficiency or for refund of franchise tax on a business corporation under Article 9-A of the Tax Law for the years 1972 and 1973 (File No. 17433).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 18, 1978 at 1:15 P.M. Petitioner appeared by Cravath, Swaine and Moore, Esqs. (Henry W. DeKosmian, Esq. and Patricia Geoghegan, Esq., of counsel). The Corporation Tax Bureau appeared by Peter Crotty, Esq. (James Morris, Esq., of counsel).

ISSUE

Whether section 208.9(i)(B) of the Tax Law which required petitioner to consolidate the receipts, expenses, assets and liabilities of its wholly-owned subsidiary, Westinghouse Electric

Export Corporation (a "DISC" corporation), with its own, in computing its New York income tax liability, is constitutional.

FINDINGS OF FACT

1. On June 15, 1976 pursuant to a field audit, the Corporation Tax Bureau issued a Statement of Audit Adjustment to petitioner, Westinghouse Electric Corporation, for the periods ending December 31, 1972 and December 31, 1973, assessing additional tax. Accordingly, a Notice of Deficiency was issued on the same day for \$73,970.23, plus interest of \$18,026.55, for a total of \$91,996.78, for the period ending December 31, 1972, and \$151,436.76, plus interest of \$25,547.38, for a total of \$176,984.14 for the period ending December 31, 1973. Due to the transposition of numbers by the auditor, the tax due should be \$71,970.00, plus interest, for the period ending December 31, 1972.

2. Petitioner, Westinghouse Electric Corporation, and the Corporation Tax Bureau stipulated and agreed as follows:

a. Petitioner, Westinghouse Electric Corporation ("Westinghouse"), is a Pennsylvania corporation which does business in New York State.

b. Westinghouse Electric Export Corporation ("DISC") is a Delaware corporation which elected to be treated as a domestic international sales organization for Federal income tax purposes and was so treated for the years 1972 and 1973.

c. Westinghouse owns all the stock of DISC.

d. Westinghouse and DISC keep their records on the accrual method of accounting.

e. During 1972 and 1973, DISC qualified under Section 992(a) of the Internal Revenue Code of 1954 (the "Code") and was exempt from Federal income tax for such years under Section 991 of the Code.

f. DISC was commission agent for Westinghouse and affiliated companies in respect of export sales of property and related services. All of DISC's business income for 1972 and 1973 consisted of commissions paid it in respect of export sales of products and related services by Westinghouse and other affiliated companies.

g. DISC reported total income on Federal Form 1120-DISC for 1972 and 1973 in the amounts of \$25,987,000 and \$57,948,738, respectively. Of DISC's total 1972 income, \$19,888,000 was received from Westinghouse and \$6,099,000 was received from other affiliated companies not doing business in New York State. Of DISC's total 1973 income, \$47,180,132 was received from Westinghouse and \$10,768,606 was received from other affiliated companies not doing business in New York State.

h. DISC did not make any distributions to Westinghouse in 1972. DISC distributed \$10,068,500 to Westinghouse in 1973, all of which was treated as made out of previously taxed income under Section 996(a)(1) of the Code.

i. \$12,956,500 of DISC's total income for 1972 and \$29,838,006 of its taxable income for 1973 was deemed distributed by DISC to Westinghouse in 1972 and 1973, respectively, under Section 995(b) of the Code and Westinghouse included those amounts in its Federal gross income for 1972 and 1973. Federal taxation of the remainder of DISC's total income for 1972 and 1973 (the "accumulated DISC income") was deferred under the DISC provisions of the Code.

j. During 1972 and 1973, DISC had no paid employees, did not engage in any business activities in New York, nor did it employ capital, own or lease real or tangible personal property, pay real estate rentals, or maintain an office in New York State at any time during such years.

k. DISC did not file a New York corporate franchise tax return for either 1972 or 1973 because it and Westinghouse take the position that DISC was not subject to New York jurisdiction.

1. Westinghouse filed Form CT-3 with the State of New York for 1972 and 1973 as a Pennsylvania corporation doing business in New York. Its reported entire net income for 1972 and 1973 was \$136,516,711 and \$43,715,850, respectively, which included the \$12,956,500 and \$29,838,006 deemed distributions from DISC for those years but did not include any portion of DISC's accumulated DISC income for

such years. The deemed distributions were allocated to New York according to Westinghouse's business allocation percentages of 6.387743% for 1972 and 6.239516% for 1973, computed without regard to such deemed distributions.

m. In separate Notices of Deficiency dated June 15, 1976, the Corporation Tax Bureau of the Department of Taxation and Finance alleged deficiencies in Westinghouse's corporate franchise tax of \$73,970.23 for 1972 and \$151,436.76 for 1973.

n. The entire amount of the alleged deficiencies relates to Westinghouse's treatment of the total income of DISC for 1972 and 1973 on Westinghouse's own returns.

o. The alleged deficiencies were computed as follows:

(1) Because more than 5% of DISC's gross receipts in both 1972 and 1973 consisted of sales commissions from Westinghouse, DISC would have been exempt from New York franchise tax under Section 208.9(i)(A) of Chapter 60, Article 9-A of the New York Tax Law whether or not New York otherwise had jurisdiction to subject it to tax. It is therefore alleged in the Notices of Deficiency that Westinghouse is required under Section 208.9(i)(B) of the Tax Law to consolidate DISC's receipts, expenses, assets and liabilities

with its own in computing its New York income tax liability, excluding all transactions between Westinghouse and DISC.

