STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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 Years 1985, 1986 and 1987. : :

DTA Nos. 808420 & 808458

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 Years 1985 and 1986. : :

Petitioners NewChannels Corporation and Upstate Community Antenna, Inc., c/o Paul Scherer & Company, 330 Madison Avenue, New York, New York 10017, each filed an exception to the determination of the Administrative Law Judge issued on July 16, 1992. Petitioners appeared by Morrison & Foerster (Hollis L. Hyans and Paul H. Frankel, Esqs. of counsel) and Paul Scherer & Company (Sheldon Singer, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq. of counsel).

Petitioners filed briefs in support of their exceptions. The Division of Taxation filed a reply brief. Oral argument, requested by petitioners, was heard on March 25, 1993. On July 6, 1993, the Tax Appeals Tribunal extended to both parties the opportunity to present their views, if any, with regard to the application of Harper v. Virginia Dept. of Taxation (___ US ___, 113 S Ct 2510) on the issues in this case. Both parties submitted comments (supplemental briefs) by the August 6, 1993 deadline established by the Tribunal. The six-month period for the issuance of the decision in this case will be measured from March 25, 1993, the date of the oral argument.

Petra Cablevision Inc., appearing by Shea & Gould (Roger Cukras, Esq., of counsel), filed a motion for leave to file an amicus curiae brief on exception on October 27, 1992. Both parties submitted letters stating therewas no objection to the motion. The Division of Taxation submitted a brief in response to the proposed amicus brief on March 2, 1993.

The Tax Appeals Tribunal has previously determined that it will look to the Rules of the Court of Appeals regarding amicus curiae relief in deciding such motions (Matter of The Racal Corp. & Decca Elecs., Tax Appeals Tribunal, May 13, 1993; Matter of Consolidated Edison Co. of New York, Tax Appeals Tribunal, May 28, 1992; Matter of Standard Mfg. Co., Tax Appeals Tribunal, July 11, 1991). The proposed amicus brief in this case meets the Court of Appeals' requirements as set forth in 22 NYCRR 500.11(e) in that it was received in time for the Tax Appeals Tribunal to consider it prior to oral argument and it is of special assistance to the Tribunal. The motion for Leave to Appear as Amicus Curiae is hereby granted.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUE

Whether the Division of Taxation properly determined that petitioners herein were corporations properly subject to corporation franchise tax pursuant to Article 9-A of the Tax Law.

FINDINGS OF FACT

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

On October 29, 1991, the parties entered into a stipulation of facts, one for each of the matters herein. However, said stipulations were identical and, as set forth below, applied to both matters. The stipulation is incorporated into the Findings of Fact below.

The parties to all matters herein stipulated that the business activity of Upstate Community Antenna, Inc. and NewChannels Corporation is identical in all material respects to the business activity described in Matter of Capitol Cablevision Sys. (Tax Appeals Tribunal, June 9, 1988).

Petitioners are domestic corporations formed in New York and during the years at issue had their sole places of business in New York State.

Petitioners' sole business during the years at issue was the provision of cable television service to customers, as more specifically described below.

Petitioners provide a monthly program package of television signals to their subscribers. This program package consists of, among other things, news, sports, movies, local origination programming and importing of distant signals. Petitioners' monthly fee is based on the provision of a variety of television channels and substantially all of their gross receipts are derived from the subscriber fees.

Petitioners initiate some programming at their offices. Petitioners also make the decision as to what distant signals to obtain. However, petitioners exercise no control over the distant provider's broadcast. The television signals are received by petitioners 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.

Petitioners provide essentially the same type of product as that provided by broadcast television. However, since petitioners utilize approximately 35 channels, they can offer more variety than a network affiliate. Both petitioners and broadcast television stations transmit their product. Petitioners, however, transmit their product by cable, while broadcast television transmits its product through the airways. Petitioners' 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 "black out" rules) and protection from competition from cable television.

MATTER OF NEWCHANNELS CORPORATION

On August 18, 1989, the Division of Taxation (hereinafter the "Division") issued to NewChannels Corporation three statements of audit adjustment for the years 1985, 1986 and 1987. The statements contained the following information:

PERIOD ENDED	TAX DEFICIENCY	INTEREST	ADDITIONAL CHARGE	TOTAL
12/31/85	$ 826,597.00	$168,600.02	$108,134.11	$1,103,331.13
12/31/86	1,149,157.00	176,578.89	126,338.25	1,452,074.14
12/31/87	1,378,801.00	134,269.67	114,288.39	1,627,359.06

For each of the years in issue, credit was given for tax paid with returns filed pursuant to Tax Law Article 9, sections 183 and 184. Each of the three statements of audit adjustment also contained the following explanation:

> "Estimated Deficiency. The above estimated deficiency was issued since the reports requested in our correspondence dated November 1, 1988 were not received."

Also on August 18, 1989, the Division issued to NewChannels Corporation three notices of deficiency under Article 9-A of the Tax Law which set forth the same amount of tax, interest and additional charges as stated on the statements of audit adjustment. Credit was given for tax paid pursuant to Article 9, sections 183 and 184 of the Tax Law on each of the notices as well.

Petitioner and the Division executed a consent extending the period of limitation for assessment of franchise taxes under Article 9-A of the Tax Law with regard to the year 1985 permitting the Division to assess at anytime on or before September 15, 1989.

Consistent with petitioner NewChannels Corporation's position that it was an Article 9 transportation and transmission corporation, it filed Form CT-183, Franchise Tax Report on Capital Stock by Transportation and Transmission Corporations and Associations, and Form

CT-184, Franchise Tax Report on Gross Earnings by Transportation and Transmission Corporations and Associations, for each of the years in issue, i.e., 1985, 1986 and 1987.

MATTER OF UPSTATE COMMUNITY ANTENNA, INC.

On June 14, 1989, the Division issued to Upstate Community Antenna, Inc. two statements of audit adjustment which set forth the following:

PERIOD ENDED	TAX DEFICIENCY	INTEREST	ADDITIONAL CHARGE	TOTAL
12/31/85	$100,000.00	$18,380.00	$ -0-	$118,380.00
12/31/86	135,000.00	17,908.93	-0-	152,908.93

For each of the years in issue, a credit was given for tax paid by petitioner with its franchise tax report on capital stock, CT-183, and franchise tax report on gross earnings, CT-184, filed by transportation and transmission corporations and associations.

An explanation appeared on both statements, identical in content, as follows:

> "The above deficiency is being issued for failure to send the tax forms requested in our correspondence dated 10/25/88 and 4/1/89."

Also on June 14, 1989, the Division issued to Upstate Community Antenna, Inc. two notices of deficiency under Article 9-A of the Tax Law setting forth the identical amount of tax, interest, additional charge and total due as set forth on the statements of audit adjustment for the same tax years. Once again, credit was given for tax paid by petitioner with its CT-183 and CT-184 for the years in issue.

The parties herein executed a consent extending the period of limitation for assessment of corporation tax under Article 9 of the Tax Law for the year 1985 permitting the Division to assess said tax at any time on or before June 15, 1989.

On February 28, 1989, the Division received a claim for credit or refund of corporation tax paid on behalf of Upstate Community Antenna, Inc. for the year 1985. Petitioner explained that it was filing this refund application as a precautionary measure in case the State prevailed in its position that the taxpayer was subject to franchise tax under Article 9-A.[1]

OPINION

The Administrative Law Judge found our decision in Matter of Capitol Cablevision Sys. (supra) controlling on the issue of whether petitioners should be deemed transmission companies and taxed under Article 9 of the Tax Law or business corporations taxed under Article 9-A of the Tax Law. The Administrative Law Judge concluded that:

> "[j]ust as the Tribunal decided in 1988 that Capitol Cablevision would be subject to Article 9-A franchise tax for the years 1976 through 1979, it was proper for the Division of Taxation to determine that [petitioners] be deemed Article 9-A corporations for the years 1985, 1986 and 1987 [cite omitted]. Furthermore, once retroactive application has been chosen for any new rule (categorization of cable companies as Article 9-A companies) it has been chosen for all those who might seek its prospective application (Duffy v. Wetzler, 174 AD2d 253, 579 NYS2d 684, 689)" (Determination, p. 9).

The Administrative Law Judge sustained the deficiencies asserted against petitioners for the years at issue, including the penalty asserted by the Division.

We deal first with the issue of whether petitioners are transmission companies and taxable under Article 9 of the Tax Law as they assert or business corporations subject to tax under Article 9-A.

Petitioners assert that we should accord the ordinary dictionary meaning to the term "transmission business" and that under such definition petitioners' business of transmitting cable television makes them clearly transmission businesses.[2]

Petitioners assert further that even "if it was not entirely clear that the commonly understood meaning of the term 'transmission business' was broad enough to include petitioner's

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[1]It is noted that the package of submitted documents does not contain the Form CT-183 for the year 1985, the franchise tax report on capital stock. However, neither party has raised this omission as an issue.

[2]In their briefs, petitioners refer us to several dictionary definitions of transmission (see, Petitioners' briefs, p. 9).

business of transmitting cable television programs to its customers," the statute should be liberally construed in favor of petitioners and petitioners should still be considered transmission businesses (Petitioner Upstate's brief, p. 11).

Addressing our decision in Capitol Cablevision, petitioners assert that:

> "[t]his holding was based, in part, on the Third Department's decision in New York State Cable
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> Television Ass'n v. State Tax Comm'n, 59 A.D.2d 81, 397 N.Y.S.2d 205 (3d Dep't 1977), aff'g, 88 Misc. 2d 601, 388 N.Y.S.2d 560 (Sup. Ct. Albany Co. 1976). That decision held that receipts received by cable television companies were not subject to sales tax as receipts received from the sale of telephony or telegraphy nor as the sale of telephone or telegraph services because telephony or telegraphy were only an incidental aspect of the service provided . . . .
>
> "It is important to note that the sales tax statute in issue in New York State Cable Television Ass'n did not provide for the taxation of receipts received from the sale of a transmission service. Thus, while the decision in New York State Cable Television Ass'n did hold that telephony and telegraphy were an incidental aspect of cable television service, the decision did not address whether transmission was an incidental aspect of cable television service.
>
> "Based on New York State Cable Television Ass'n, the Tribunal concluded in Matter of Capitol Cablevision that the taxpayer's business was selling television entertainment to subscribers and that transmission was 'merely the means by which the [taxpayer] conveys its product to its customers, it is not the [taxpayer's] business.' 1988-1 N.Y.T.C. at T-130. This conclusion, however, does not take into consideration the fact that while telephony and telegraphy are incidental to the provision of cable television service, transmission is certainly not incidental to the provision of such service. In fact, as previously stated, transmission is the essential part of Petitioner's business. Without the transmission of the various network programs, movie channels, sports channels, and miscellaneous channels (which is, after all, why people pay for 'cable' -- they certainly don't pay for local programming) to its customers, those customers would not receive those programs and Petitioner would have no business at all.
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> "Thus, the Tribunal's conclusion in Matter of Capitol Cablevision, that a corporation which transmits television programs to customers by cable is not engaged in the conduct of a transmission business, is incorrect because it does not take into consideration the fact that transmission is the substantial (as opposed to incidental) component of Petitioner's business. The decision in Matter of Capitol Cablevision should therefore be overturned" (Petitioner NewChannels' brief, pp. 12-14).

Next, petitioners assert that even if our decision in Capitol Cablevision is correct, it does not prevent our finding that petitioners were engaged in the conduct of a transmission business. Petitioners offer the following reasoning to support their conclusion:

> "[t]he Tribunal stated that it was 'further compelled to find for the [taxpayer] because of the vagueness of the statute itself.' 1988-1 N.Y.T.C. at T-131. Since the statute was, and continues to remain, vague, the Tribunal resolved its doubt in favor of the taxpayer and determined that the taxpayer was not engaged in the conduct of a transmission business. It is important to note that had the Tribunal been free from doubt with its conclusion that the taxpayer in Matter of Capitol Cablevision was not engaged in the conduct of a transmission business, it would have been unnecessary to cite to the vagueness of the statute and continue with its analysis.
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> "As previously stated, it is more beneficial for Petitioner to be considered to be engaged in the conduct of a transmission business. Certainly the vagueness that 'compelled' the Tribunal to hold in favor of the taxpayer in Matter of Capitol Cablevision should likewise permit it to hold in favor of Petitioner in this instance" (Petitioner NewChannels' brief, pp. 14-15).

The Division argues that the determination of the Administrative Law Judge is correct in all respects. The Division asserts that "[u]nlike the Division, petitioners have the right to challenge in court the Tribunal's decision as to the franchise tax status of cable television companies. Thus, there is no compelling reason why the Tribunal should reconsider its decision in Capitol Cablevision" (Division's Brief, p. 4). The Division goes on to assert that:

> "if the Tribunal were to reconsider its decision in Capitol Cablevision in the absence of any new case law on point, the administration of franchise tax in regard to cable television companies would be thrown into chaos . . . no cable television company could be sure of its franchise tax status . . . if there is doubt as to the validity of the Tribunal's decision in Capitol Cablevision that doubt will be most expeditiously resolved by the filing of an Article 78 petition by the petitioners . . ." (Division's Brief, p. 4).

The Division concludes by asserting that our decision in Capitol Cablevision was reasonable and supported by relevant case law.

We find the reasons offered by petitioners less than persuasive for us to conclude that our decision in Capitol Cablevision was incorrect, or if correct, that we should reach a different result for petitioners (see, Matter of Field Delivery Serv. v. Roberts, 66 NY2d 516, 498 NYS2d

111 [when an agency determines to alter its prior stated course, it must set forth its reasons for doing so]).

The crux of petitioners' argument is that: transmission is different from telegraphy or telephony; transmission was not at issue in New York State Cable Tel. Assn. v. State Tax Commn. (supra); that case held only that telegraphy or telephony were an incidental aspect of cable television; the case did not address the issue of whether transmission was an incidental aspect of cable television; and, thus, we were wrong to rely on the case to conclude that Capitol sold entertainment and that transmission was only an incidental aspect of the service, the means by which it conveyed the product to its customers.

Petitioners misunderstand the reasoning underlying our conclusion in Capitol Cablevision; specifically our reference to New York State Cable Tel. Assn. v. State Tax Commn. (supra). The core issue in Capitol Cablevision was the characterization of the cable television business for purposes of the corporate franchise tax. We stated that:

> "[i]t 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 [cites omitted]" (Matter of Capitol Cablevision Sys., supra, emphasis added).

We relied on New York State Cable Tel. Assn. for the guidance it provided in characterizing the business of cable television as one of selling entertainment and not one of selling telegraphy or telephony. In so doing, it was clear that we recognized that the characterization was in the context of the sales tax as applicable to telegraphy or telephony. As we stated in Capitol Cablevision:

> "[c]able television has already been subjected to this type of analysis, for sales tax purposes, in New York State Cable Tel. Assn. v. State Tax Commn. . . . 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" (Matter of Capitol Cablevision Sys., supra, emphasis added).

Using the court's analysis of the business of cable television, we concluded that:

> "[Capitol'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. [Capitol] originates programming towards this same goal. Transmission is merely the means by which [Capitol] conveys its product to its customers, it is not [Capitol's] business" (Matter of Capitol Cablevision Sys., supra, emphasis added).

We find no reason to conclude, as petitioners assert, that our decision in Capitol Cablevision was incorrect because of our reliance on New York State Cable Tel. Assn. for guidance; nor are we persuaded that our decision should in anyway be changed.

We deal next with petitioners' alternative argument that Capitol Cablevision should not be applied on a retroactive basis. In their brief on exception, petitioners rely on Chevron Oil Co. v. Huson (404 US 97), where the United States Supreme Court established a three-factor test for the nonretroactivity of judicial decisions.

Petitioners assert that the decision in Capitol Cablevision meets the first Chevron test in that it established a new principle of law by overruling clear, past precedent which existed for over 30 years and upon which petitioners relied in filing their returns and paying their tax for the years in issue.

Petitioners assert they meet the second test in that:

> "[a]pplying the . . . new interpretation retroactively would send an ominous signal to all taxpayers concerning their ability to rely on Division of Taxation interpretations and on established rules. Not only would corporate taxpayers be exposed to unexpected and potentially large tax liabilities for all open years, but they would also be deprived of the certainty necessary to conduct their business affairs in an orderly manner. Such a consequence would assuredly retard the operation of the Tax Law and should not be permitted" (Petitioners' Brief on Exception, p. 20).

They meet the third test, petitioners assert, because "[i]t is hard to imagine a clearer case where the equities dictate in favor of a finding of no retroactivity" (Petitioners' Brief on Exception, p. 21). The crux of petitioner's argument is that it would, unexpectedly, have to pay more taxes. Moreover, petitioners assert that the effect of retroactive application will be uneven among taxpayers. Petitioners refer us to the words of Justice Scalia in Quill Corp. v. North

Dakota (___ US ___, 112 S Ct 1904, 1924) that "we ought not visit economic hardship upon those who took us at our word."

In their supplemental brief, petitioners assert that Harper v. Virginia Dept. of Taxation (___ US ___, 113 S Ct 2510) does not impact the present case because there is no Federal constitutional question at issue. Petitioners' reassert their argument that for the years at issue they were entitled to rely on the Division's 35 year policy of requiring cable companies to file as Article 9 taxpayers.

Finally, petitioners assert that no grounds exist for the imposition of penalty for the years at issue since petitioners were merely following the policy of the Division that cable companies file under Article 9 of the Tax Law.[3]

The amicus brief urges that cable companies were entitled to rely on the Division's long-standing policy that they were required to file under Article 9 of the Tax Law and that any change in such policy, even if brought about by a decision of the Tribunal, should not be retroactively applied by the Division. The amicus brief relies on Matter of Howard Johnson Co. v. State Tax Commn. (65 NY2d 726, 492 NYS2d 11), Hoffman v. City of Syracuse (2 NY2d 484, 161 NYS2d 111) and Matter of Friesch-Groningsche Hypotheekbank Realty Credit Corp. v. Tax Appeals Tribunal (185 AD2d 466, 585 NYS2d 867, lv denied 80 NY2d 761, 592 NYS2d 670).

The amicus also asserts that the "authorities with respect to the retroactive effect of legislation also support the conclusion that the [Division] cannot apply Capitol Cablevision to require cable television companies to pay more franchise taxes for periods ending prior to the Capitol Cablevision decision" (Amicus Brief, p. 8).

The Division asserts that the general rule in civil cases is that:

> "a court decision is applied retroactively unless a compelling judicial reason exists for not doing so. James Bean Distilling Co. v Georgia, 501 US ___, 115 L Ed 2d 481; People v Loria, 10 NY2d 368. . . . [and that while there] are exceptions to the general rule of retroactivity . . . limiting the precedential significance of a decision to future cases only . . . is an exceptional expedient used only when traditional

[3]Penalty was only asserted against petitioner NewChannels Corporation.

> retroactivity would wreak more havoc than society's interest in stability will tolerate [cite omitted]. The conditions for limiting the precedential significance of the Tribunal's decision in Capitol Cablevision do not exist in the present matters [since] there has been no unexpected change in law. Nor is this [a] case where retroactive application of a rule will retard its operation. Most crucially, even if the assessments in question represent in some sense a retroactive reclassification of petitioners' franchise tax status, there are compelling equitable reasons why it is proper to make such a reclassification. In sum, there is nothing unfair or unconstitutional in classifying petitioners as Article 9-A taxpayers" (Division's Brief, pp. 10-11).

The Division asserts further that in Capitol Cablevision we determined that the Division policy of requiring cable companies to file as Article 9 was ultra vires and that there:

> "is clear precedent for the proposition that it is not improper for an administrative [agency] to change, even in a retroactive manner, a policy or rule which is ultra vires. The decision in Manhattan Cable Tel. v. State Tax Commn., 137 AD2d 925, is on point in this regard" (Division's Brief, p. 13).

The Division goes on to assert "[t]here is no proof in the record that petitioners relied on the [Division's] prior policy of classifying cable television companies as Article 9 taxpayers. However, even if such reliance existed, it would not be reasonable" (Division's Brief, p. 15). On this point, the Division asserts that the 1976 decision of the Appellate Division in New York State Cable Tel. Assn. v. State Tax Commn. (supra) "was a clear portent that the Division's policy of classifying cable television companies as Article 9 taxpayers was no longer viable" (Division's Brief, p. 16).

Finally, the Division, referring to the three-part test in Chevron, asserts that: "[p]etitioners have not explained how retroactive application of the Capitol Cablevision decision would retard its operation. In fact, equity requires retroactive application in this case" (Division's brief, p. 18).

In its brief in response to the amicus brief, the Division asserts that: "[t]he basic premise of [the amicus brief] is that the Division has changed its policy. It has not done so. It is merely complying with the law as interpreted by an adjudicative body, the Tax Appeals Tribunal" (Division's response to amicus curiae brief, p. 4). The result of Capitol Cablevision, the Division asserts, is the same as the result of Matter of Manhattan Cable Television v. New York

State Tax Commn. (137 AD2d 925, 524 NYS2d 889, appeal dismissed 72 NY2d 839, 530 NYS2d 554), where the Court ruled the Division's regulation was invalid ab initio and could not be relied upon by the taxpayer, i.e., its prior position was invalid and, therefore, could not be binding upon any party.

The Division goes on to assert that "any limitations on . . . [an] administrative agency's right to retroactively change past policy has no application to the present matters because the old policy was based on different facts" (Division's response to amicus curiae brief, p. 8). The gist of the Division's argument is that the cable television business has developed over the years such that the industry as it existed at the time of Capitol Cablevision was substantially different than the industry to which the 1953 Opinion of Counsel was directed. The Division concludes, stating that:

> "the doctrine of stare decisis does not apply where an administrative body considers new and substantial evidence [cite omitted]. Since the Tribunal decision in Capitol Cablevision is based on new facts, there is absolutely nothing improper to applying the holding of that case to similarly situated taxpayers for the years subsequent to the years litigated in the Capitol Cablevision case" (Division's response to amicus curiae brief, p. 11).

Finally, the Division asserts that the case law relevant to the retroactivity of legislative changes and to retroactive changes made by administrative agencies is not relevant to this matter since the change in policy here is brought about by the decision of the Tribunal, not by the Division changing its policy or the Legislature changing its policy via statutory amendment.

In its supplemental brief, the Division states that:

> "[t]he issued raised in NewChannels Corporation is whether the Article 9-A franchise tax should be imposed retroactively on petitioners. Since this issue involves a question of state law (the application of Article 9-A), the Harper ruling would not apply since Harper applies to rules of federal law only. Nevertheless, Harper does have some relevance to the present matters in that the U.S. Supreme Court also vacated the Appellate Division's decision in Duffy v Wetzler in light of Harper 161 USLW 3863" (Division's supplemental brief, p. 2).

We reverse the determination of the Administrative Law Judge.

While we agree with the Division that our decisions are to be applied retroactively unless there is a compelling reason for not doing so, we reject the Division's assertion that such reasons are not present in this case.

We find reference to Chevron particularly instructive in the case at hand. There, the Supreme Court was faced with the same basic issue as we face in the instant case, that is, whether to apply its decision in Rodrigue v. Aetna Cas. & Sur. Co. (395 US 352), to the plaintiffs in Chevron.

In Chevron, the plaintiff was injured while working on an artificial island drilling rig. Plaintiff instituted, in Federal District Court, a personal injury action some two years after the injury was sustained. The action was timely under the Federal law prevailing at the time. It would have been untimely under the applicable State law because Louisiana had a one-year statute of limitations for such actions. While the personal injury suit was pending, the United States Supreme Court, in Rodrigue v. Aetna Cas. & Sur. Co. (supra) determined that in suits of this type, the Federal law (i.e., the Death on the High Seas Act), was inapplicable and that its inapplicability removed any obstacle to the application of Louisiana law. Relying on this decision, the District Court in Chevron held that Louisiana's one-year statute of limitations on personal injury actions governed and barred the action.

The case made its way back to the Supreme Court where the issue before the Court was whether its decision in Rodrigue should be applied retroactively to the plaintiff in Chevron. The Court reviewed the factors considered in its cases dealing with the nonretroactivity question and concluded that the Louisiana one-year statute should not be applied retroactively since the Rodrigue case was a case of first impression which effectively overruled a long line of decisions to the effect that the State statute of limitations was not applicable. The Court summarized the criteria for the nonretroactivity of judicial decisions as follows:

> "[f]irst, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied [cite omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [cite omitted]. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the

> rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation' [cite omitted]. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity' [cite omitted]" (Chevron Oil Co. v. Huson, supra, at 106-107).

The Chevron analysis has been adopted by the New York Court of Appeals. The Court of Appeals applied Chevron in Gager v. White (53 NY2d 475, 442 NYS2d 463, cert denied sub nom Guertin Co. v. Cachat, 454 US 1086) and stated:

> "where there has been . . . a sharp break in the continuity of law that its impact will 'wreak more havoc in society than society's interest in stability will tolerate' [cite omitted], it is now recognized that, when adherence to the traditional course [i.e., retroactive application of the decision] is strongly contraindicated by powerful factors, including strong elements of reliance on law superseded by the new pronouncement, a court may direct that it operate prospectively alone (Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296; Great Northern Ry. v. Sunburst Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360)" (Gager v. White, supra, 442 NYS2d 463, 466).

Further, the Court of Appeals' adoption of the Chevron analysis to resolve State issues of retroactivity is not affected by the Supreme Court's decision in Harper because Harper is limited to questions of Federal law (Harper v. Virginia Dept. of Taxation, supra).

We find that the application of the criteria in Chevron to the case at hand indicates that the decision in Capitol Cablevision should not be applied retroactively.[4]

First, the 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

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[4]The fact that the action in Chevron was pending when Rodrigue was issued by the Court and that here there was no pending action when we issued Capitol Cablevision is not relevant. Practically speaking, there could not be an action because the petitioners were in compliance with the Division's policy. This compliance is similar to Chevron in the sense that there the plaintiff was in compliance with the Federal law when plaintiff instituted the personal injury action.

under Article 9 of the Tax Law. Clearly, this was a policy that petitioners relied upon since they filed under Article 9 for the years at issue.

It also cannot be said that the result in Capitol Cablevision was "clearly foreshadowed," i.e., that petitioners did or could foresee that this consistent policy of the Division would be overturned. In this context, we explicitly reject the Division's assertion that the 1976 decision in New York State Cable Tel. Assn. v. State Tax Commn. (supra) "was a clear portent that the Division's policy of classifying cable television companies as Article 9 taxpayers was no longer viable" (Division's Brief, p. 16). The case did not deal with the issue at hand, i.e., franchise tax liability of the cable television company, but instead with the issue of whether charges by such companies to consumers were subject to sales tax. Moreover, it hardly seems appropriate to charge petitioners here with knowledge that a policy was not "viable" when the Division itself continued to enforce it for eleven more years and continued to support it even when challenged directly in Capitol Cablevision. It seems clear to us that the most petitioners could do was comply with the policy.

Second, the purpose of this Tribunal is to provide the public with a just system for the resolution of controversies with the Division and to ensure that the elements of due process are present in such system (Tax Law § 2000). 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. Weighing the merits and demerits, we fail to see how retroactive operation of that new status will further either the purpose of the new rule or the purpose of the Tribunal's job of rendering just decisions; nor how prospective-only operation of the decision will, in any way, undermine the effect of the new rule or the Tribunal's ability to administer a just system of dispute resolution. We agree with petitioners' statement that:

> "[a]pplying the . . . new interpretation retroactively would send an ominous signal to all taxpayers concerning their ability to rely on Division of Taxation interpretations and on established rules. Not only would corporate taxpayers be exposed to unexpected and potentially large tax liabilities for all open years, but they would also be deprived of the certainty necessary to conduct their business affairs in an orderly manner. Such a consequence would assuredly retard the operation of

> the Tax Law and should not be permitted" (Petitioners' Brief on Exception, p. 20).

Finally, on the last criterion of Chevron, the weighing of the equities, we conclude the equities balance in favor of petitioners who acted in good faith in reliance on a policy which the Division enforced consistently for over thirty-five years; a policy which petitioners could not have reasonably anticipated would be invalidated, and a policy which the Division clearly deemed proper given its position in Capitol Cablevision.

We next address the Division's assertion that the result in Capitol Cablevision is the same as the result in Matter of Manhattan Cable Television v. New York State Tax Commn. (supra), where the Court ruled that the Division's regulation was invalid ab initio and could not be relied upon by the taxpayer, i.e., the Division's prior position was invalid and, therefore, could not be binding upon any party. The significant difference between Capitol Cablevision and Manhattan Cable is that in Capitol Cablevision the Division stood behind a 35-year policy which had not been challenged. In Manhattan Cable, the issue of the sales tax liability for the service provided by cable television companies was challenged from the time it was announced by the Division and the regulation granting the concomitant exemption for equipment purchased to provide such taxable service was short lived.[5]

Next, while we agree with the Division that the case law concerning the retroactive effect of changes in policy made by administrative agencies may not be directly applicable to the case at hand, we find Hoffman and Howard Johnson instructive in evaluating the merits of the Division's policy to apply our decision in Capitol Cablevision retroactively.

First, we find persuasive the fact that any effort by petitioners to file as Article 9-A taxpayers would have been opposed by the Division just as they opposed the Capitol

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[5]For similar reasons, we would also distinguish People ex rel. Rice v. Graves (270 NY 498, cert denied 298 US 683), a case not relied upon by either party, from Capitol Cablevision. In Rice, the State had taxed copyright royalties for a period of ten years before the United States Supreme Court, in 1928, declared the tax unconstitutional. Four years later, in 1932, the Supreme Court reversed its decision. Under these circumstances, the New York Court of Appeals sustained the Tax Commission's recalculation of the taxpayer's income tax.

Cablevision filing. In this respect, the situation is similar to that in Hoffman v. City of Syracuse (supra), where the Court stated:

> "it hardly needs statement that the city is not entitled to hold the liquor dealers liable for the higher sales tax which they could have charged and collected, had the commissioner not directed a contrary course of action during the period. Since . . . the vendors were actually prohibited from charging their customers a sales tax based on inclusion of the excise taxes, it would be unthinkable to hold them responsible for the larger amounts they would have collected had they, contrary to the city's direction, included excise taxes [cite omitted]. In other words, since the city required plaintiffs to charge and collect sales taxes on the selling price of the liquor, less excise taxes, between 1952 and October 1, 1955, it would be estopped from asserting any claim for additional taxes that might otherwise have accrued against them during that period" (Hoffman v. City of Syracuse, supra, 161 NYS2d 111, 116).

Second, in Matter of Howard Johnson Co. v. State Tax Commn. (supra), the Court, confronted with efforts by the Tax Commission to retroactively repeal a long-standing Department policy, concluded simply that:

> "[t]he record makes it abundantly clear the Commissioner has consistently for more than 20 years, interpreted the statute to mean that short-term notes of the kind in issue here are investment capital and the income earned from them investment income (see, letter of Commissioner Joseph Murphy, dated June 6, 1962, Appellants Brief, at A-5-6; Matter of Diamond Intl. Corp., 5 CCH New York State Tax Rptr. [Transfer Binder 1966-1968], ¶ 98-933 [State Tax Commn Dec. 1, 1967]). Petitioner was entitled to rely on the Commissioner's interpretation, therefore, and respondent's contrary interpretation of the statute in this case was arbitrary and capricious" (Matter of Howard Johnson Co. v. State Tax Commn., supra, 492 NYS2d 11, 11).

Accordingly, we conclude that our decision in Capitol Cablevision should not be applied retroactively to petitioners herein.[6]

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of NewChannels Corporation and Upstate Community Antenna, Inc. are granted;

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

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[6]This conclusion makes it unnecessary for us to consider the issue of penalty asserted against petitioner, NewChannels. Neither do we have to deal with the Division's assertion that our decision in Capitol Cablevision determined that the Division's interpretation was ultra vires, i.e., beyond the Division's power. Simply stated, we did no such thing.

3. The petitions of NewChannels Corporation and Upstate Community Antenna, Inc. are granted; and

4. The notices of deficiency, dated August 18, 1989, to NewChannels Corporation and the notices of deficiency, dated June 14, 1989, issued to Upstate Community Antenna, Inc. are cancelled.

DATED: Troy, New York
September 23, 1993

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

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