STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
EXHIBITGROUP, INC.	:	DECISION DTA No. 811850
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Year 1988.	:	

Petitioner Exhibitgroup, Inc., Tax Department, Dial Tower, Station 2249, Phoenix, Arizona 85077-2249, filed an exception to the determination of the Administrative Law Judge issued on February 27, 1995. Petitioner appeared by The Dial Corp., Tax Department (Earle M. Dornan, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John O. Michaelson, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioner's reply brief was received on May 31, 1995 and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner DeWitt concurs. Commissioner Francis R. Koenig took no part in the consideration of this decision.

ISSUE

Whether, in the absence of prior permission granted by the Division of Taxation, petitioner may properly file a combined franchise tax report with its wholly-owned subsidiary, David H. Gibson Company.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "9" and "12" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioner, Exhibitgroup, Inc.[1] ("Exhibitgroup" or "petitioner"), is incorporated in the State of Delaware with its corporate offices located at 2825 Carl Boulevard, Elk Grove Village, Illinois 60007. Exhibitgroup is a wholly-owned subsidiary of The Dial Corporation, 1850 North Central Avenue, Phoenix, Arizona.

David H. Gibson Co. ("Gibson") is located in Texas with offices at 8401 Ambassador Row, Dallas, Texas. Gibson is one of six wholly-owned subsidiary divisions of Exhibitgroup. The other divisions are located in San Francisco, Los Angeles, Atlanta, Chicago and Edison, New Jersey.

During the 1988 tax year, Exhibitgroup conducted business, employed capital, owned or leased property or maintained offices in the Metropolitan Commuter Transportation District, State of New York.

Exhibitgroup is in the business of designing, constructing, installing, and later, removing and storing convention exhibits for its customers. Petitioner installs and dismantles the exhibits at convention sites and trade shows. It is a total "turn-key" operation, since all the customer has to do is arrive at the convention and the exhibit is ready for use. Gibson, out of its Texas office, is engaged in the same business and provides its customers the same product lines.

William Bloom, vice president of finance and administration for Exhibitgroup, testified for petitioner. Mr. Bloom stated that Gibson and the other divisions are an integral part of Exhibitgroup's network. Exhibitgroup's advertising includes the addresses and phone numbers for each of its divisions across the country. Exhibitgroup uses the fact that it has this network

---

[1]Also referred to in the record as "Greyhound Exhibitgroup, Inc."

of division offices in various parts of the country as a competitive advantage, since petitioner is in a position to assist its customers in any one of its division offices. Mr. Bloom noted that petitioner is only one of two companies in the United States that have this network capability. If a customer participated in multiple trade shows in cities like Los Angeles, Orlando, Dallas and New York, petitioner has the ability to design, construct, ship, install, dismantle and reship its exhibits from location to location.

The business functions of petitioner and Gibson are integrated. Thomas Urban, president of Gibson, reports to Charles Corzentino, president of Exhibitgroup. The presidents of all of the other divisions also report to Corzentino. Exhibitgroup is charged with the responsibility of administering all of the business activities of each of its divisions, including Gibson. Exhibitgroup and its divisions share design and development of exhibits to reduce costs. Gibson cannot make capital expenditures without approval of petitioner. When Gibson takes on a new customer, a job order cannot be opened until a job number is assigned by Exhibitgroup after it has conducted a credit check. If one of the divisions, including Gibson, has problems collecting from a customer, collections are handled by Exhibitgroup's corporate headquarters. Exhibitgroup totally funds Gibson, including the local bank, for payroll and other accounts. Gibson has no independent lines of credit and could not function without petitioner.

Every year Exhibitgroup's management conducts a budget review where budgeted sales and expenses of the divisions, including petitioner, are agreed upon and approved.

Gibson provides storage and other services, where necessary, for customers of other divisions of petitioner. In transactions with other divisions of petitioner, Gibson receives a discount of 20 percent on labor and material and a 30 percent discount on installation and dismantling.

Gibson and the other divisions all share a common management at Exhibitgroup corporate headquarters (tr., p. 30). Gibson's administrative functions, including advertising, human resources and insurance claims, are handled by Exhibitgroup. Exhibitgroup, Gibson and the other divisions share a common profit-sharing plan all administered by petitioner.

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

> William Bloom, petitioner's vice president for finance and administration, testified on direct examination that Gibson is a corporation incorporated in the State of Texas and that the only distinction between Gibson and petitioner's other divisions is that Gibson is a corporation and the other divisions are not corporations (tr., p. 13, lines 19-21). The Division of Taxation ("Division"), in its answer to petitioner's petition, affirmatively states that "during the period in issue Petitioner wholly-owned the subsidiary corporation David H. Gibson Company, a corporation with offices in Illinois" (Division Exhibit "D"; see also, Division's Exhibit "E," 1988 Form CT-3-A, p. 4 and attached 1988 Form CT-3-ATT, p. 2, Schedule C, Part II and attached Federal Form 7004, and Division's Exhibit "G").[2]

The Division does not dispute that petitioner and its subsidiary divisions are engaged in the same type of business.

The Division concedes that the business activities of petitioner, Gibson and the other divisions are integrated with, dependent upon and contribute to each other.

We modify finding of fact "12" to read as follows:

---

[2] Finding of fact "9" of the Administrative Law Judge's determination read as follows:

> "William Bloom, petitioner's vice president for finance and administration, testified on cross-examination that Gibson is the only subsidiary division of petitioner that is not a corporation (tr., P. 35).*
>
> * "Petitioner's attorney, on redirect, did not ask the witness to explain or clarify this statement. While petitioner's attorney referred to Gibson as incorporated and doing business in Texas (tr., pp. 10-11), his unsworn statement is not evidence."

We modified finding of fact "9" to clarify the record on the pivotal fact that Gibson was a corporation. In concluding that Gibson was not a corporation, the Administrative Law Judge misread testimony given by Mr. Bloom on cross examination (tr., p. 35). The Administrative Law Judge, in footnote 2 of his determination, apparently recognized that the question to which Mr. Bloom responded on cross examination was unclear in its phrasing, when he states that "[p]etitioner's attorney, on redirect, did not ask the witness to explain or clarify this statement." He also pointed out in the same footnote that "[w]hile petitioner's attorney referred to Gibson as incorporated and doing business in Texas (tr., pp. 10-11), his unsworn statement is not evidence." In our view, the testimony of Mr. Bloom, coupled with the Division's answer to petitioner's petition and the documentary evidence in the record, clearly supports the fact that Gibson was a corporation.

> The Division concedes that based on the unity of ownership, centralized management, functional integration and flow of value, services and goods between Exhibitgroup and Gibson, they are engaged in a unitary business (tr., p. 33).
>
> The concession is based on the following colloquy between the Administrative Law Judge and the Division's representative at hearing:
>
> > "ALJ Jenkins: B, 'Based on the unity of ownership, centralized management, functional integration and flow of value, services, and goods between the two companies, they constitute a unitary business.' Do you admit that, because if you do, I think we can cut through a lot of this. We can get to the issue that's stated at the beginning of this thing.
> >
> > "Mr. Michaelson: Yeah, I don't have a problem with that either.
> >
> > "Mr. Dornan: Okay, your Honor.
> >
> > "ALJ Jenkins: I think we can now go to the issue" (tr., p. 33).[3]

Michel E. Mazakis, director of taxes for The Dial Corporation, testified for petitioner. Mr. Mazakis is responsible for all state and local taxes for The Dial Corporation and its subsidiaries, including Exhibitgroup.

The Division's Midwestern Regional District Office conducted a general verification field audit of Greyhound Exhibitgroup, Inc. (now "Exhibitgroup, Inc.") for tax years 1986 and 1987. At that time, petitioner was a wholly-owned subsidiary of the Greyhound Corporation. The audit report notes that Exhibitgroup had a warehouse in New York City which was used to sell exhibits and service its customers. This field audit is not the subject of this proceeding. Its significance is that there is no indication in this audit report of the two years previous to 1988 of any request by petitioner to file a combined franchise tax return, or that the question of combined reporting ever arose. Since the possibility of combined reporting never arose, petitioner's books and records were not audited with that purpose.

The Division did not conduct a field audit of petitioner's or Gibson's books and records

---

[3] We modified finding of fact "12" of the Administrative Law Judge's determination by adding the last paragraph and the colloquy between the Administrative Law Judge and the Division's representative at hearing to more fully reflect the record.

for 1988.

Petitioner filed an application, dated March 14, 1989, for automatic six-month extension to file its 1988 franchise tax return.

For calendar year 1988, Exhibitgroup and Gibson filed a New York State Combined Franchise Tax Return ("CT-3-A") dated October 5, 1989. Prior to filing this combined return, petitioner admits that it had not requested permission from the Division to file on a combined basis.

The Division conducted a desk audit of petitioner's and Gibson's 1988 combined return.

Mr. Mazakis testified that in response to the combined return, he received a notice from the Division. This notice advised petitioner that since it had not requested prior permission to file on a combined basis, the combined filing was disallowed. This notice also raised the issue of interest on subsidiary capital (tr., p. 39).

Two statements of audit adjustment, both dated November 23, 1990, were issued to petitioner.[4] The first statement asserted additional franchise tax due of $60,505.00, plus interest, for calendar year 1988.[5] The second statement was issued to petitioner asserting additional Metropolitan Transportation Business Tax Surcharge ("MTBTS") of $10,286.00, plus interest, for the same period.

Two notices of deficiency, both dated January 23, 1991, were issued to petitioner asserting, respectively, additional franchise tax of $60,505.00, plus interest, and MTBTS of $10,286.00, plus interest.

Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services. This request raised two issues: (i) whether petitioner was entitled to file a combined return; and (ii) whether petitioner owed tax arising from interest on subsidiary capital. The conference was held on March 27, 1992. The advocate for the Division

---

[4]Then named "Greyhound Exhibitgroup, Inc."

[5]There being no dispute over the computation, it has not been shown.

was James Doherty ("Doherty"), an auditor in the Division's Corporation Tax Unit. The conferee, Sareve Dukat, directed the parties to attempt to settle the matter.

Pursuant to the direction of the conciliation conferee, the Division's advocate made several requests for additional information from petitioner in furtherance of the effort to settle the matter. Petitioner, after some delays, provided the information.

Petitioner also sent Doherty a letter dated June 26, 1992 enclosing a partially-completed request for permission to file a combined report ("request") (Ex. "G"). The instruction on the first page of this request states that it must be filed with the Tax Commissioner no later than 30 days after the close of the taxable year in accordance with the Department's regulations (20 NYCRR 6-2.4). None of the boxes are checked on page one of this request to show the purpose for which it is being filed or the tax year. Testimony in the record indicates that this request was intended to be filed for tax year 1988. Page 2 of the request names petitioner and Gibson as the companies covered by the request. The top of page 2 indicates that petitioner is included in the request and is a corporation taxable in New York State. Gibson is included in the request but, according to the form, is not taxable in New York State.

As a result of the conferee's request and the parties' efforts over a period of months, agreement was reached on the issue of interest on subsidiary capital.

A Conciliation Order (CMS No. 113357) dated February 5, 1993 was issued to petitioner reducing the tax deficiency to $24,365.00, plus interest. This order does not indicate how this figure was arrived at or the amounts by which each Notice of Deficiency was reduced. All that is given is the combined total tax remaining due on both notices. Petitioner says that only the issue of subsidiary capital was resolved at the conference, so presumably, the issue of whether petitioner was entitled to file a combined report was denied sub silentio.[6]

[6]Petitioner's brief, at page 4, states that "[t]he Bureau issued a Conciliation Order on or about February 5, 1993 denying Exhibitgroup's request to file a unitary report with D. H. Gibson . . . ."

OPINION

The filing of combined reports for corporation franchise tax purposes is authorized by Tax Law § 211(4), which provides, in part, as follows:

> "[i]n the discretion of the commissioner of taxation and finance, any taxpayer, which owns or controls either directly or indirectly substantially all the capital stock of one or more other corporations, or substantially all the capital stock of which is owned or controlled either directly or indirectly by one or more other corporations . . . may be required or permitted to make a report on a combined basis covering any such other corporations and setting forth such information as the commissioner may require . . . ."

Regulations promulgated under Tax Law § 211(4), effective for all taxable years ending on or after December 31, 1983, provide that combined reports shall be permitted where the corporations in the group meet the capital stock requirement (20 NYCRR 6-2.2[a]), unitary business requirement (20 NYCRR 6-2.2[b]) and the "other requirement" (20 NYCRR 6-2.3) set forth in the regulations (see, 20 NYCRR 6-2.1).

The "other requirement" is defined in 20 NYCRR 6-2.3 and is the so-called distortion requirement, i.e., if the stock ownership and unitary business requirements are satisfied, the Division:

> "may permit or require a group of taxpayers to file a combined report if reporting on a separate basis distorts the activities, business, income or capital in New York State of the taxpayers. The activities, business, income or capital of a taxpayer will be presumed to be distorted when the taxpayer reports on a separate basis if there are substantial intercorporate transactions among the corporations" (20 NYCRR 6-2.3).

The regulation at 20 NYCRR 6-2.4 provides, in part, as follows:

> "(a) A taxpayer must make a written request for permission to file a combined report. The request must be addressed as follows: Department of Taxation and Finance, Central Office Audit Bureau, Corporation Tax Section, Building 9, State Campus, Albany, NY 12227. The request must be received by the Tax Commission not later than 30 days after the close of its taxable year. A report filed on a combined basis does not constitute a request for permission to file a combined report. A request to file a combined report must include the following information:
>
> * * *
>
> "(b) A written request for permission to include or exclude a corporation from an existing combined report must be received by the Tax Commission not later than 30 days after the close of the taxable year of the corporations filing the combined report. The information required by

> paragraphs (2), (4) and (5) of subdivision (a) of this section must be submitted with the request" (20 NYCRR 6-2.4).

In Matter of Autotote Ltd. (Tax Appeals Tribunal, April 12, 1990), the only ground advanced by the Division for not allowing petitioner to file on a combined basis was the failure to comply with the 30-day rule. In finding the Division's position to be wholly untenable, we stated that:

> "[t]he purpose of the thirty-day rule would appear to be to permit the Division to establish the tentative filing status of a taxpayer prior to the time the returns are due [footnote omitted]. Although the Division reserves the right to require combination or decombine a taxpayer on audit (20 NYCRR 6-2.4[c]), the application and approval process allows the taxpayer to know how it should file and allows the Division to know from whom to expect a return. Even if there are other reasons for the thirty-day rule and the permission process, such reasons cannot be used to prohibit a taxpayer from filing on a combined basis where, as in the instant case, the Division, on its own initiative, has had the opportunity through the audit process to examine and scrutinize petitioner's business activities, in particular intercompany transactions" (Matter of Autotote Ltd., supra, emphasis added).

In this case, the Administrative Law Judge rejected petitioner's assertion that the Division's opportunity, during the conciliation conference, to review the information provided by petitioner at the Division's request in that proceeding, constituted an in-depth field audit in the context of Autotote. The Administrative Law Judge found that petitioner and Gibson were engaged in a unitary business activity contemplated by the Division's regulation (20 NYCRR 6-2.2[b]), "[t]here was an 'umbrella of centralized management and controlled interaction' between the two entities (see, Exxon Corp. v. Wisconsin Dept. of Revenue, 447 US 207, 224, 65 L Ed 2d 66, 81) and through this centralized management, each engaged in activities related to the other (20 NYCRR 6-2.2[b][1]) and engaged in the same or related lines of business as the other (20 NYCRR 6-2.2[b][2])" (Determination, conclusion of law "E").

Further, the Administrative Law Judge found that petitioner and Gibson had substantial intercompany transactions. However, he concluded that:

> "information provided in furtherance of settlement negotiations cannot be equated with an in-depth field audit review of petitioner's complete books and records. Since petitioner made no effort to request permission to file a combined return prior to filing said return for 1988 and the Division had not conducted a field audit of petitioner, the Division properly rejected

petitioner's combined return and retroactive request to file" (Determination, conclusion of law "H").

The Administrative Law Judge stated that he found an even more compelling reason for rejecting petitioner's argument namely, the fact that Mr. Bloom, petitioner's vice president, testified that "all of petitioner's subsidiaries were corporations except one . . . . So while petitioner has shown that Gibson is a wholly-owned subsidiary of petitioner, it has not shown that Gibson is a corporation or that petitioner owns its 'capital stock'" (Determination, conclusion of law "I").

The Administrative Law Judge went on to find that while "[p]etitioner has shown that it had intercompany transactions with Gibson . . . petitioner has failed to show by clear and convincing evidence that they were 'intercorporate transactions' (20 NYCRR 6-2.3[c]) and, therefore, the distortion of income requirement is not satisfied" (Determination, conclusion of law "J," emphasis added).

Finally, the Administrative Law Judge concluded that "although the Division agrees that petitioner and Gibson are engaged in a unitary business activity, petitioner has not been shown that they are two corporations engaged in a unitary business activity (20 NYCRR 6-2.2[b])" (Determination, conclusion of law "K").

On exception, petitioner asserts that the Administrative Law Judge erred in finding that Gibson was not a corporation. Petitioner asserts that the record clearly supports the fact that Gibson is a corporation incorporated in Texas. Petitioner also asserts that the Division's concession that it was engaged in a unitary business with Gibson brings it within the ambit of Autotote.

We reverse the determination of the Administrative Law Judge.

At the outset, we are constrained to point out that if the Administrative Law Judge was correct in his finding that Gibson was a noncorporate division of petitioner engaged in a unitary business with petitioner, there is no issue of whether petitioner may file on a combined basis with Gibson. Petitioner would be required to include Gibson in petitioner's franchise tax return (Matter of British Land [Maryland] v. Tax Appeals Tribunal, 85 NY2d 139, 623 NYS2d 772).

However, the fact is that Gibson is a corporation incorporated in Texas. Further, it is clear that, in response to questions from the Administrative Law Judge during the course of the hearing, the Division conceded that "[b]ased on the unity of ownership, centralized management, functional integration and flow of value, services, and goods between [petitioner] and Gibson, they constitute a unitary business" (tr., p. 33). We need not inquire into the basis for the concession of these facts by the Division. The fact that the concession was made at hearing by the Division's representative blunts the Administrative Law Judge's concern that the information was garnered in settlement negotiations and not, therefore, probative at hearing.

In our view, the facts established at hearing, that petitioner and Gibson were engaged in a unitary business and engaged in substantial intercompany transactions, meet the requirements of Autotote. Under these circumstances, reliance on the 30-day rule is wholly inappropriate (Matter of Autotote Ltd., supra).

Accordingly, we conclude that petitioner is entitled to file a combined report with Gibson for the year 1988.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Exhibitgroup, Inc. is granted;

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

3. The petition of Exhibitgroup, Inc. is granted; and

4. The notices of deficiency issued on January 23, 1991 are cancelled.

DATED: Troy, New York
October 19, 1995

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

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