STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

AMHERST CABLEVISION, INC.

for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Year 1985.

In the Matter of the Petition

of

KEN-TON CABLEVISION, INC.

for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Year 1985.

DECISION
DTA NOS. 806105, 806106, 806107, 806808 AND 806809

In the Matter of the Petition

of

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In the Matter of the Petition

of

COMAX TELECOM CORPORATION

for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Year 1986.

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on November 10, 1994 with respect to the petitions of Amherst Cablevision, Inc., Ken-Ton Cablevision, Inc. and Comax Telecom Corporation, 3000 One American Center, Austin, Texas 78701.

Petitioners appeared by Whitman, Breed, Abbott & Morgan, Esqs. (Brian E. Gledhill, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Robert Tompkins, Esq., of counsel).

The Division of Taxation filed a brief on exception. Petitioners filed a brief in opposition. The Division of Taxation filed a letter in lieu of a reply brief. Oral argument was heard on September 14, 1995, which date began the six-month period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioners Koenig and DeWitt concur.

ISSUE

Whether the Division of Taxation may assert tax deficiencies against petitioners under Article 9 of the Tax Law.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

These matters have a rather complex procedural history. Before detailing that history, it will be helpful to begin with a brief summary. Each of the petitioners, Amherst Cablevision, Inc. ("Amherst"), Ken-Ton Cablevision, Inc. ("Ken-Ton") and Comax Telecom Corporation ("Comax") were issued notices of deficiency under Article 9 of the Tax Law. After those notices were issued, the Tax Appeals Tribunal issued a decision in an unrelated case holding that a provider of cable television programming, was not subject to the tax on transmission companies imposed by Article 9 of the Tax Law, but rather was a general business corporation subject to tax under Article 9-A of the Tax Law (Matter of Capital Cablevision Systems, Tax Appeals Tribunal, June 9, 1988). Based on this decision, the Division of Taxation ("Division") took the position that petitioners were liable for the tax imposed by Article 9-A of the Tax Law and issued notices of deficiency to petitioners under Article 9-A. Some procedural skirmishing followed. A hearing was held and completed on May 26, 1993 where the only issue addressed was whether in the years 1985 and 1986 petitioners were subject to the tax imposed by Article 9-A of the Tax Law. Petitioners filed a brief on August 30, 1993, addressing that issue. In September 1993, the Tax Appeals Tribunal issued a decision where it held that cable companies were entitled to rely on the Division's long-standing policy requiring them to file under Article 9 of the Tax Law and that any change in that policy could not be applied retroactively by the Division (Matter of Newchannels Corp., Tax Appeals Tribunal, September 23, 1993). The Division then requested and received an extension of time in which to file a brief. By letter dated December 9, 1993, the Division expressed its view that the issue had shifted back to whether petitioners were liable for tax under Article 9 of the Tax Law. Briefs were exchanged by the parties addressing this issue. With this background, the history of this case will now be detailed.

The 1985 Deficiencies

On October 30, 1987, the Division issued notices of deficiency to Amherst and Ken-Ton, asserting tax deficiencies against each under Article 9 of the Tax Law for the calendar year 1985. Notice number C870914461N issued to Amherst asserted a tax due of $939.06 and

notice number C870914460N issued to Ken-Ton asserted a tax due of $1,010.38. Amherst and Ken-Ton each made a timely request for a conciliation conference to challenge the notices.

On or about September 16, 1988, the Division sent Amherst and Ken-Ton similar letters, purportedly revising the tax asserted by the notices of deficiency to reflect tax due under Article 9-A of the Tax Law. Each letter included the following statement:

> "As indicated above, the assertion of a greater deficiency is done in accordance with Section 1089(d)(1) of the Tax Law which states in part, 'The Tax Commission shall have the power to determine a greater deficiency . . . if claim therefor is asserted at or before the hearing . . . .'"

The Division later issued statements of audit adjustment to Amherst and Ken-Ton, dated November 18, 1988. Each statement contains this explanation:

> "Based on the decision reached In the Matter of the Petition of Capitol [sic] Cablevision Systems, Inc. it was determined that corporations engaged in cable television are taxable under Article 9A, not Article 9 of the Tax Law. The above assessment is based on this decision."