(2) Since Westinghouse only included the deemed distributions from DISC for 1972 and 1973, and not the DISC's accumulated DISC income for such years, in its own entire net income for 1972 and 1973, it is proposed in the Notices of Deficiency that Westinghouse's entire net income for 1972 be increased by \$13,390,500 from \$136,516,711 to \$149,907,211 and that its entire net income for 1973 be increased by \$28,110,732 from \$43,715,850 to \$71,826,582. In addition, it is proposed in the Notices of Deficiency that the receipts factors used to compute Westinghouse's business allocation percentages for 1972 and 1973 be recomputed by adding DISC's commission income derived from customers other than Westinghouse (which other customers did not do business in New York and were not subject to New York tax) for such years to the denominator of such factors, but not to the numerator, thus reducing Westinghouse's receipts factor for 1972 from 5.945712% as reported on its 1972 return, to 5.935845% and reducing its receipts factor for 1973 from 5.665182%, as reported on its 1973 return, to 5.650114%. Such a calculation results in a reduction of Westinghouse's business

allocation percentage for 1972 from 6.387743% to 6.384454% and for 1973 from 6.239516% to 6.234494%. The net effect of the two proposed adjustments for 1972 described above increased Westinghouse's business income for 1972 allocable to New York from \$8,683,334 to \$9,533,778, an increase of \$850,444, with a resulting deficiency in tax for 1972 of \$76,539.96. Similarly, the net effect of the two proposed adjustments for 1973 described above increased Westinghouse's business income for 1973 allocable to New York from \$2,702,912 to \$4,453,304, an increase of \$1,750,392, with a resulting deficiency in tax for 1973 of \$157,535.28.

(3) It is proposed in the Notice of Deficiency, however, that Westinghouse be allowed credits under Section 210(13)(a) of the Tax Law in the respective amounts of \$2,569.77 and \$6,098.22 for 1972 and 1973. Such credits were computed by first multiplying \$13,390,500, and \$28,110,732, representing the DISC's accumulated DISC income for 1972 and 1973 respectively, as computed by the auditor, by 4.771297% and 5.523182%, respectively, those being the percentages of Westinghouse's receipts from export property on which DISC earned a sales commission and which was shipped from a regular place of business of Westinghouse in New York as compared to Westinghouse's total

receipts on the sale of export property for such years for which DISC received a sales commission. Such total receipts amounted to \$223,587,000 in 1972 and \$408,080,000 in 1973.

(4) The respective products, \$638,901 for 1972 and \$1,552,607 for 1973, were then multiplied by Westinghouse's revised business allocation percentages for the respective years, with the result that of the \$13,390,500 and \$28,110,732 alleged to be includable in Westinghouse's entire net income for 1972 and 1973, respectively, only \$40,790 and \$96,797 respectively, was found to be eligible for credit under Section 210(13)(a). These amounts were then multiplied first by 70% and then by the 9% rate of tax in effect for 1972 and 1973 to arrive at credits of \$2,569.77 and \$6,098.22 for 1972 and 1973, respectively.

p. Westinghouse paid franchise tax under Article 9-A of the Tax Law in the amounts of \$749,384 and \$205,548, respectively, for 1972 and 1973. The taxes so paid by Westinghouse reflected the inclusion in its business income for 1972 and 1973 of the deemed distributions in the amounts of \$12,956,500 and \$29,838,006 for 1972 and 1973, respectively.

q. With respect to Westinghouse's assignment of error number 2 of the Perfected Petition, the Department of Taxation

and Finance for the State of New York concedes that the proposed increase in Westinghouse's entire net income for 1972 under the State's theory should be \$13,030,500 rather than \$13,390,500 and that therefore the proposed deficiency for 1972 is \$71,970.

r. The parties agree to reserve the calculation of the amount of any deficiency or refund until ultimate resolution of the issues raised in Westinghouse's petition.

s. The petition in this action was timely filed on September 10, 1976.

CONCLUSIONS OF LAW

A. That the constitutionality of the laws of the State of New York is presumed at the administrative level. Accordingly, the State Tax Commission does not have jurisdiction to declare such laws unconstitutional and it must be presumed that section 208.9 (i)(B) of the Tax Law is constitutional to the extent that it relates to the imposition of the tax which is the subject of this proceeding.

B. That the petition of Westinghouse Electric Corporation is denied and the notices of deficiency issued June 15, 1976 are sustained.

DATED: Albany, New York

AUG 31 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER