

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
MOHASCO CORPORATION :
for Redetermination of Deficiencies or for :
Refund of Corporation Franchise Tax under :
Article 9-A of the Tax Law for the Years 1984 :
through 1986. :

DECISION
DTA Nos. 808901
and 808956

In the Matter of the Petition :
of :
MOHASCO CARPET CORPORATION :
for Redetermination of Deficiencies or for :
Refund of Corporation Franchise Tax under :
Article 9-A of the Tax Law for the Years 1984 :
through 1986. :

Petitioners Mohasco Corporation and Mohasco Carpet Corporation, 4401 Fair Lakes Court, Fairfax, Virginia 22033, and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on May 27, 1993. Petitioners appeared by Philip J. Vecchio, Esq. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

The Division of Taxation and petitioners filed briefs in support of their exceptions, in opposition to the other party's exception and reply briefs. Oral argument, at both parties' request, was heard on May 19, 1994, which date began the six-month period to issue this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Division of Taxation properly denied petitioners' permission to file combined franchise tax reports for the years 1983, 1984 and 1985.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "4" which has been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional findings of fact are set forth below.

Petitioner Mohasco Corporation ("Mohasco") filed combined franchise tax reports with its subsidiary, petitioner Mohasco Carpet Corporation ("Carpet"), for the years 1984, 1985 and 1986.

The Division of Taxation ("Division") conducted an audit of the combined franchise tax reports of Mohasco and Carpet over the course of five days at Mohasco's offices in Fairfax, Virginia. In total, the auditor attributed 62 hours to the conduct of the audit at issue herein. Of the total number of hours charged to the audit, 57 hours were charged to Mohasco and 5 hours were charged to Carpet. In the course of the audit, the auditor reviewed petitioners' New York returns, Federal consolidated returns, allocations, workpapers, supporting documents for the returns and annual reports. The auditor was not denied access to any documents he requested.

During the audit, the auditor ascertained that Mohasco did not engage in advertising or distributing of goods on behalf of Carpet. Further, it was the auditor's understanding that Mohasco did not purchase goods or products from Carpet or finance sales of Carpet. Lastly, the auditor did not see any indication that Mohasco engaged in product design or research and development on behalf of Carpet.

We modify the Administrative Law Judge's finding of fact "4" to read as follows:

The auditor found that more than 95% of Mohasco's income was derived from dividends. The precise figures for the years in question are as follows:

Dividend Income

Total Income

1984	\$43,862,735.00	\$41,480,935.00 ¹
1985	27,472,944.00	27,689,769.00
1986	26,021,752.00	26,323,663.00 ²

The auditor did not examine intercompany charges because the amount of these charges was not considered substantial in comparison to the total deductions reported on the returns.

During the audit, the auditor found that in 1980 the Division made a determination that Mohasco was required to file a combined report with four other subsidiaries. At the time the Division made this determination, Mohasco was engaged in manufacturing or other business activities and Carpet did not exist.

The Division ascertained that the taxpayers did not receive permission to file a combined report for the years in issue. The Division also found that, although Mohasco had a number of other first-tier subsidiaries, only Carpet was included with Mohasco on the combined reports during the years in issue.

At the conclusion of the audit, the Division determined that petitioners improperly filed a combined report for two reasons. First, the Division concluded that petitioners had failed to obtain permission. The Division also concluded that the parent and subsidiary did not constitute a unitary business and that there was an absence of substantial intercorporate transactions. The auditor reached the conclusion that there was an absence of substantial intercorporate transactions from a review of the Federal return. This finding was also based on the observation that the income which Mohasco received was predominantly dividends. The conclusion that the activities of Mohasco and Carpet did not constitute a unitary business was

1

Losses reported on the return resulted in total income being lower than dividend income.

2

We modified the first sentence of the Administrative Law Judge's finding of fact "4" by changing the word "corporations" to "Mohasco's" to more accurately reflect the record.

based on the Division's finding that Mohasco was a holding company and Carpet was an operating company.