The Statement of Audit Adjustment issued to Amherst (Assessment number C881118460N) contains this calculation of tax due under Article 9-A:

"Net income	$1,314,857.00
New York State allocation	100%
Allocated income	1,314,857.00
Taxable at 10%	131,485.70
Tax paid under Sections 183 and 184	49,293.19
Deficiency	82,192.51"

The Statement of Audit Adjustment issued to Ken-Ton (Assessment number C881118462N) contains this calculation of tax due under Article 9-A:

"Net income	$1,485,166.00
New York State allocation	100%
Allocated New York income	1,485,166.00
Taxable at 10%	148,517.00
Tax paid under Sections 183 and 184	44,684.67
Deficiency	103,832.33"

On January 4, 1989, the Division issued notices of deficiency to Amherst and Ken-Ton under Article 9-A. The notice issued to each petitioner shows the same amount of tax due as asserted in the corresponding Statement of Audit Adjustment and bears the same assessment number as that appearing on the statement.

On or about January 20, 1989, the Division issued conciliation orders to Amherst and Ken-Ton. Each Conciliation Order shows the "Tax Article No." as "9A". The Conciliation Order issued to Amherst shows the Notice Number as C870914461N, which corresponds to the number on the original notice issued under Article 9, and sustains that notice. The Conciliation Order issued to Ken-Ton sustains notice number C870914460N which is the number on the notice issued to Ken-Ton under Article 9.

On February 1, 1989, the Division issued individual notices to Amherst and Ken-Ton. Each notice states: "As a result of your correspondence and/or recent conference, the balance of the above assessment has been cancelled" (original in capital letters). In each case, the assessment number shown on the notice corresponds to the number appearing on the Notice of Deficiency issued on January 4, 1989, asserting tax due under article 9-A of the Tax Law. In short, as of February 1, 1989 the only extant 1985 assessments against Amherst and Ken-Ton were the original notices issued on October 30, 1987 under Article 9 of the Tax Law.

On April 17, 1989, the Division of Tax Appeals received the petitions of Amherst and Ken-Ton. By those petitions, Amherst and Ken-Ton challenged taxes assessed under both Article 9 and Article 9-A of the Tax Law.[1] Amherst and Ken-Ton alleged that the Commissioner of Taxation and Finance erred in applying the holding of Capital Cablevision Systems retroactively and recalculating tax due under Article 9-A of the Tax Law. The petitions indicate that Amherst and Ken-Ton conceded the Division's authority to revise the outstanding notices of deficiency issued under Article 9 by recalculating the tax under Article 9-A in accordance with the Division's letter of September 16, 1988.

In its answer to the petitions of Amherst and Ken-Ton, the Division denied each of petitioner's allegations of error and affirmatively asserted:

> "that the Audit Division revised certain deficiencies issued against the Petitioners' [sic] based on the New York State Tax Appeals Tribunal Decision In

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[1] Whether petitioners simply understood that the Division did not intend to cancel the Article 9-A deficiencies or some other communication passed between the parties is not known.

the Matter of the Petition of Capital Cablevision Systems, Inc., STATES that said decision determined that corporations engaged in cable television are taxable under Article 9A of the Tax Law."

The 1986 Deficiencies

On July 7, 1988, the Division issued statements of audit adjustment to Amherst, Ken-Ton and Comax, asserting deficiencies in tax under Article 9, section 184, of the Tax Law for the calendar year 1986. In each case, the Statement of Audit Adjustment indicated that the tax was imposed on gains from the sale of intangibles. The total tax asserted against Amherst was $163,264.00; the total tax asserted against Ken-Ton was $131,040.00; and the total amount asserted against Comax was $346,557.00. On August 29, 1988, the Division issued notices of deficiency to petitioners asserting the same tax deficiencies as shown on the statements of audit adjustment.

On October 4, 1988, petitioners filed petitions with the Division of Tax Appeals challenging the notices issued under Article 9. In each petition, the petitioner alleged that the Commissioner erred by determining that the gain on the sale of intangible assets is subject to tax under Article 9 of the Tax Law. Each petitioner alleged that all of its assets were sold pursuant to a contract which allocated the purchase price between tangible and intangible assets. Each petitioner claimed that "gross earnings" as that term is used in Article 9 does not include gain from the sale of intangible assets.

On November 18, 1988, the Division issued statements of audit adjustment to Amherst and Ken-Ton (but not to Comax) asserting tax due under Article 9-A of the Tax Law. The amount of tax asserted against Amherst was $1,113,225.80, and the amount of tax asserted against Ken-Ton was $937,139.57.

Pursuant to State Administrative Procedure Act § 306(4), official notice is taken of the fact that the Division filed an answer to the petition of Comax on or about January 10, 1989. A copy of that answer was filed with the Division of Tax Appeals, although it was not placed in evidence by the parties. The answer denied all of the allegations contained in paragraphs (3), (4), (5) and (6) of section II of the petition; asserted that under section 184 of Article 9 of the

Tax Law gross earnings includes earnings from the sale of intangible assets; and alleged that a penalty was properly imposed because petitioner failed to supply information to the Division. The Division requested that the Notice of Deficiency issued to Comax on August 29, 1988 in the amount of $346,557.00 be sustained. On January 19, 1989 the Division filed an amended answer to Comax's petition, expanding its denials to include paragraphs (7) through (12) of section II of the petition. The Division's answer and amended answer made no mention of Article 9-A of the Tax Law.

On January 19, 1989, the Division filed its answer to the petition of Amherst. The answer denied all of petitioner's allegations; asserted that under section 184 of Article 9 of the Tax Law gross earnings includes earnings from the sale of intangible assets; and alleged that a penalty was properly imposed because petitioner failed to supply information to the Division. The answer was silent concerning the Statement of Audit Adjustment issued two months earlier asserting tax under Article 9-A.

On February 1, 1989, the Division issued notices to Amherst and Ken-Ton cancelling the notices of deficiency issued to each under Article 9 of the Tax Law. This explanation is given for the cancellation: "As a result of your correspondence and/or recent conference the balance of the above assessment has been cancelled" (original in capital letters). The Statement of Audit Adjustment issued to Ken-Ton on July 7, 1988 bears the following handwritten notation: "TC34 to cancel L Martinez dup assmt corp is taxable as 9A."

On February 8, 1989, the Division filed an answer to the petition of Ken-Ton, denying petitioner's allegations. It contains the same affirmative allegations with regard to petitioner's liability under section 184, Article 9, of the Tax Law as are contained in the answers to the petitions of Comax and Amherst. The answer is silent about the cancellation of the Article 9 notice on February 1, 1989 and the issuance of the statement of audit adjustment under Article 9-A of the Tax Law in November 1988.

On September 27, 1989, the Division issued notices of deficiency under Article 9-A of the Tax Law to Amherst and Ken-Ton, asserting tax deficiencies in the same amounts as those asserted in the November 1988 statements of audit adjustment.

By letter to the Division's attorney, Deborah J. Dwyer, dated November 15, 1989, petitioners' attorney, Arnold Zelman, outlined petitioners' position with regard to the pending petitions. The letter states, in relevant part:

> "I am writing to make sure there is no misunderstanding as to the position of the above named Taxpayers in the hearings presently pending before the Division of Tax Appeals . . . .
>
> "Initially, the State of New York assessed deficiencies against the Taxpayers on the grounds that the returns filed by them under Article 9 of the Tax Law contained errors . . . . Taxpayers duly filed their petition with the Division of Tax Appeals and the State duly answered. Issue was joined and hearing was set for early December.
>
> "Subsequently, when Taxpayers requested that you agree to certain stipulations, you informed Taxpayers that the State will not be trying the issue because of its cancellation of the Article 9 Notices of Deficiency . . . .
>
> "As we see it, if the State is really considering changing its theory of liability and the amount owed for the years now before the Division of Tax Appeals, it can do so - if at all - only by moving to amend the pleadings it has filed in the cases currently pending. While Taxpayers have not researched whether the State can now amend its theory of liability - and preserve any claims they may have to request a denial of the State's motion to amend or to quash such amended pleadings - Taxpayers will assert at the least that, under the rules of procedure governing Division of Tax Appeals proceedings, the State will have the burden of proof with regard to the changed theory and the asserted increased tax liability, if any. In addition, once the State's pleadings are so amended, Taxpayers will seek a continuance on the basis of surprise.
>
> "Taxpayers believe that the State cannot 'start over' with impunity and just ignore the legal processes which have already transpired or the current posture of the cases. It may very well be too late for the State to decide it assessed deficiencies under the wrong statute (and Taxpayers vigorously deny any liability under either Article 9 or Article 9-A). At the least, however, as stated above, if the State wishes to change its theory or the amount of the deficiency, it must seek to amend its pleadings and assume the burden of proof with respect to same. Taxpayers would vigorously contest any motion to amend which fails to incorporate Taxpayers [sic] position as described herein."

A letter from Mr. Zelman to Ms. Dwyer, dated November 28, 1989, states:

> "This will confirm our recent telephone conversation wherein you advised me that the State will promptly move to amend its Answers in the above-referenced cases so as to allege an increased tax deficiency by reason of changing the theory of taxation from Article 9 to Article 9-A of the Tax Law. You also agree that the

> State will have the burden of proof in these cases by reason of such amendment. I assume that the State will cancel Notices of Deficiency which it had issued on September 27, 1987 [sic] for Amherst Cablevision, Inc. and Ken-Ton Cablevision, Inc.
>
> "However, Petitioners cannot agree that the State is entitled to amend its Answers to conform them to the evidence. Section 3000.4(c) provides that such a motion can be made before the Hearing is concluded and, as you know, the Hearing has not yet begun. We believe you must move to amend and serve amended Answers before the Hearing has commenced. As a matter of fact, Petitioners will be prejudiced if this is not done in such manner."

On December 29, 1989, the Division sent similar letters to Amherst, Ken-Ton and Comax. The letters sent to Amherst and Ken-Ton state that the purpose of the letter is (1) to formally assert an additional franchise tax deficiency for 1986 "in supplement to" the notice issued on July 7, 1988 under Article 9 and (2) to clarify the Division's position regarding the status of the administrative proceeding commenced by petition of the Article 9 notices. In each letter, the Division asserted that its purpose in issuing notices of deficiency under Article 9-A was "merely to assert an additional franchise tax deficiency for 1986." Each letter states:

> "[T]he cancellation notice issued in regard to [the notice of deficiency issued on July 7, 1988] should be deemed a nullity. It should be noted that your client did not sign off on this cancellation notice; therefore, the administrative proceeding pertaining to this notice was never concluded.
>
> "In summary, [the notice of deficiency issued on September 27, 1989] need not be petitioned because it is, in effect, a de facto notice of claim asserting an additional deficiency. The original notice remains intact, and additional deficiency is asserted in an amount listed below."

Each letter then provided a computation of tax due for 1986 under Article 9-A of the Tax Law. Penalty was cancelled.

Since the Division had never cancelled the original Article 9 assessment issued to Comax, it was not necessary for it to clarify its position regarding that notice. The letter sent to Comax merely states that the original notice was revised to reflect tax under Article 9-A of the Tax Law, and it shows a recalculation of the tax deficiency under Article 9-A.

After receiving the letters of December 29, 1989, Mr. Zelman repeated his earlier assertions (1) that the Division was required to amend its answer if it was going to assert additional deficiencies under Article 9-A of the Tax Law, (2) that it could not amend without

seeking permission to do so from the Tax Appeals Tribunal, (3) that petitioners were not required to petition the Division's letters of December 29, 1989, and (4) that the Division had the burden of proof with regard to the Article 9-A deficiencies. In a letter to the Supervising Administrative Law Judge, dated January 29, 1990, the Division's attorney stated that the Division did not believe that it had an obligation to file an amended answer and that petitioners should, instead, file amended petitions. To resolve the dispute between the parties, a hearing was scheduled before Administrative Law Judge Timothy J. Alston.

At the hearing before Judge Alston, the primary issue discussed was whether the Division followed the proper procedure when it issued the letters of December 29, 1989 asserting tax deficiencies under Article 9-A. The Division's position, as stated by its representative at that hearing, was (1) that the Division could no longer pursue a claim for taxes under Article 9 and (2) that the December 29th letters acted as notices of claim for additional taxes due under Tax Law § 1089(d)(1). If the notices were not deemed to satisfy the requirements of section 1089(d)(1), the parties asked Judge Alston to determine what form the assertion of the Article 9-A deficiencies should take.

Petitioners argued that the only way in which the Division could assert additional deficiencies was by filing amended answers. They took the position that no evidence could be submitted regarding the Article 9-A taxes until amended pleadings were filed putting those taxes in issue.

The Division objected to filing an amended answer on the ground that it would be procedurally confusing. The Division's attorney also stated that the letters of December 29, 1989 provided the petitioners with adequate notice of the Division's position and that the filing of an amended answer would simply be redundant. In an attempt to clarify the Division's position, Judge Alston stated to Ms. Dwyer:

> "But you do take the position, do you not, that by your -- by the issuance of the December 29th letter, you do take the position that that notice dated 8/29/88 was canceled, in effect canceled and you're changing your theory of liability -- I mean, wait, excuse me. You take the position that the Notice is still good, but you're asserting liability under the other article, correct?"

Ms. Dwyer responded: "That's correct." (Tr., pp. 32-33.)

Judge Alston issued a determination on April 25, 1991 where he ordered the Division to file amended answers and ordered petitioners to file replies to those answers. The Division then filed a consolidated amended answer to the petitions of Amherst, Ken-Ton and Comax where it alleged as follows:

> "1. AFFIRMATIVELY STATES that the Tax Appeals Tribunal issued a decision, Matter of Capital Cablevision Systems, Inc. on June 9, 1988.
>
> "2. AFFIRMATIVELY STATES that as a result of the decision cable television companies, which were previously improperly taxed under Article 9, were deemed to be properly taxable under Article 9A.
>
> "3. AFFIRMATIVELY STATES that the Petitioner corporations are cable television companies and therefore within the purview of Matter of Capital Cablevision.
>
> "4. AFFIRMATIVELY STATES that as a result of the decision the Audit Division supplemented its original notice with a notice of claim for additional taxes due on December 29, 1989; said notices outlined the basis for the additional tax due under Article 9A and included a computation of tax due for each corporation. (Notices of claim attached hereto).
>
> "5. AFFIRMATIVELY STATES that based on the foregoing, the Audit Division asserts that by the decision rendered by the Tribunal in Capital Cablevision, the Petitioner corporations are properly taxable under Tax Article 9A.
>
> "6. AFFIRMATIVELY STATES that pursuant to Section 1089(e)(3) the Audit Division has the burden of proof with respect to the additional tax asserted by its notices of claim; accordingly the Audit Division need only show that it properly assessed Article 9A tax pursuant to Section 208.9 based on 'entire net income'.
>
> "7. AFFIRMATIVELY STATES that the Petitioner has the burden of proof to establish that the Assessment is erroneous and/or improper."

Petitioners filed a reply to the amended answer denying that they are subject to tax under Article 9-A, affirmatively alleging that they are subject to tax under Article 9 and alleging that "the returns filed by Petitioners under Article 9 were correct as filed."

The 1985 and 1986 Deficiencies

The administrative hearing was continued on March 10, 1993. The Division's attorney made the following opening statement:

> "Briefly, to state the issue before you, was the Audit Division correct when it made the determination pursuant to Capital Cablevision, decided by the Tribunal on June 9th, 1988, that the Petitioners herein should be taxed under Article 9-A rather than Article 9.
>
> "Prior to Capital Cablevision, the Petitioner had been taxed under Article 9. Once the decision was rendered in Capital Cablevision, the Audit Division believed it was bound by the terms of that decision and, accordingly, changed the long-standing policy that cable companies were taxable under Article 9 and instead, taxed all cable companies under Article 9-A.
>
> "The Petitioner has objected to the change on several grounds, stating that--of course, he will elaborate on this--Capital Cablevision does not apply to their particular business and that Capital was improperly retroactively applied.
>
> "It would be for you to determine whether or not the Audit Division acted properly in this matter." (Tr., p. 66.)

Later in the proceeding, the following exchange took place between the Administrative Law Judge and the Division's attorney:

> Q: "Thank you. This is probably covered in your Stipulations but let me ask to clarify in my own mind. The notices of deficiency [issued] under Article 9, Miss Dwyer, were those withdrawn or are you asserting a new deficiency--"
>
> A: "They were, in essence, cancelled and new deficiencies issued under Article 9-A."
>
> Q: "Meaning the letters issued in December 1989."
>
> A: "Yes." (Tr., p. 77.)

The parties executed and submitted into evidence seven stipulations and numerous exhibits. The First Stipulation contains the following statement:

> "As of the date of this stipulation, the Department does not assert any Tax Law Article 9 deficiency against Amherst, Comax or Ken-Ton for calendar years 1985 or 1986."

The First Stipulation is dated November 1991 and signed by Deborah J. Dwyer for the Division. Among the exhibits stipulated into evidence were the Article 9 franchise tax reports

filed by petitioners for the years in issue and petitioners' 1985 and 1986 Federal income tax returns.

Based on the Federal income tax returns and other information provided to the Division, the Division recalculated petitioners' tax liabilities under Article 9-A of the Tax Law, and the parties stipulated to the amount of the Article 9-A deficiencies as follows:

Period Ending	9/30/85	9/30/86
Amherst	$ 96,626.00	$133,985.00
Comax	None	$197,536.00
Ken-Ton	$125,040.00	$226,280.00

Petitioners presented testimony at hearing intended to support their claim that unlike the petitioner in Capital Cablevision they operated transmission companies properly taxable under Article 9. They also presented evidence and testimony to show that they would be unfairly prejudiced by the retroactive application of the decision in Capital Cablevision. The direct testimony of David Justice, petitioners' comptroller during the years in issue, described petitioners' calculation of the gross receipts tax under Article 9 in order to support their contention that petitioners would have filed combined reports and treated expenses differently if they were filing as Article 9-A taxpayers. The Division asked no questions of Mr. Justice regarding petitioners' calculation of the Article 9 tax in 1985 or 1986.

The Division presented no witness testimony of its own. It did offer in evidence an affidavit executed by Linda Martinez, a Division employee. Her affidavit states, in pertinent part:

> "6. In 1987 I commenced a franchise tax desk audit of the Article 9 Franchise Tax reports filed by Amherst Cablevision Inc. (Amherst), Comax Telecom Corporation (Comax) and Ken-Ton Cablevision Inc. for the year 1985.
>
> * * *
>
> "8. Based on the information available, I recomputed tax due from these companies under Article 9. On August 29, 1988 Article 9 deficiency notices were issued to Amherst, Comax and Ken-Ton.

"9. After Amherst, Comax and Ken-Ton timely petitioned the Article 9 deficiency notices, the Tax Appeals Tribunal issued its decision in Matter of Capitol [sic] Cablevision Systems, Inc.

"10. From June, 1988 forward the Audit Division's policy was to follow the legal precedent established by the Tax Tribunal in Capitol [sic] Cablevision and, as a consequence, the Audit Division classified all cable television companies as Article 9-A taxpayers for all open tax years.

"11. Based on the Audit Division's policy described in paragraph 10, I computed franchise tax due from Amherst Comax and Ken-Ton under Article 9-A of the Tax Law using information taken from the companies [sic] franchise tax reports."

Attached to the affidavit were three letters sent by Ms. Martinez to Ken-Ton, Comax and Amherst, respectively, in the course of her Article 9 audit. In those letters she requested additional information to supplement franchise tax reports filed by Amherst and Ken-Ton for 1985 and by Comax for 1986. Her letter to Comax states, as relevant here:

"Gain on the sale of investments of all types, (governmental and non-governmental) and gain on the sale of properties located or from sources in this state are taxable. To compute the gain on the sale of property, the cost, not book value, less any expenses incurred in making the sale, is used.

"Using the above paragraph as a guideline, please compute the tax due on the sale of intangibles in the amount of $46,207,611.00."

No other evidence was offered by the Division to explain its calculation of tax deficiencies under Article 9.

On August 31, 1993, petitioners filed a brief in which their principal arguments were (1) that petitioners were principally engaged in a transmission business and were subject to tax under Article 9 of the Tax Law, (2) that the retroactive application of the decision in Capital Cablevision is unlawful, (3) that the Division was equitably estopped from retroactively applying the decision in Capital Cablevision.

On September 23, 1993, the Tax Appeals Tribunal issued a decision (Matter of Newchannels Corp., supra) which generally supported petitioners' contentions. The administrative law judge then granted the Division's request for an extension of time in which to file a responsive brief.

In lieu of a brief, the Division sent a letter to the Administrative Law Judge, dated December 9, 1993, where it stated its position as follows:

> "On September 23, 1993, the Tax Appeals Tribunal ruled in NewChannels Corporation, that Capitol [sic] Cablevision should be applied prospectively only. Accordingly, the Division no longer asserts that the petitioners must be taxed under Article 9-A for the tax years 1985 and 1986, years prior to the 1988 decision of Capitol [sic] Cablevision.
>
> "The Division agrees with petitioners' contention that they should be taxed under Article 9 for the tax years in issue. However, the question remains whether petitioners owe tax under Article 9. In summary, the fact that an additional/supplemental deficiency asserted can not [sic] be sustained does not invalidate the tax originally asserted due based on a premise petitioners contend was correct. Because the parties have not focused on the computation of the Article 9 deficiencies, the record should be reopened to allow the parties to submit proof as to this issue."

Because new issues were raised by the Division's letter, a new briefing schedule was established. Briefs were exchanged by the parties generally addressing the Division's assertion that petitioners' liability for Article 9 taxes is now the subject of this proceeding.

OPINION

The first issue addressed by the Administrative Law Judge was whether the Division acted properly in asserting liability against petitioners under Article 9-A of the Tax Law. She determined that since "the parties now agree [based on Matter of NewChannels Corp., Tax Appeals Tribunal, September 23, 1993] that petitioners were not subject to the tax imposed under Article 9-A in the assessment years . . . . any assessments issued to petitioners under the authority of Article 9-A are cancelled" (Determination, conclusion of law "A"). The Division does not except to this portion of the Administrative Law Judge's determination.

The next issue addressed by the Administrative Law Judge was whether the Division may now assert liability under Article 9 of the Tax Law. After reviewing the events following the Division's issuance of the Article 9 assessments, the Administrative Law Judge concluded that "the Division is bound by its stipulation, its amended answer and the statements of its representative at hearing. The Division's arguments in favor of restoring the Article 9 assessments are meritless" (Determination, conclusion of law "B").

On exception, the Division argues that the determination of the Administrative Law Judge is wrong. The Division's argument has three components. We will deal with each component separately.

The Division first asserts that it should not be bound by the Stipulation of Facts because "[t]he statement in the Stipulation of Facts that the Division 'does not assert any Tax Law Article 9 deficiency against Amherst, Comax or Ken-Ton for calendar years 1985 and 1986' was a statement of legal position that was not properly the subject of a Stipulation of Facts" (Division's brief, p. 5). The Division argues that:

> "[a]t a minimum, the stipulation is redundant in that it only states what the amended answers assert . . . . [i.e.,] that the petitioners should be classified as Article 9-A taxpayers. In essence, the amended answers were incorporated into the stipulation. However, this incorporation should not obscure the key point that parties have not stipulated to a fact, a point of law or even what the issues are. The Division cannot be limited by stipulation to the arguments it can make as to the issue or issues. This principle is particularly appropriate where the alternative position raised by the Division is the position argued by the petitioners, i.e., they are Article 9 taxpayers for the years at issue" (Division's brief, p. 6).

We cannot agree. The Tribunal's Rules of Practice and Procedure provide, in relevant part, that "[w]ith the exception of those instances where the petitioner does not desire to stipulate any facts, the parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all facts not privileged which are relevant to the pending controversy" (former 20 NYCRR 3000.7[1][I]). Former 20 NYCRR 3000.7 provided:

> "[a] stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the tribunal, administrative law judge or presiding officer, or agreed upon by the parties. The tribunal, administrative law judge or presiding officer will not permit a party to a stipulation to qualify, change or contradict a stipulation in whole or in part, except where justice requires. A stipulation and the admissions therein shall be binding and have effect only in the pending proceeding and not for any other purpose, and cannot be used against any of the parties thereto in any other proceeding."

The "key point" of the Division's argument is that in stipulating not to assert Article 9 liability, the Division did not stipulate "to a fact, a point of law or even what the issues are." The logic of this assertion escapes us. In short, just what purpose did the Division ascribe to the

stipulation? The clear wording indicates that the purpose was to narrow the issues in the case, i.e., the Division would not assert Article 9 liability.[2]

We have found such narrowing of the issues entirely permissible under our regulations (see, Matter of Mallinckrodt, Tax Appeals Tribunal, November 12, 1992, relying on Estate of Quirk v. Commissioner, 928 F2d 751, 91-1 USTC ¶ 50,148).[3] Moreover, the Division, through the terms of the first stipulation which were repeated at hearing through the statements of its representative, made it absolutely clear that it was not raising the Article 9 assessment as an issue in this case. Under the circumstances, we conclude that the Division is bound by the clear and unambiguous terms of the stipulation (cf., Matter of J & L Home Improvement, Tax Appeals Tribunal, August 1, 1991 [a stipulation that the "ultimate issue" to be decided was whether petitioner was personally liable for sales tax indicated an intent by the parties that such liability would be the dominant issue but not the only issue and that petitioner could contest liability for penalty]).

The second prong of the Division's position is that the Administrative Law Judge erred in dismissing, as groundless, the Division's argument that "justice" requires that the Division be permitted to free itself from the terms of the stipulation. "Assuming the Division may be precluded by a stipulation from raising alternative arguments, justice requires that the Tax

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[2]While not at issue in this case, there are six other stipulations which were entered into by the parties, each of which served to narrow the issues in the case.

[3]In Quirk, the taxpayer stipulated that the discharge of his share of partnership indebtedness by the partnership resulted in a "distribution" to him. The Tax Court denied his petition. On appeal, the taxpayer claimed that the discharge of his indebtedness did not result in a "distribution" and that he should not be bound by his stipulation on this issue because the amount he received as a distribution for tax purposes was a question of law as well as of fact. The Court rejected the taxpayer's argument. Interpreting Tax Court Rule 91(e), the Court stated:

> "the Tax Court Rules of Practice and Procedure admonish litigants in that court that their stipulations generally will be treated as binding and conclusive (citing Rule 91[e]). Normally when a party wants to waive an argument or issue that might otherwise be litigated, the waiver can be accomplished by a stipulation which narrows the dispute. In fact, narrowing disputes to the essential disputed issues is the primary function of stipulations. It would seem that if parties could challenge their prior stipulations at will, stipulations would lose much of their purpose" (Estate of Quirk v. Commissioner, supra, 91-1 USTC ¶ 50,148 at 87,908).

Appeals Tribunal permit the Division to change the written Stipulation of Facts, by withdrawing the statement of legal position at issue: The Division 'does not assert any Tax Law Article 9 deficiency against Amherst, Comax or Ken-Ton for calendar years 1985 or 1986'" (Division's brief, p. 7). The Division argues that "the injustice of dismissing the Division's Article 9 claim on a procedural/pleading technicality is magnified by the result of discarding a very large amount of liability" (Division's brief, p. 9). The Division argues that its "Article 9 claim has been barred because of a strict pleading viewpoint that did not give proper weight to the extent to which jurisdictional and pleading documents have established an Article 9 case in considering whether to permit the Division to withdraw from the pleading statement placed in the Stipulation of Facts" (Division's brief, pp. 11- 12).

We do not agree. The issue here is not, as the Division asserts, a mere assertion of an alternative argument by the Division. The crux of the matter here is that the Division made a choice in litigation strategy to abandon the Article 9 assessment and to seek to apply our decision in Capital retroactively to petitioners and assess liability under Article 9-A. The Division made this choice with full knowledge of petitioners' argument that retroactive application was precluded by New York Law and presumably with knowledge of the Chevron Oil Co. v. Huson (404 US 97) principles we applied in NewChannels. In short, the Division knew the hazards of its position, i.e., that it could lose and be without recourse under Article 9. The fact that the issue of retroactivity was resolved first in NewChannels, rather than in this case, is of no moment and does not provide, as a matter of justice, any basis for the Division to reassert liability under a theory that it abandoned through the stipulation. Moreover, we find no basis in law to equate the dollar amount of the asserted liability to the principle of justice espoused by the Division as grounds to vacate the stipulation.

The third prong of the Division's argument is that:

> "[a]ssuming the stipulation cannot be modified, it does not follow that petitioner has no liability as an Article-9 taxpayer . . . . If the petitioner was not taxable under Article 9-A it had to be taxable under Article 9.

* * *

> "The ALJ determination would eliminate all the Article 9 deficiencies, even though petitioners have pleaded that they are Article 9 taxpayers, resulting in the extreme injustice of a taxpayer obtaining a huge windfall. The circumstances of this case do not support a need for applying such a requirement . . . . The petitioner is not now prejudiced by having to explain its legal position on this purely legal issue" (Division's brief, pp. 16-18).

The Division argues, in effect, that having failed to show proper reasons to permit this Tribunal to modify the stipulation, we should, nevertheless, modify the stipulation because unless we do so petitioners will not be subject to the Article 9 deficiencies which the Division agreed would not be asserted against petitioners.

We find no merit in the Division's argument.

First, petitioners are not getting a "free ride" as the Division implies. Petitioners paid taxes under Article 9 for the years at issue in accordance with the Division's 35-year old policy to treat cable television companies as Article 9 taxpayers. The only result of the determination of the Administrative Law Judge is to require the Division to adhere to the terms of the stipulation by which it agreed not to assert deficiencies under Article 9.

Second, this Tribunal is "responsible for providing the public with a just system of resolving controversies with [the Division] and to ensure that the elements of due process are present with regard to such resolution of controversies" (Tax Law § 2000). Since its creation in 1987, this Tribunal has been steadfast in its belief that the foundation of an equitable system of tax administration which respects and assists taxpayers and encourages full compliance with the Tax Law is the ability of taxpayers to reasonably rely upon communications and agreements with the Division.[4] The stipulation is a voluntary agreement between petitioners and the

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[4]See, Matter of Felix Indus. (Tax Appeals Tribunal, July 22, 1993 [Division failed to show fraud, malfeasance or misrepresentation of material fact and was, thus, bound by stipulation with taxpayer to discontinue proceeding]); Matter of D & C Glass Corp. (Tax Appeals Tribunal, June 11, 1992 [taxpayer entitled to rely upon notice of discontinuance of action issued by Division]); Matter of Kayton Specialty Shop (Tax Appeals Tribunal, January 17, 1991 [taxpayer entitled to rely upon agreement with the Division that penalty would be waived upon full payment of tax and interest]); Matter of Eastern Tier Carrier Corp. (Tax Appeals Tribunal, December 6, 1990 [taxpayer entitled to rely upon letter from Division that it would be entitled to a hearing before the Division would issue an assessment]); and Matter of Harry's Exxon (Tax Appeals Tribunal, December 6, 1988 [taxpayer entitled to rely upon letter from Division stating that sales tax audit was concluded and no additional sales tax was due]). See also, Matter of Mullin (Tax Appeals Tribunal, June 9, 1994 [taxpayer failed to show fraud, malfeasance or misrepresentation of material fact and was, thus, bound by stipulation with Division to discontinue proceeding]).

Division as to the issues to be litigated in this case. It is the product of the evaluation and acceptance by each party of the others' representations. Absent proof of fraud, malfeasance, misrepresentation of material fact or any other ground which would require this Tribunal, as a matter of justice, to permit the Division to modify the terms of the stipulation, petitioners are entitled to rely upon the representations of the Division as embodied in the stipulation.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

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

3. The petitions of Amherst Cablevision, Inc., Ken-Ton Cablevision, Inc. and Comax Telecom Corporation are granted; and

4. The notices of deficiency issued to Amherst Cablevision, Inc. and Ken-Ton Cablevision, dated October 30, 1987, January 4, 1989 and September 27, 1989 and the notices of deficiency issued to Amherst Cablevision, Inc., Ken-Ton Cablevision, Inc. and Comax Telecom Corporation, dated August 29, 1988, are cancelled.

DATED: Troy, New York
March 7, 1996

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner