

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CAPITOL CABLEVISION SYSTEMS, INC.	:	DECISION
for Redetermination of a Deficiency or for Refund	:	
of Franchise Tax on Transportation and	:	
Transmission Corporations under Article 9 of the	:	
Tax Law for the Years 1976 through 1979.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on October 1, 1987 with respect to a petition by Capitol Cablevision Systems, Inc. , petitioner, 130 Washington Avenue Extension, Albany, New York 12203. The petition was filed for redetermination of a deficiency or for refund of franchise tax on transportation and transmission on corporations under Article 9 of the Tax Law for the years 1976 through 1979 (File No. 800124). Petitioner appeared by O'Connell and Aronowitz, P.C. (Neil H. Rivchin, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Thomas C. Sacca, Esq., of counsel).

Neither of the parties requested oral argument on this exception. The petitioner and the Division of Taxation each filed a brief.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly determined that petitioner, Capitol Cablevision Systems, Inc., a provider of cable television programming, was subject to corporation franchise tax under Article 9 of the Tax Law rather than under Article 9-A of the Tax Law.

FINDINGS OF FACT

The Tribunal adopts the findings of fact set forth in the Administrative Law Judge's determination and such facts are incorporated herein by this reference, except that we find, pursuant to the request by the Division of Taxation in its exception, that contrary to findings of fact "9" and "14" in such determination petitioner provided its subscribers approximately 15 stations rather than 27 stations.

During the years in issue Capitol Cablevision Systems, Inc. (hereinafter referred to as "petitioner") filed State of New York franchise tax reports pursuant to Article 9-A of the Tax Law. Petitioner listed its principal business activity on the reports as "CATV Signal & Service". On its corresponding U.S. corporation income tax returns, petitioner listed its business activity as "Community Antenna TV".

On both September 12, 1980 and October 23, 1980 the Division of Taxation issued four notices of deficiency pursuant to Article 9 of the Tax Law to petitioner. Each of the notices of deficiency was premised on the Division's position that petitioner was subject to tax pursuant to Article 9 of the Tax Law rather than Article 9-A of the Tax Law. In reaching this conclusion, the Division relied solely upon petitioner's description of its activities on its tax returns and upon an opinion of former Deputy Commissioner Kassell, dated October 8, 1953, which stated, in part, that:

"[A] corporation principally engaged in the erection and maintenance of a centrally located antenna to pick up and relay television signals by cables to television receivers of its subscribers is engaged in a transmission business subject to tax under section 183 of the Tax Law."

On or about April 14, 1966 petitioner was incorporated in the State of New York pursuant to the Transportation Corporations Law for the purpose of becoming a community antenna television company. Paragraph "Second (a)" of petitioner's certificate of incorporation described the purpose for which petitioner was formed as:

"To construct, own, use, erect, operate and maintain poles, wires, cables, conductors, ducts, conduit, vaults, manholes, amplifiers, appliances, attachments, antenna, equipment and other property as may be necessary and pertinent to a community antenna television system wholly within the State of New York and to acquire and own, or lease any interest in such line or lines or any grants therefor or for any and all such purposes."

Paragraph "Second (b)" of petitioner's certificate of incorporation described the purpose for which petitioner was formed as:

"To broadcast, receive or transmit through the air by wireless, radio, television, telephone, or any other medium of communication now known or employed, or hereafter invented or discovered, communications of any kind, including, but not by way of limitation, any news reports, speeches, information, operas, music, concerts, singing, communication, speaking, or any other sounds whatsoever, any photographs, images, visual objects, color, or any other object or means of creating impressions on the human senses."

Paragraph "Second (c)" of petitioner's certificate of incorporation described the purpose for which petitioner was formed as:

"To create, develop, acquire, own, produce, reproduce, generate, control, transmit, record, sell, lease and distribute sound, energy, force, signals, waves, images, and communications of all sorts, now or hereafter invented or devised or discovered."

Petitioner provides a monthly program package of television signals to its subscribers.

This program package consists of, among other things, news, sports, movies, local origination programming and importing of distant signals. Petitioner's monthly fee is based on the provision

of a variety of television channels and all of its gross receipts are derived from the subscriber fees.

Petitioner initiates some programming at its offices. Petitioner also makes the decision as to what distant signals to obtain. However, petitioner exercises no control over the distant provider's broadcast. The television signals are received by petitioner 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.

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.

OPINION

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 basis. Specific corporations enumerated in subdivision 4 of section 209 are not subject to tax under Article 9-A. These include particular corporations liable to tax under sections 183 and 184 of Article 9 of the Tax Law.

The relevant language of section 183 of the Tax Law states, in part, that, "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 aviation, railroad, canal, steamboat, ferry (except a ferry operating between any of the boroughs of the City of New York under a lease granted by the city) ; express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car business . . . and every other domestic corporation . . . principally engaged in the conduct of a transportation or transmission business . . . shall pay, in advance, an annual tax (Emphasis added.)

Similarly, section 184 of the Tax Law states, in part, that, "[E]very other corporation, joint-stock company or association formed or principally engaged in the conduct of a transportation or transmission business . . . for the privilege of exercising its corporate franchise or of doing business . . . shall pay a franchise tax which shall be equal to three-quarters of one percentum upon its gross earnings from all sources within the state..." (Emphasis added.)

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 telegraph and telephone, was originally enacted (L 1880, ch 542); cable television still did not

exist when the statute was amended in 1935 (L 1935, ch 545) to include every other domestic corporation "principally engaged in the conduct of a transportation or transmission business"

The first commercial cable television system was established in 1950 (United States v. Southwestern Cable Co., 392 US 157, 162).

If petitioner is taxable under sections 183 and 184, it must be because it is principally engaged in the conduct of..... a transmission business a phrase not defined in statute or regulation.

We conclude it is not and affirm the determination of the Administrative Law Judge.

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 Bros. v. Bates, 272 AD 511.)

Cable television has already been subjected to this type of analysis, for sales tax purposes, in New York State Cable Television Association v. State Tax Commn. (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 the means by which the petitioner conveys its product to its customers, it is not the petitioner's business.

We are further compelled to find for the petitioner because of the vagueness of the statute itself. There is no statutory or regulatory definition of ". . . principally engaged in the conduct of a . . . transmission business . . . " and, application of the normal tools of statutory construction and interpretation such as the words of the act, legislative history and precedent shed little light on the meaning of the phrase. Therefore, any doubt as to its meaning must be resolved in favor of the taxpayer. As the Court of Appeals stated in Matter of Bloomingdale Brothers v. Chu (70 NY2d 218, 223), "Finally, we must be ever mindful that tax statutes of doubtful meaning are to be construed in favor of the taxpayer. (Matter of American Cyanamid and Chemical Corp. v. Joseph, 308 NY 198, 204; Dun and Bradstreet, Inc. v. City of New York, 276 NY 198, 204.) Moreover, an administrative agency may not extend the meaning of statutory language to apply to situations not embraced within the statute. (Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman, 57 NY2d 588, 595; see, Matter of Jones v. Berman, 37 NY2d 42, 53.)"

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is in all respects denied, except to the extent that findings of fact "9" and "14" of the Administrative Law Judge's determination are modified as set forth above;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Capital Cablevision Systems, Inc. is granted and the notices of deficiency issued September 12, 1980 and October 23, 1980 are cancelled.

DATED: Albany, New York
JUN 09, 1988

John P. Dugan
President

Francis R. Koenig
Commissioner