On the basis of the foregoing audit, the Division recalculated Carpet's tax liability as if it had filed separate returns and issued a series of notices of deficiency as follows:

<u>Date of Notice</u>	<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
July 10, 1989	December 31, 1984	\$18,334.00	\$9,264.00	\$27,598.00
July 10, 1989	December 31, 1985	3,252.00	1,103.00	4,355.00
July 10, 1989	December 31, 1986	2,904.00	635.00	3,539.00

The Division also issued a series of notices of deficiency to petitioner Mohasco as follows:

<u>Date of Notice</u>	<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
August 15, 1989	December 31, 1984	\$29,762.00	\$15,491.00	\$45,253.00
August 15, 1989	December 31, 1985	47,922.00	16,895.00	64,817.00
August 15, 1989	December 31, 1986	25,360.00	5,858.00	31,218.00

After the foregoing notices were issued, the amount of tax asserted to be due from Carpet was adjusted by a Conciliation Order issued by the Bureau of Conciliation and Mediation Services. The recalculation of tax was attributable to the Division's acceding to a request for a net operating loss carryback for Carpet. The tax currently asserted to be due from Carpet is \$4,429.00, \$3,252.00 and \$2,904.00 for the years 1984, 1985 and 1986, respectively.

Prior to the formation of Carpet in 1983, Mohasco manufactured carpeting which it sold through subsidiaries.

In 1983, Mohasco created Carpet as a wholly-owned subsidiary pursuant to Internal Revenue Code § 351. The reason for the corporate reorganization was to save corporate franchise taxes in the states of Texas and Mississippi. It was also thought that it would be conducive to a proper allocation of costs.

After the reorganization, the business practices between Mohasco and Carpet remained the same in that, when Carpet was a division or profit center, it was charged with a corporate

burden. After Carpet became a separate entity, it continued to be charged with a corporate burden in the same way as when it was part of Mohasco.

Over time, Mohasco purchased carpet distribution companies from individuals who wished to retire because Mohasco viewed it as profitable to purchase a company rather than lose a distribution point. Normally, the person who served as comptroller and/or office manager of the carpet distribution company went along with the company and became a part of the Mohasco organization.

At the end of 1984, all of the distributors were merged into Carpet. The latter mergers also did not bring about a change in operations or personnel procedure. However, it did result in a small reduction in staff.

The reason Mohasco included Carpet in its combined report and excluded the other subsidiaries was because Carpet had always been included in the combined group and, as far as Mohasco was concerned, nothing had changed.

Uniform administrative policies of Mohasco and its subsidiaries were established by Mohasco's corporate officers. These policies were always carried out because a majority of the directors of Mohasco's subsidiaries were also officers or directors of Mohasco. Uniform policies involved taxes and risk management. Mohasco did not set policies regarding daily operations of subsidiaries.

One uniform administrative policy concerned capital acquisition. When a subsidiary wished to make a capital expenditure of over \$2,500.00, it was required to submit an appropriation request to Mohasco. The appropriation request was then reviewed by various departments of Mohasco.

Mohasco was not involved in hiring the manufacturing people who worked in the factories. However, the interviews of officers or high-level professionals would be carried out at Mohasco's headquarters.

Mohasco acted as the conduit of all debt incurred for large capital transactions. Mohasco borrowed the funds from third parties as needed to fund the operations of the subsidiaries.

Mohasco also acted as the conduit for all cash receipts of the subsidiaries through a "locked box" system. These funds were fully accounted for, and remained the property of the subsidiary on whose behalf they were received. On an as-needed basis, Mohasco transferred these funds to the bank accounts of the respective subsidiaries through wire transfers. In essence, Mohasco served the working capital needs of the group from this pool of funds by acting as a "bank" or clearinghouse for all of its first and second-tier subsidiaries.

The following schedule reflects the percentage of service and interest revenue from Carpet to total business receipts earned by Mohasco and the actual percentage of service and interest revenue from all subsidiaries to the total business receipts earned by Mohasco for each year:³

Gross-up of business receipts	<u>1986</u>	<u>1985</u>	<u>1984</u>
Gross royalties	\$ 103,774.00	\$ 114,349.00	
Net gain	575.00	700.00	\$ 5,720.00
Other income	35,710.00	17,335.00	52,178.00
Service Revenue	8,122,000.00	8,232,000.00	7,124,000.00
Interest on working capital	<u>6,372,258.00</u>	<u>6,374,432.00</u>	<u>6,395,057.00</u>
Total business receipts	<u>\$14,634,317.00</u>	<u>\$14,738,836.00</u>	<u>\$13,576,955.00</u>
Carpet - Service expense	\$ 2,793,000.00	\$ 3,201,000.00	\$ 2,917,000.00
Carpet - Interest on working capital	<u>3,159,000.00</u>	<u>3,336,000.00</u>	<u>2,778,000.00</u>
	\$ 5,952,000.00	\$ 6,537,000.00	\$ 5,695,000.00
Percentage of Carpet expense to total business receipts	40.6%	44.4%	41.9%
Percentage of service revenue and interest to total business receipts	99%	99.1%	99.6%

Mohasco and its subsidiaries had an executive incentive plan. The plan was administered at corporate headquarters.

During the years 1984 through 1986, Mohasco made a practice of allocating certain expenses which it incurred to its subsidiaries. The total corporate charges were as follows:

3

This schedule focuses upon business receipts as opposed to total receipts or revenues. Hence, dividends are excluded.

1984	\$7,124,000.00
1985	8,232,000.00
1986	8,122,000.00

Mohasco also allocated intercorporate interest charges of approximately \$3,000,000.00 or \$4,000,000.00 per year.

Mohasco used one of several methods to allocate its expenses. According to an affidavit which was attached to a stipulation, Mohasco followed one of two allocation methods, as follows:

"a. the expense of services provided by Mohasco Corporation to the various operating units for the periods referenced above were allocated to Mohasco Carpet Corporation and its subsidiaries on the basis of the estimated 'degree of effort' by each department of Mohasco Corporation. 'Degree of effort' was, and is, defined for purposes of allocation as the estimated expenditures in terms of manpower, travel, consulting fees and other expenses incurred for the benefit of the operating unit in question by a department of the Mohasco Corporation;

"b. interest expense, expenses incurred by Mohasco Corporation of a general nature, and expenses which the various departments of Mohasco Corporation could not (or would not) allocate under the method referenced . . . above, were based upon the 'net assets' of the individual operating units to the sum of the total net assets of the combined Mohasco Domestic Corporation operating units. 'Net assets' for purposes of this allocation method were defined to include accounts receivable, inventories, and property, plant, and equipment, less accounts payable and accrued expenses"

Certain expenses were not allocated as set forth above. For example, Mohasco paid legal fees directly. The expense would then be charged to the particular subsidiary involved.

The following expenses were allocated by Mohasco to its subsidiaries:

(a) Engineering - This expense was for the office which performed plant design for each of the subsidiaries. Mohasco employed 15 to 20 engineers which were used by the subsidiaries.

(b) Director of Engineering - This expense was for the compensation of the officer in charge of the engineers.

(c) Executives - This item was for the expenses incurred for the Chairman of the Board and the President.

(d) Secretary's Office - This category was for the expenses incurred by the corporate secretary of Mohasco.

(e) Corporate Public Relations - This was the cost of maintaining a staff which disseminated reports. The expense might also include charges from third parties.

(f) Corporate Distribution Services - This was the cost of maintaining the department which leased vehicles for Mohasco's subsidiaries. The vehicles involved were mainly cars which were used by executives and salesmen. The subsidiaries had their own fleet of trucks which was also handled by employees of Mohasco.

(g) Legal - Most of this expense was for legal services of people who were on staff. The expense also included the cost of legal services provided by outside counsel.

(h) V-P Human Resources - This cost was for salary of the president and the staff of the human resources department. The expense might also include the cost of consultants who assisted on pensions and benefits.

The subsidiaries had their own person who dealt with personnel. However, Mohasco, rather than the subsidiaries, operated the pension plan, health insurance and accident insurance.

(i) Compliance System - At the hearing, petitioners' witness was uncertain what constituted the compliance system.

(j) Compensation and Benefits - This expense arose from part of Mohasco's human resource system. The department handled salary structures and grades.

(k) Industrial Relations - These costs were incurred as part of Mohasco's human resource system. The individuals who worked in this department were employed by Mohasco but their office was in Dublin, Georgia because Carpet was mainly in Georgia and South Carolina. The furniture subsidiaries were mainly located in Mississippi. Consequently, Georgia was a more central location.

The industrial relations expense did not include fees charged by consultants or other third parties.

(l) Occupancy - This category was used for recording the cost of running the Mohasco corporate headquarters which was used exclusively by the officers and employees of Mohasco.

(m) Communications - This item was reserved for recording the costs incurred for telephone and telegram services. It might also include the salaries of people who worked in the communications area.

(n) Real Estate Administration - This category was used to record the costs of a distinct department that handled real estate throughout the country. The department was involved in leasing, buying and selling property. Where applicable, the cost of a broker would be directly attributed to the company.

(o) Interior Design - This item represented the costs associated with the showrooms which were leased by Mohasco throughout the country.

(p) Cafeteria - This category was used to record expenses of the cafeteria at the corporate headquarters. None of the subsidiaries had any employees at the corporate headquarters other than the individuals that were officers of both Mohasco and a subsidiary.

(q) Corporate Accounting - General - The exact nature of this item was not disclosed at the hearing. It is not clear whether the fees charged by outside accountants were included in this item or another category. The subsidiaries also maintained small accounting departments.

(r) Corporate Budget - This item was for the expenses incurred for the corporate budget and financial department. The department established the subsidiaries' budgets and forecasted their performance. To some extent, subsidiaries prepared their own budget with the help of Mohasco.

(s) Comptroller - This item included the costs associated with the comptroller of the corporation and his staff. The comptroller's duties included supervision of certain employees of the subsidiaries. The subsidiaries also had their own comptrollers.

(t) Vice-President Finance - This item was reserved for allocating the costs associated with the office of the vice-president of finance. During a portion of the period in issue, the position of vice-president of finance was vacant. However, the costs associated with maintaining the physical space and those that worked in that area continued to be allocated.

(u) Treasurer's Office - This category was used for allocating the expenses of the treasurer's office including the salary of the treasurer.

(v) Internal Audit - This item was employed for recording the expenses of the office which conducted audits of subsidiaries.

(w) Tax - This item was used to record the expenses of Mohasco's tax department. Said expense included fees for outside consulting of approximately \$10,000.00 a year.

(x) Insurance - This item was used to record the expenses of the department which handled risk management. The insurance itself was not included on this line.

(y) Other - It is not clear from the record what items were included in this category.

During the years in issue, Mohasco did not engage in any manufacturing, marketing or sales activity. It never provided services for a fee to an unaffiliated corporation. Mohasco did not engage in product design or research and development of products that were sold by its subsidiaries.

All recurring purchases by Mohasco were made from third parties.

Mohasco's subsidiaries received an economic benefit from having services provided by Mohasco through economies of scale.

Some of the services provided by Mohasco to subsidiaries were rendered outside of New York State. These costs were recorded at corporate headquarters in New York State.

In accordance with State Administrative Procedure Act § 307(1), petitioners' proposed findings of fact have been rejected. The Tax Appeals Tribunal Rules of Practice and Procedure provide that "[t]he proposed findings of fact shall refer, wherever possible, to the relevant pages of the transcript of hearing and exhibits" (20 NYCRR 3000.10[d][5]). Petitioners' proposed

findings of fact do not indicate that any attempt was made to comply with this requirement. It is noted that the substance of most of the proposed findings of fact have been included in this determination.

We find an additional finding of fact to read as follows:

On May 29, 1992, the parties, by their respective representatives, entered into a stipulation of fact. Relevant provisions of the stipulation are reproduced below as follows:⁴

"The parties hereby stipulate and agree that for purposes of this hearing the following facts and exhibits attached hereto and made a part hereof by reference may be taken as true, subject to the rights of the parties to introduce other and further evidence not inconsistent with this stipulation.

* * *

"4. Schedules attached to Exhibit A (the Affidavit by Ernest P. Haufe, Budget Director for Mohasco Corporation) reflect the actual cost to Mohasco Corporation of the services acquired on behalf of, and rendered to, and for, the subsidiaries. Said schedules accurately reflect the allocation of charges made by Mohasco Corporation to each of the subsidiaries for the taxable years 1984, 1985, and 1986. The allocations made in said schedules were made in accordance with the methodology of the Affidavit of Ernest P. Haufe, Budget Director for the Mohasco Corporation to which they were attached and made a part by reference. The charges for said services were made without any 'mark-up' or profit whatsoever."

Attached to the stipulation was the affidavit of Ernest P. Haufe, Budget Director for Mohasco Corporation during the years in issue. The affidavit referenced allocation schedules which listed expenses allocated by Mohasco to its subsidiaries. According to the affidavit, the allocation schedules:

"a. completely and accurately reflect the costs charged to said companies by Mohasco Corporation;

"b. reflect a pass through of expenses incurred by Mohasco Corporation without a mark-up for profit;

"c. were, as a rule, lower than the cost of obtaining comparable services from third part [sic] vendors; were prepared using a dual method of allocation."

4

Other provisions of the stipulation of fact, though not specifically referencing the stipulation, were originally incorporated into the Administrative Law Judge's findings of fact, so they need not be reproduced here.

OPINION

The Administrative Law Judge, applying the Division's regulations, held that petitioners satisfied the three conditions precedent that would require or allow the filing of a combined report. First, since Carpet was a wholly-owned subsidiary of Mohasco, the capital stock requirement was met. Second, the Administrative Law Judge held that since Mohasco provided engineering and transportation services, reviewed capital acquisitions, obtained cash and performed budgeting services, petitioners were engaged in a unitary business. Third, the Administrative Law Judge held that if petitioners reported on a separate basis, distortion would result. The Administrative Law Judge reached this conclusion based on the fact that there was an absence of arm's length pricing between Mohasco and Carpet. Specifically, the Administrative Law Judge concluded that in no instance did the expenses charged to Carpet include a profit. Finally, the Administrative Law Judge held that petitioners' failure to request permission to file combined reports within thirty days of their taxable year

"cannot serve as a basis to deny petitioners the right to file a combined report since 'the Division, on its own initiative, has had the opportunity through the audit process to examine and scrutinize petitioners' business activities, in particular intercompany transactions' [citation omitted]" (Determination, conclusion of law "T").

Petitioners, on exception, do not dispute the Administrative Law Judge's conclusions of law, but merely except to certain of the Administrative Law Judge's findings of fact. Our review of the record indicates the Administrative Law Judge correctly found the facts.

On exception, the Division does not challenge the Administrative Law Judge's determination with respect to the thirty-day rule. Further, the Division does not dispute that some components of petitioners' business constitute elements of a unitary business, but asserts that many of the services allocated to Carpet were overhead of Mohasco and it is an error to categorize these costs as services provided to Carpet. The Division also argues that the presence or absence of profit on intercompany transactions is not determinative of whether these transactions were at arm's length. In essence, the Division asserts that petitioners have not sustained their burden of proving distortion exists.

In response, petitioners assert that Mohasco and Carpet were components of a unitary business in that Mohasco obtained all funds from outside creditors on behalf of Carpet, the interlocking board of directors determined the policies and procedures of Carpet, Mohasco exercised total control over Carpet's cash management through the use of a locked box system, and Mohasco had to approve capital expenditures in excess of \$2,500.00. Petitioners assert that reporting separately would result in distortion.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

In order to avoid distortion and more realistically portray true income, Tax Law § 211.4 allows the Division to require or permit corporate taxpayers to file combined reports (Matter of Campbell Sales Co. v. New York State Tax Commn., 68 NY2d 617, 505 NYS2d 54, cert denied 479 US 1088). The regulations require that the corporate taxpayer own substantially all of the capital stock of the other corporation(s) to be included in the combined report (20 NYCRR 6-2.2[a]), the combined group is engaged in a unitary business (6-2.2[b]), and "reporting on a separate basis distorts the activities, business, income or capital in New York State of the taxpayers" (20 NYCRR 6-2.3).

To begin with, it is undisputed that the capital stock requirement has been met because Carpet is a wholly-owned subsidiary of Mohasco. In addition, the Division, although initially excepting to the Administrative Law Judge's finding that Mohasco and Carpet were engaged in a unitary business, has withdrawn its exception on this issue in light of Matter of Sears, Roebuck & Co. (Tax Appeals Tribunal, April 28, 1994). Thus, the only issue before us is whether petitioners have proven distortion.

Under the regulations, if the capital stock and the unitary business requirements are met, the activities, business, income or capital of a taxpayer will be presumed to be distorted if the taxpayer reports on a separate basis when there are substantial intercorporate transactions (20 NYCRR 6-2.3). The absence of substantial intercorporate transactions will not preclude a taxpayer from being permitted to report on a combined basis if the reporting on a separate basis

results in distortion; the burden, however, is on the taxpayer who wishes to file a combined report to prove that reporting on a separate basis would result in distortion of the New York taxpayer's activities, business, income or capital.

The regulations interpreting Tax Law § 211.4 do not define distortion (see, Faber, "Combined Reporting Under the New York State Franchise Tax," 15 The Journal of Corporate Taxation 4 [Winter, 1989], 299). Previous Tax Appeals Tribunal cases have looked to the presence or absence of arm's length pricing when addressing this issue. For example, in Matter of USV Pharm. Corp. (Tax Appeals Tribunal, July 16, 1992), we held that arm's length pricing as evidenced by section 482 adjustments was sufficient to rebut the presumption of distortion that arose from substantial intercorporate transactions (see also, Matter of Standard Mfg. Co., Tax Appeals Tribunal, February 6, 1992).⁵ Likewise, in Matter of Sears, Roebuck & Co. (supra), we held that transactions between a wholly-owned subsidiary and its parent entered into at arm's length rebutted the presumption of distortion that resulted from substantial intercorporate transactions. Based on this framework, we agree with the Administrative Law Judge that the absence of arm's length transactions between Mohasco and Carpet resulted in distortion.

The Administrative Law Judge held that petitioners' income is more accurately reflected by the filing of a combined report because the record showed an absence of arm's length pricing between them. The Division, however, contends that it is an error to categorize many of these expenses allocated to its subsidiaries as services provided to its subsidiaries. The Division asserts that many of these expenses allocated to Mohasco's subsidiaries were allocations of Mohasco's overhead and not for services rendered to the subsidiaries. The Division contends that in a typical arm's length transaction, the price of the product being sold or the service being rendered has an overhead component built in. The Division asserts that it was incumbent upon petitioners to prove that the cost of services actually provided to its subsidiaries in the aggregate

⁵In general, section 482 adjustments will be made if it is determined such adjustments are necessary in order to clearly reflect the income of two or more organizations owned or controlled directly or indirectly by the same interests (Internal Revenue Code § 482).

(including the overhead costs) would result in distortion. We conclude that petitioners met this burden.

Regarding the Division's assertions that a portion of the costs charged to Carpet constituted allocations of overhead and not allocations for services actually rendered, the Division stipulated that the costs charged to the subsidiaries were for services. Specifically, paragraph four of the stipulation states that the costs allocated by Mohasco to its subsidiaries "reflect the actual cost to Mohasco Corporation of the services acquired on behalf of, and rendered to, and for the subsidiaries [emphasis added]" (Exhibit "L"). In addition, the preamble to the stipulated facts provides that the stipulated facts and all exhibits attached to said stipulation "may be taken as true, subject to the rights of the parties to introduce other and further evidence not inconsistent with this stipulation [emphasis added]" (Exhibit "L"). Likewise, with regard to the Division's argument that petitioners have not proven the transactions were not at arm's length, the Division has also stipulated that the transactions were not entered into at arm's length. The affidavit attached to the stipulation indicates that the costs allocated by Mohasco to its subsidiaries "were as a rule, lower than the cost of obtaining comparable services from third part [sic] vendors . . ." (Exhibit "L," attached affidavit ¶ 3[a]). Because the stipulation limits the parties' ability to introduce any evidence that contradicts the stipulation,⁶ we conclude that the costs allocated to Carpet were for services rendered and these services were not rendered on an arm's length basis. Therefore, we conclude that petitioners have shown, through the stipulated facts, that in the aggregate the prices for services from Mohasco to Carpet were not at arm's length and that separately reporting would result in distortion.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The exception of Mohasco Corporation and Mohasco Carpet Corporation is denied.

⁶Our rules of practice and procedure provide that "[t]he tribunal, administrative law judge or presiding officer will not permit a party to a stipulation to qualify, change or contradict in whole or in part, except where justice requires" (20 NYCRR § 3000.7[e]).

3. The determination of the Administrative Law Judge is affirmed;
4. The petitions of Mohasco Corporation and Mohasco Carpet Corporation are granted;

and

5. The notices of deficiency dated July 10, 1989 and August 15, 1989 are cancelled.

DATED: Troy, New York
November 10, 1994

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner