STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THE NEW YORK TIMES COMPANY	:	DETERMINATION DTA NO. 809776
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 1981, 1982 and 1983.	:	

Petitioner, The New York Times Company, 229 West 43rd Street, New York, New York 10036, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1981, 1982 and 1983.

A hearing was commenced before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on July 29, 1992 at 1:15 P.M., continued at the same location on July 30, 1992 at 9:00 A.M., further continued at the same location on October 22, 1992 at 9:15 A.M., and continued to conclusion at the same location on December 3, 1992 at 10:30 A.M.,[1] with all briefs to be submitted by November 5, 1993.

Petitioner's brief was received on June 7, 1993, and the answering brief of the Division of Taxation was received on October 14, 1993. Petitioner's reply brief was filed on November 5,

[1]In addition to the formal hearing held in this matter, petitioner and the Division of Taxation agreed to the introduction into the administrative record of videotapes as well as written transcriptions of the examinations under oath of (i) Lance R. Primis and Michael Ryan conducted on July 22, 1992, and (ii) Francis X. Flood and Alfred J. Forbes conducted on October 16, 1992. These examinations were conducted at the offices of the taxpayer's representative without the presence of the Administrative Law Judge. On June 11, 1992, counsel had obtained prior permission from the Chief Administrative Law Judge, Andrew F. Marchese, to submit videotaped examinations.

1993. Petitioner appeared by Morrison & Foerster (Arthur R. Rosen, Esq., and James M. Bergin, Esq., of counsel) and Coopers & Lybrand (Robert Wood, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., and John Michaelson, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation may properly require petitioner, The New York Times Company, and its subsidiary, The New York Times Sales, Inc., to file combined franchise tax reports for the years 1981 through 1983.

II. Whether petitioner, The New York Times Company, may properly file a combined franchise tax report with its affiliated corporation, Northern SC Paper Corp., for the years 1981 through 1983.

FINDINGS OF FACT

The Division of Taxation ("Division") issued five notices of deficiency dated May 8, 1989 against petitioner, The New York Times Company, asserting the following corporation franchise tax deficiencies:

Year	Tax	Interest	Total
1981	$ 305,337.00	$ 352,417.00	$ 657,754.00
1982	435,045.00	373,484.00	808,529.00
1982	78,828.00[2]	67,765.00	146,593.00
1983	463,664.00	302,074.00	765,738.00
1983	74,137.00	48,300.00	122,437.00
	$1,357,011.00	$1,144,040.00	$2,501,051.00

The Division also issued five statements of audit adjustment dated May 8, 1989 each simply explaining that the asserted deficiencies were "based on recent field audit."

A Conciliation Order dated April 19, 1991 reduced the tax deficiency of $1,357,011.00 asserted due for the three years to $968,666.00 because petitioner had provided additional information to show that it had overstated its receipts factor. An auditor's schedule dated

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[2] This amount as well as the smaller amount asserted due for 1983 of $74,137.00 represent additional metropolitan business tax surcharges under Tax Law § 209-B.

March 1, 1991 showed the following summary of the revision in tax asserted due:

Year	Tax	Additional Tax or Refund	Interest	Total
1981	9-A	$(83,008.00)	$ (133,324.00)	$ (216,332.00)
1982	9-A	435,045.00	558,646.00	993,691.00
1983	9-A	463,664.00	477,436.00	941,100.00
1982	Surcharge	78,828.00	101,224.00	180,052.00
1983	Surcharge	74,137.00	76,339.00	150,476.00
Total		$968,666.00	$1,080,321.00	$2,048,987.00

A second schedule also dated March 1, 1991 showed the following recomputation of tax due:

	1981	1982	1983
Tax on allocated net income	$1,288,531.00	$1,792,771.00	$4,355,160.00
Tax on subsidiary capital @ .009	17,753.00	26,777.00	7,152.00
Minimum tax on combined affiliate	250.00	250.00	250.00
Total tax before credits	$1,306,534.00	$1,819,798.00	$4,362,562.00
Less: Investment tax credit	611,263.00	499,466.00	1,451,004.00
Franchise tax per audit	$ 695,271.00	$1,320,332.00	$2,911,558.00
Tax previously paid	778,279.00	885,287.00	2,447,894.00
Additional tax (refund) due	$ (83,008.00)	$ 435,045.00	$ 463,664.00

Metropolitan business tax surcharges for 1982 and 1983 were recalculated as follows:

	1982	1983
Franchise tax per audit	$1,320,082.00	$2,911,306.00
Metropolitan commuter transportation district (MCTD) allocation % as reported	97.6261%	94.1280%

Allocated tax	$1,288,745.00	$2,740,356.00
Surcharge rate	18%	17%
Surcharge per audit	$ 231,974.00	$ 465,861.00
Surcharge reported	153,146.00	391,724.00
Additional surcharge	$ 78,828.00	$ 74,137.00

The total of the additional tax (refund) of ($83,008.00) for 1981, $435,045.00 for 1982, $463,664.00 for 1983, and the surcharges of $78,828.00 for 1982 and $74,137.00 for 1983 is $968,666.00, the revised amount asserted as due.

As a result of a field audit by the Metropolitan District Office, the Division required petitioner to file combined tax reports with its subsidiary, The New York Times Sales Corp., resulting in the additional tax asserted as due as noted above.

The New York Times Company's Annual Report for 1983 (Pet. Ex. "129") includes the following concise description of petitioner in a section labeled "What We Are":

> "The New York Times Company takes its name from the distinguished newspaper, founded in 1851, that has become a standard for journalistic excellence.
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> "In addition to The New York Times, this diversified, publicly-owned communications company publishes 29 smaller-city dailies and weeklies. Its other businesses include three leading magazines, three televisions stations, two radio stations and a cable TV system. The Company also publishes general books, and syndicates news and features worldwide.
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> "The Company owns substantial equity interests in three newsprint mills and a supercalendared-paper mill, and a one-third interest in the International Herald Tribune."

A section of the 1983 Annual Report entitled "Segment Information" notes that petitioner has classified its business into the following four segments and equity interests:

> "Newspapers: The New York Times, a newspaper of general circulation with readership in New York City, its suburbs and throughout the U.S., 29 smaller-city newspapers principally in the southeast, a news service and a features syndicate.
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> "Magazines: Family Circle, Golf Digest, Golf World, Tennis and Times Books.
>
> "Broadcasting/Cable TV: WREG-TV, Memphis, Tenn., KFSM-TV, Fort Smith, Ark., WHNT-TV, Huntsville, Ala., WQXR AM/FM radio, New York, N.Y., and NYT Cable TV, Southern New Jersey.
>
> "Associated Companies: Equity interests in three Canadian newsprint companies (Donohue Malbaie, Inc. - 35%; Gaspesia Pulp and Paper Company, Limited - 49%; and Spruce Falls Power and Paper Company, Limited - 49.5%);

Madison Paper Industries (a partnership); and International Herald Tribune S.A. - 33.3%. The three Canadian newsprint companies and the partnership supply the major portion of the annual paper requirements for production of The New York Times."

In the section of the 1983 Annual Report listing The New York Times Company's directors, officers and executives, the classification of petitioner's business is reflected in the listing of "Operating Group Officers and Executives" which shows a breakdown into the following four operating groups: (1) The New York Times, (2) Regional Newspapers, (3) Magazines, and (4) Broadcasting.

A review of the 1983 Annual Report discloses that 1983 was a record year for petitioner in terms of all financial measures: consolidated revenues, net income, total assets, common stockholders' equity per share, dividends per share of common stock and stock price at year-end. The years at issue were years of strong growth, as shown in the following comparisons:

	1981	1982	1983
Consolidated revenues	$841,707,000.00	$933,692,000.00	$1,091,302,000.00
Net income	49,970,000.00	54,257,000.00	78,668,000.00
Total assets[3]	598,865,000.00	761,479,000.00	774,189,000.00

Key financial ratios improved significantly:

	1981	1982	1983
Key Ratios			
Operating profit to revenues	7%	9%	14%
Net income to revenues	6%	6%	7%
Return on average stockholers' equity	18%	17%	21%
Return on average total assets	9%	9%	10%
Long-term debt to total capitalization	25%	31%	16%
Current assets to current liabilities	1.2	1.1	1.0

Operating profits doubled from newspapers and moved generally higher in other areas:

	1981	1982	1983
Operating Profit (Loss)			
Newspapers	$54,100,000.00	$64,012,000.00	$130,674,000.00
Magazines	13,134,000.00	23,649,000.00	16,365,000.00
Broadcasting/Cable TV	3,528,000.00	2,728,000.00	4,936,000.00
Books, Information and Education	(3,051,000.00)	(299,000.00)	9,396,000.00

[3]Petitioner's tax returns disclose amounts for "total assets" of $561,902,353.00 for 1981, $757,853,811.00 for 1982, and $777,681,714.00 for 1983. The reason for the variance between these amounts and those in the Annual Report is unknown.

Unallocated Corporate Expenses	(9,303,000.00)	(8,531,000.00)	(11,808,000.00)

A comparison of operating profit to revenues for the newspapers category shows an increasing operating margin:

	1981	1982	1983
Revenues			
Newspapers	$607,532,000.00	$674,231,000.00	$ 833,220,000.00
Magazines	152,248,000.00	169,395,000.00	186,354,000.00
Broadcasting/Cable TV	36,776,000.00	46,982,000.00	53,380,000.00
Books, Information and Education	45,151,000.00	43,084,000.00	18,348,000.00
Total	$841,707,000.00	$933,692,000.00	$1,091,302,000.00
Operating Profit Percentage for Newspapers (operating profit divided by revenues)	8.905%	9.494%[4]	15.683%

A review of petitioner's New York corporation franchise tax reports for each of the years at issue shows that it calculated New York franchise tax based upon an allocation of its net income to New York (plus allocated subsidiary capital):

	1981	1982	1983
(i) Allocated net income	$13,540,842.00	$12,654,498.00	$38,829,782.00
(ii) 10% of allocated net income	1,354,084.00	1,265,450.00	3,882,978.00
(iii) Allocated subsidiary capital	19,806,904.00	30,096,221.00	15,677,358.00
(iv) 00.09% of allocated subsidiary capital	17,826.00	27,087.00	14,110.00
Net tax[5]	$ 1,371,910.00	$ 1,292,537.00	$ 3,897,088.00

In allocating its income to New York, petitioner used business allocation percentages of 75.58073% for 1981, 55.67675% for 1982, and 52.11934%

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[4] Alfred J. Forbes testified that operating margins for The Times were 9%, 12% and just shy of 16% for 1981, 1982 and 1983 (Forbes tr., p. 50). He appears to have made a calculation error for 1982. The annual report noted that lower newsprint prices coupled with revenue increases principally accounted for the improvement in operating margins.

[5] Net tax was calculated by adding lines "(ii)" and "(iv)" above.

for 1983. The decline in its business allocation percentage over the three years in issue is primarily rooted in a dramatic increase in receipts from services provided outside New York as reflected in Appendix A.

As noted in Finding of Fact "3", the basis for the deficiency notices issued against petitioner is the determination by the Division that petitioner must file combined tax reports with its subsidiary, The New York Times Sales, Inc. ("Sales Inc."). Sales Inc., which is incorporated in the State of Delaware, is a wholly-owned subsidiary of The New York Times Company.

Sales Inc. was established in 1956 in the aftermath of the Alabama Supreme Court's decision in Sullivan v. Times[6] (273 Ala 656, 144 So 2d 25) awarding $500,000.00 in damages against petitioner for libel. According to the testimony of Michael E. Ryan, petitioner's former corporate counsel and currently a senior vice-president, Sales Inc. was established to insulate petitioner from libel actions in jurisdictions outside New York. Sales Inc. was given responsibility for all sales and distribution of The New York Times newspaper and the sale of advertising outside the New York metropolitan area:

> "We were advised at that time in order to not have the same problem in the future in other states that we really ought to structure ourselves so that we have the sales, the circulation and advertising activities in a separate corporation, which was the Sales Corporation, and that we leave the news gathering function in The New York Times Company . . . because they were exempt in just about all of the states . . ." (Ryan tr., p. 186).

Consequently, anyone seeking to sue petitioner for libel would, more than likely, be compelled to maintain litigation in New York, with New York law applying. Petitioner took care to ensure

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[6]In that case, 20 civil rights advocates, all but two of whom were clergymen in various southern cities, had purchased an advertisement in The New York Times which contained minor misstatements including one that Dr. Martin Luther King had been arrested seven times in Montgomery, Alabama. In fact, Dr. King had been arrested four times. Petitioner was found subject to the Alabama court's jurisdiction because it had sold 66 copies of The New York Times newspaper containing the advertisement in the State of Alabama. The Alabama court's decision was reversed in the famous 1964 case of New York Times Co. v. Sullivan (376 US 254).

that Sales Inc. maintained a distinct corporate identity with its own directors and officers although they were petitioner's employees.

Sales Inc. filed separate New York corporation franchise tax reports for each of the years at issue. It calculated tax based upon an allocation of its net income to New York:

	1981[7]	1982[8]	1983
Allocated net income	$88,157.00	$461,076.00	$9,049.00
Net tax:			
10% of allocated net income	8,816.00	46,108.00	905.00

In allocating its income to New York, Sales Inc. used business allocation percentages of 2.7506% for 1981, 4.83868% for 1982, and .07976% for 1983. The substantial decline in the subsidiary's business allocation percentage in 1983 was primarily the result of the elimination of rental real estate and any employees in New York as reflected in Appendix B.

Petitioner concedes that it and Sales Inc. were engaged in a unitary business and that there were substantial intercorporate transactions between them during the years at issue. Nonetheless, it contends that the substantial intercorporate transactions between the two were at "arm's length" so that separate reporting would not distort petitioner's taxable income in New York.

The auditor noted in his audit report concerning petitioner[9] (Div. Ex. "J") dated March 17, 1989 that, in his opinion, permitting petitioner to file

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[7]The photocopy of the 1981 tax return is of poor quality with typed entries crossed out and handwritten numbers substituted. It appears that an auditor made such changes based upon incorrect math used by Sales Inc. in calculating its business allocation percentage for 1981. Amounts as reported have been used above.

[8]Petitioner filed an amended return for 1982 increasing its allocated net income from $382,815.00 to the $461,076.00 shown above.

[9]This audit report noted 385.50 "total hours" expended by the auditor on the audit. A second audit report concerning Sales Inc. which is undated (Div. Ex. "K") shows expenditure of 75 hours

separately from Sales Inc. would result in a distortion of petitioner's income:

> "In determining the area of 'distortion', this area also qualifies the company for combined filing. Excluding 'Sales' from the combined report would be distortionary. If the principal business activity of the taxpayer is the publishing and sale of the newspaper, to exclude the solicitation [of advertising] and circulation outside the New York area and the publication and sale of the National Edition would distort the business activities of the company."

Included in the audit report is an undated memorandum from the auditor to an employee of the Division involved with a so-called "committee on combined reports" that further elaborated upon the auditor's position:

> "Although no clear cut definition exists as to what constitutes distortion, I feel our argument has merit. When taking a broad overview of taxpayer's business, we can establish that the taxpayer's line of business is the production of newspapers, specifically under the title the New York Times. Included in the production of a newspaper are several functions which include Circulation, Advertising, Editing, Printing and Distribution to name a few. Therefore, since Sales solicits Advertising and Circulation and Prints and Distributes the National Edition of the New York Times, to exclude the Sales Company would be distortionary to the total business of the Times."

However, the audit report did not address the issue of whether the transactions between petitioner and Sales Inc. were at "arm's length". During the audit, petitioner provided the auditor with a copy of an

agreement dated December 31, 1980 entitled "Circulation and Advertising Agreement between The New York Times Company and The New York Times Sales, Inc." (part of Div. Ex. "L"). The auditor pointed to this circulation and advertising agreement in support of the Division's position that there were substantial intercorporate transactions between petitioner and Sales Inc. On cross-examination, the auditor testified that he "believed" he reviewed "the method of expense and income attribution [to Sales Inc.]" that was attached to the agreement (tr., p. 68). The auditor also "believed" that he and his supervisors made a determination that the method of attributing expenses and income to Sales Inc. was at "arm's length", but then he appeared to backtrack in his testimony:

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by the auditor.

Auditor: "It's really difficult to remember. I believe that we did make a determination that they were arm's length."

Attorney Arthur Rosen: "That they were arm's length?"

Auditor: "But I don't remember, I really don't." (Tr., pp. 68-69.)

On his later redirect (tr., p. 77) and recross testimony (tr., p. 82), the auditor further backtracked on his initial response that attribution of expenses and income to Sales Inc. was at arm's length. He ultimately agreed with opposing counsel's suggestion that "no investigation was ever made whether or not the agreement resulted in arm's length pricing" (tr., p. 82).

The circulation and advertising agreement between petitioner and Sales Inc. provided, in substantive part, as follows:

> "1. Sales, Inc. is retained by The Times for the purpose of developing the circulation growth of The New York Times throughout the United States except in New York particularly through home delivery, and to that end Sales, Inc. will furnish the following services to The Times:
>
> "(a) Hiring and training of sales persons and canvassers and co-ordinating of sales and promotion activities with individual home delivery routes;
>
> "(b) Supervising the distribution of papers through wholesalers to the route carriers;
>
> "(c) Maintaining complete daily and Sunday circulation records and making regular reports to The Times.
>
> "The compensation of Sales, Inc. for its services and the expenses attributable to such services under this paragraph will be determined annually in accordance with a schedule to be prepared no later than 30 days from the date hereof and attached as Exhibit A hereto.
>
> "2. Sales, Inc. is also retained by The Times for the purpose of soliciting advertising throughout the United States, except in New York, for publication in The New York Times. The compensation of Sales, Inc. for its services under this paragraph and expenses attributable to such services will be determined annually in accordance with a schedule to be prepared no later than 30 days from the date hereof and appended hereto as Exhibit A.
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> "3. The Times is retained by Sales, Inc. for the purpose of providing legal, tax, accounting and other services to Sales, Inc. as and when requested."[10]

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[10] It is noted that the body of the agreement does not explicitly specify that Sales Inc. will reimburse petitioner for such services, although the use of the term "retain" implies that some payment or reimbursement will be made by Sales Inc. for such services.

Appended to the circulation and advertising agreement, which consists of less than 2½ pages, are two additional sheets. The first sheet, which was photocopied so that the heading is cut off, but which presumably is the so-called "Exhibit A", provided as follows:

> "The New York Times Sales, Inc. ('Sales, Inc.') shall reimburse The New York Times Company ('The Times') for all expenses attributable to the advertising and circulation of The New York Times Newspaper, including but not limited to: paper and ink, editorial, news, pre-press production, composing/ photoengraving, distribution, mail and delivery, press/stereo/night paperhandlers/maintenance, manufacturing, outside printing and binding, operating overhead, advertising and consumer marketing promotional expenses.
>
> "Income allocated to Sales, Inc. shall be advertising branch office linage times the average rate per line plus circulation
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> from the branch office times the net price per copy. Based upon determination of the percentage of operating expenses to revenues, that percentage of Times Sales revenue shall be allocated as operating expense. These are in addition to the expenses of rent, utilities and payroll, already reflected on the accounts of Sales, Inc."

The second sheet attached to the circulation and advertising agreement is labeled "Allocation to New York Times Sales Co. [sic]" and provides as follows:

> "1. Advertising Revenue Allocated to Times Sales[11]
>
> "P_t Branch office linage x average rate per line
>
> "2. Circulation Revenue Allocated to Times Sales
>
> "P_t Average net paid circulation from branch x approx. net price/copy (for daily & Sunday)
>
> "3. Expenses Allocated to Times Sales
>
> "P_t Paper & Ink, Editorial, News, Pre-Press Production, Composing/Photoengraving, Distribution, Mail & Delivery, Press/Stereo/Night Paperhandlers/Maintenance, Manufacturing, Outside Printing & Binding, Operating Overhead, Advertising & Consumer Marketing Promotional Expenses.

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[11] It is somewhat odd that in the so-called Exhibit A, New York Times Sales Corp. is referred to as Sales, Inc., while on this other sheet it is referred to as Times Sales. The variance supports a finding that the two sheets were either not prepared by the same person or were prepared at different times.

"Pt Based on 11 months of 1980, these expenses accounted for 75% of revenue.

"Pt Allocation percentage for 1981 will be based upon budget performance. Will be recorded quarterly. Percentage adjusted at year-end, if material.

"4. Allocated to Times Sales:

"A. Income

"(1) Advertising branch office linage x average rate/line.

"(2) Circulation from branch x net price/copy.

"B. Expenses

"(1) 75% of above revenue was allocated as operating expenses.

"(2) Expenses of branch office (rent, utilities, payroll) are already reflected on books of Times Sales."

Petitioner presented two witnesses, Alfred J. Forbes and Siv Janger, in support of its position that it should not be required to file a combined report with its subsidiary, Sales Inc.

Alfred J. Forbes, a certified public accountant, has been an employee of petitioner since April 1983 and is currently involved in the design of new financial reporting systems in a managerial position. He testified that he became familiar with Sales Inc. "[f]irst, in connection with the audit work I performed while with Deloitte[12] and then as

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[12]Petitioner's annual report for 1983 includes an auditors' opinion of Deloitte Haskins & Sells dated February 16, 1984 reflecting the fact that Mr. Forbes' prior employer audited the consolidated balance sheets of petitioner and its subsidiaries and certified petitioner's financial statements. The auditors' opinion provided as follows:

"We have examined the consolidated balance sheets of The New York Times Company and subsidiaries as of December 31, 1983 and 1982 and the related consolidated statements of income, stockholders' equity, and changes in financial position for each of the three years in the period ended December 31, 1983. Our examinations were made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

"In our opinion, such consolidated financial statements present fairly the financial position of the companies at December 31, 1983 and 1982 and the results

part of my work for The New York Times newspaper" (Forbes tr., p. 7). Petitioner was an audit client of the Deloitte accounting firm, and Mr. Forbes participated in the audit of petitioner during the period at issue:

> "My first knowledge of Sales came as part of the audit of The New York Times newspaper. We had a procedure called APT, which is transaction testing. We select debits, journal entries, essentially, from the general ledgers of The New York Times Company, the New York Times Sales Company [sic], a variety of companies, subsidiaries of The New York Times Company, The Times.
>
> "Among those selections were a number of the entries recording revenues and expenses for the Sales Company [sic]" (Forbes tr., p. 8).

In an affidavit dated October 21, 1992 (Pet. Ex. "132") submitted after his examination under oath (which was conducted outside the presence of the Administrative Law Judge), Mr. Forbes clarified his less than coherent videotaped testimony concerning the attribution of income and expenses to Sales Inc. pursuant to the advertising and circulation agreement. It is noted that part of the cause for the confusing nature of his testimony under oath is the skimpy nature of this central agreement which he was called upon to explain.[13] For example, the responsibility of Sales Inc. to produce the national edition of The New York Times was not even mentioned in the agreement. Mr. Forbes opined that "production of the paper is implied" by the obligation of Sales Inc. "to deliver a paper at someone's home in time for them to take it

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> of their operations and the changes in their financial position for each of the three years in the period ended December 31, 1983, in conformity with generally accepted accounting principles applied on a consistent basis."

[13]Furthermore, Mr. Forbes' knowledge of the agreement appears to have been secondhand. The agreement was signed by petitioner's corporate secretary, Solomon B. Watson, IV, on behalf of Sales Inc. by its vice-president, Benjamin Handelman (who is also described in the 1983 annual report as petitioner's senior vice-president, and deputy to the president). Mr. Forbes was not responsible for the drafting or development of the agreement. It is unknown who was so responsible. It is fair to say that Mr. Forbes, as a certified public accountant and auditor, was more of an interpreter or reviewer of the agreement and the arrangement between petitioner and Sales Inc. than someone with personal involvement in the development of such agreement and arrangement.

with them to work" (Forbes tr., p. 70). Additionally, charges by petitioner to Sales Inc. for management and supervisory charges were not mentioned in the agreement. Mr. Forbes suggested an explanation for such omission:

> "A parent does not need a contractual right to -- from the standpoint of consolidated financial statements or from the standpoint of tax reporting to allocate the expenses to a subsidiary" (Forbes tr., p. 115).

In any event, Mr. Forbes' affidavit, submitted after his examination under oath, represented a much clearer statement[14] than his testimony. First, he described the activities of Sales Inc. succinctly as follows:

> "During the years 1981 and 1982, the business of Sales consisted of three activities: (i) selling advertising for the Newspaper in all parts of the country except the Time's primary marketing area, consisting of the New York metropolitan area and the area within a radius of approximately 50 miles from New York City, (ii) production and circulation of the national edition of the Newspaper outside the northeast corridor, and circulation within the northeast corridor (but excluding the Times's primary marketing area) of copies of the Newspaper produced by the Times, and (iii) operation of a news service (the 'News Service') that marketed news stories and other materials produced by the Times to third parties. In 1983, Sales continued operating its advertising and circulation businesses but did not operate the News Service."

The 1983 annual report noted that the press run for the National Edition was approximately 100,000 copies on weekdays and 200,000 copies on Sundays. The 1983 unaudited circulation of the Times was 934,600 copies on weekdays and 1,543,300 copies on Sundays. The annual report noted the following general breakdown of the paper's geographic distribution:

> "Approximately 75% of the weekday circulation is sold in New York City, its suburbs and certain adjacent areas and 25% is sold elsewhere. On Sundays, approximately 67% of the circulation is sold in New York City, its suburbs, and certain adjacent areas and 33% elsewhere."

The Form 10-K filed by petitioner with the Securities and Exchange Commission (Pet. Ex. "129") indicated that during the years at issue the National Edition was distributed from

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[14]It should be noted that there do not appear to be any inconsistencies between Mr. Forbes' testimony and his statements in his affidavit.

three printing sites: in the midwest from a Chicago site, in the southeast from a Lakeland, Florida site, and in the southwest from a Torrance, California site. Satellite transmission of page images to the printing plants made early morning delivery of the newspaper possible.

Mr. Forbes' affidavit also included the following coherent description of the revenues of Sales Inc.:

> "9. The revenues of Sales . . . for 1981 and 1982 included three components: (i) all advertising revenues attributable to customers located in the territories serviced by the branch offices of Sales; (ii) circulation revenues derived from total circulation of the national edition of the Newspaper and from circulation of the Newspaper within the northeast corridor (but excluding the Times's primary marketing area); and (iii) all revenues attributable to the activities of the News Service. The revenues of Sales . . . for 1983 include the first two of these components, but do not include any revenues from the activities of the News Service."

Mr. Forbes' affidavit also clearly described the expenses of Sales Inc. in the following paragraphs:

> "10. For the years 1981 and 1982, the expenses of Sales . . . fall into five major categories . . . .
>
> "11. The first category of expenses consists of Sales's direct costs of operating its advertising and circulation businesses, including all direct costs of maintaining Sales's branch offices and employee work force, all costs of receiving the editorial content of the Newspaper from the Times and producing and delivering the national edition of the Newspaper after receipt of the editorial content from the Times, and all costs of delivering the Newspaper within the northeast corridor (but excluding the Time's primary marketing area) after receipt of the Newspaper from the Times.[15]
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> * * *
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> "15. The second category of Sales's expenses was a management and supervisory charge[16] which the Times charged to Sales to cover various

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15 In paragraphs "12", "13" and "14" of his affidavit, Mr. Forbes pinpointed where in the tax returns of Sales Inc. these direct costs of operating its advertising and circulation businesses were reported for 1981, 1982 and 1983, respectively.

16 Mr. Forbes, in his affidavit, pinpointed where in the 1981 and 1982 Federal tax returns these expenses were reported. He did not reference the 1983 return, but in reviewing petitioner's Exhibit "131", which is a photocopy of the 1983 Federal tax return, it is observed that a deduction for a management and supervisory charge of $1,715,555.00 is shown on Statement 2

administrative services that the Times performed for Sales. The management and supervisory charge was calculated using a formula that took into account the operating pre-tax net income and gross revenues of the Times and each of its subsidiaries . . . .

"16. The third category of Sales's expenses was an advertising and circulation sales service charge[17] intended to reimburse the Times for a portion of costs of preparing and producing the Newspaper . . . .

"17. The sales service charge for advertising and circulation was determined by multiplying certain of Sales's advertising and circulation revenues by the gross cost percentage for the Newspaper. For purposes of this calculation, the gross cost percentage was the ratio of (i) the sum of the Times's cost of materials (i.e. paper and ink), operating expenses (i.e. editorial, news, distribution, outside printing and binding, overhead, and other operating costs), advertising and consumer marketing, to (ii) total revenues from advertising and circulation of the Newspapers produced by the Times.

"18. To calculate the advertising and circulation sales service charge, the gross cost percentage described above was applied against the sum of (i) all advertising revenues attributable to Sales, except revenues for certain classified advertising appearing in the national edition (in particular, 'display advertising' appearing only in the national edition, and 'repeat advertising' appearing in the national edition), and (ii) circulation revenues derived from distribution of the Newspaper within the northeast corridor (but excluding the Times's primary marketing area). Sales's circulation revenues from the distribution of the national edition of the Newspaper were excluded from the base used to calculate the advertising and circulation sales service charge . . . .

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of the return. Such charges for 1981 consisted of $2,435,665.00 described as "M & S charges by N.Y.T. Co." under the heading "The New York Times Sales, Inc. - Div" and of an amount of approximately $500,000.00 under the heading "The New York Times Sales, Inc. - News Sevs Div". The photocopy of Statement 6 to the 1981 tax return is of such poor quality that the specific amount cannot be deciphered. Such charges for 1982 consisted of $515,213.00 "M & S charges by N.Y.T. Co." under the heading "The New York Times Sales, Inc. - Div" and of $505,199.00 under the heading "The New York Times Sales, Inc. - News Sevs Div". There was only one amount representing "M & S charges" for 1983 because, as noted in Finding of Fact "18", in 1983 Sales Inc. did not operate the news service.

17

Mr. Forbes noted that, in each of the Federal tax returns for the years at issue, these expenses were reported as part of the cost of goods sold of Sales Inc. and were reflected in a detailed description of cost of operations that was included in each return. The returns show sales service charges of $47,828,848.00, $52,159,514.00 and $57,176,760.00 for 1981, 1982 and 1983, respectively.

"20. The fourth category of expenses consists of reimbursement to the Times for all expenses specifically attributable to the News Service, including salaries, benefits, rents, printing, data processing, communication costs, and other such expenses[18]. . . .

"21. The fifth category of expenses consisted of a royalty paid by Sales to the Times for the use of news materials produced by the Times and resold through the News Service.[19] The royalty was equal to 45%[20] of Sales's operating profit

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Mr. Forbes did not reference one specific line in the Federal tax returns on which such expenses were reported. Rather, he noted that such "expenses are reflected on Form 1120, Statement 2, Line 2 and Lines 12 through 25 and part of Line 26." These lines show the following:

"Line	Line Description		1981	1982
2	Cost Goods Sold/Op		$ 909,454.00	$ 696,014.00
12	Compensation offcr		129,227.00	134,430.00
13	Salaries and Wages		261,375.00	233,005.00
14	Repairs	12,031.00	19,130.00	
15	Bad debts	106,048.00	92,230.00	
16	Rents		71,232.00	105,914.00
17	Taxes		114,684.00	75,466.00
18	Interest expense		--	--
19	Contributions		--	--
20	Amortization		--	--
21	Depreciation	15,008.00	11,244.00	
22	Depletion	--	--	
23	Advertising	26,667.00	21,091.00	
24	Pension profit shr		16,711.00	--
25	Other ben. plans		9,045.00	58,994.00
26	Other deductions		2,445,668.00	2,777,552.00
Lines 12-26 Total			$3,207,696.00	$3,529,056.00"

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Mr. Forbes referenced Statement 6 in the line called "Sales Service Miscellaneous From Corp." for the royalty paid by Sales Inc. to petitioner in 1981. The amount on the poor photocopy appears to be over $1,000,000.00, but is not easily decipherable. For 1982, such expense amounted to $1,907,681.00.

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Mr. Forbes testified that he did not "know the basis for determining the rate" (Forbes tr., p. 40). A so-called news service agreement dated December 31, 1980 between petitioner and Sales Inc.

attributable to the sale of the Time's material by the News Service . . . ."

There is an overwhelming interdependence between petitioner and Sales Inc. Sales Inc. never sold advertising for anyone other than petitioner according to Mr. Forbes, who rejected the suggestion by petitioner's counsel that Sales Inc. sold an advertising package covering other newspapers in different markets than petitioner (Forbes tr., p. 18). Petitioner checked the creditworthiness of all advertisers and performed billing functions for Sales Inc. Circulation revenues were, according to Mr. Forbes, "[o]n a daily basis, those funds are swept out of the lock box accounts [of Sales Inc.] into a concentration account [of petitioner's] here in New York" (Forbes tr., p. 25). Accounting, legal and tax services were all performed by petitioner's employees for Sales Inc. Furthermore, marketing campaigns and advertising strategies were developed mostly by petitioner. A telling indication that petitioner and Sales Inc. were interdependent is the following (albeit incorrect) response by Lance Primis, president and general manager of The New York Times (the newspaper division of petitioner, which is The New York Times Company [emphasis added]):

> Attorney Rosen: "Let me ask a question I asked you earlier in a different way. Are you familiar with the relationship between The New York Times Company and the Sales Company?"
>
> Mr. Primis: "The New York Times -- the Sales Company is a division of The New York Times Company" (Primis tr., p. 42; emphasis added).

Mr. Forbes testified that the net income of Sales Inc. as a percentage of its total expenses was approximately 4%, which he noted was reasonable in comparison to petitioner's New York newspaper wholesalers. In concluding his direct examination, Mr. Forbes opined that the financial arrangement between petitioner and Sales Inc. was at arm's length.

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set the royalty at 45% and also requires Sales Inc. to reimburse petitioner for all expenses attributable to the news service.

The Testimony of Experts

Petitioner presented the testimony of Siv Janger, a manager at the firm of Coopers & Lybrand. Ms. Janger, an economist, was qualified as an expert who had expertise in the publishing industry and in transfer pricing, especially the practical application of Internal Revenue Code § 482. Ms. Janger had been previously employed as an industry economist by the Internal Revenue Service. She was familiar with the arrangement between petitioner and Sales Inc. based on interviews of several employees of petitioner and a review of documents including the Federal tax returns and workpapers for The New York Times Company and Sales Inc., the circulation and advertising agreement as detailed in Finding of Fact "15", the news service agreement as noted in footnote "20", the methodology used to allocate costs between petitioner and Sales Inc., the affidavit of Alfred J. Forbes quoted at length in Findings of Fact "18", "19" and "20", 10-K reports for certain newspaper companies, and a report prepared by the Division's expert, Mr. Arthur Friedson. Ms. Janger also prepared a report summarizing her analysis and conclusions, which was received in evidence as petitioner's Exhibit "133".

The crux of Ms. Janger's testimony was that, from an economic perspective, petitioner and Sales Inc. were engaged in a cost-sharing arrangement for the development of an intangible, namely the editorial content of The New York Times newspaper, and that, judged by the standards of Internal Revenue Code § 482 ("section 482"), this cost-sharing arrangement was the equivalent of an arm's-length transaction. She based this opinion on three essential findings: first, the editorial content of the newspaper constituted an intangible; second, petitioner and Sales Inc. were engaged in a good-faith effort to share costs associated with the development of the editorial content of the newspaper -- that is, that there was no effort to evade taxation; and third, that these costs were shared proportionately in relation to the benefits each party anticipated receiving from the exploitation of the editorial content. Ms. Janger's opinion was that, from an economic perspective, the arrangement between petitioner and Sales Inc. was a good-faith, cost-sharing arrangement that would qualify as the equivalent of an arm's-length transaction under section 482.

Ms. Janger also emphasized that, based on a comparison of the operating margins of petitioner and Sales Inc. with each other and with other relevant newspaper publishing companies, there was no indication of income shifting from petitioner to Sales Inc. The operating margins for both corporations fell well within the range of the sample group's operating margins. In particular, Ms. Janger noted that petitioner's operating margin was markedly similar to that of The Washington Post, the newspaper in the sample group with characteristics most similar to those of The Times.

The Division presented the expert testimony of Arthur Friedson, an economist and an employee of the Office of Tax Policy Analysis (the Division's research arm), regarding the relationship between petitioner and Sales Inc. The Division also submitted in evidence a report prepared by Mr. Friedson (Div. Ex. "M").

Mr. Friedson, who has been involved in a so-called "combined reporting study" for the Division, did not have any prior experience with the publishing industry. He did not profess to any expertise regarding the concept of cost-sharing arrangements under section 482, and from his review of the circulation and advertising agreement and "some looking at the tax returns" (tr., p. 610), Mr. Friedson would not conclude that petitioner and Sales Inc. were engaged in joint cost sharing in the development of an intangible, i.e., the editorial content of the newspaper.

Mr. Friedson indicated that, in his opinion, petitioner's income would be distorted by the filing of separate tax reports by petitioner and Sales Inc. because:

(i) Sales Inc. was permitted to use the trade name, The New York Times, without any compensation to petitioner;

(ii) Petitioner's relationship with its wholly-owned subsidiary enabled it to avoid substantial costs it otherwise would have incurred to ensure quality control and avoid debasement of its trade name;

(iii) The absence of any markup for materials such as paper and ink in the circulation and advertising agreement provided evidence of distortion;

(iv) Under the circulation and advertising agreement, the allocation of income to Sales Inc. was wholly dependent on petitioner's activities, indicating an inequality of bargaining power between the two; and

(v) The two companies were part of a vertically integrated business, suggesting a distortion of income between the two companies due to savings of transaction costs that would have been incurred in dealing with unaffiliated parties.

Petitioner's expert responded as follows to each of these points:

(i) Because the value of the trade name, The New York Times, was based upon the accumulated value of the quality of the editorial content together with enhancements in value resulting from advertising for the newspaper itself, and because all costs associated with the development of the editorial content and the newspaper's marketing activities were included in the pool of shared costs under the arrangement between petitioner and Sales Inc., it would be improper and contrary to the cost-sharing approach to require Sales Inc. to pay any separate amount for the use of petitioner's trade name;

(ii) Petitioner's relationship with Sales Inc. did not result in any substantially enhanced benefits in the area of quality control. The editorial content of the newspaper was wholly within the control of petitioner and it could easily have had the same arrangement for transmission of editorial content with a third party as it had with Sales Inc. In addition, petitioner's relationship with Sales Inc. did not affect the risk of debasement of the trade name or quality control problems in the area of distribution, since Sales Inc. ultimately contracted with third parties for these services;

(iii) Petitioner's costs for paper and ink were already included in the cost-sharing arrangement, and since all costs of production were shared equitably, it would be inappropriate for petitioner to charge any additional markup for these items;

(iv) Allocations of revenue to Sales Inc. were not dependent on activities of petitioner. Rather, they were dependent on the volume of advertising and circulation sales achieved by Sales Inc. itself, factors outside petitioner's control. Moreover, the mere presence of

unequal bargaining power between petitioner and Sales Inc. did not demonstrate distortion, since unequal bargaining power is often present in relationships between unaffiliated parties; and

(v) The relationship between the corporations did not result in savings of transaction costs, as Mr. Friedson suggested, because petitioner was already engaged in every activity conducted by Sales Inc., and did not need to integrate with Sales Inc. in order to overcome inefficiencies in bargaining with third parties. Petitioner's relationship with Sales Inc. did result in economies of scale, particularly from the concentration of editorial functions and the physical production of newspapers in petitioner, but these cost savings did not result in any distortion of income, since all such costs were included in the cost-sharing formula and were shared equitably by the two.

Northern SC Paper Corp.

Petitioner filed a Form CT-8, "Claim for Credit or Refund of Corporation Tax Paid", dated July 17, 1990, asserting a claim for refund of tax paid in the amount of $4,573,845.00 plus interest for the years 1981, 1982 and 1983. Petitioner's refund request was based upon the inclusion of Northern SC Paper Corp. (hereinafter "Northern SC") in a combined return with petitioner.[21]

The auditor testified that when he first discussed with petitioner the possibility of combination with Sales Inc., petitioner "raised to me the question is it limited to just these two companies or can other companies be included?" (tr., p. 60). The auditor's response was that if the criteria for combination were met, "any other company could be included in the combined report" (tr., p. 60). The auditor testified that he determined that petitioner should not be

[21]Petitioner's representative, in his statement of the issues at the hearing on July 22, 1992, indicated that petitioner, "upon learning of the criteria utilized" by the Division in making its determination to require petitioner and Sales Inc. to file on a combined basis, "realized that applying those same criteria to [Northern SC] would result in combined reporting being appropriate with reference to [Northern SC]" (tr., p. 24). The Division has not challenged petitioner's request to file combined returns with Northern SC on the basis that such request was not made within 30 days after the close of the respective years at issue (see, 20 NYCRR 6-2.4).

permitted to file in combination with Northern SC for the following reason:

> "[O]ur regulations basically state that a holding company, which in effect has no intercompany transactions, would not meet the qualifications for a combined report" (tr., p. 65).[22]

The auditor elaborated further:

> "Being that there were no intercompany transactions, there was no distortion created, and therefore we disallowed [combination]" (tr., p. 66).

Included in the Division's Exhibit "K", the audit report concerning Sales Inc., is a photocopy of a memorandum dated April 15, 1988 from Carol Sheffer, Corporation Tax Auditor II, to the auditor noting that the Division's Combined Reporting Sub-Committee "unanimously agreed that [Northern SC] should not be included in the combined report of [petitioner]" based upon the following reasoning:

> "Combined reporting will only be allowed to correct any distortion which is present when reporting on an individual basis. The committee feels that all transactions with a partnership, where the other partner is an unrelated party, are on an arms-length basis and therefore no distortion exists. The terms of the partnership agreement indicates that transactions were to be recorded in accordance with GAAP, and therefore arms-length. The agreement also states that neither NYT nor NSC actively participated in handling the affairs of the partnership.
>
> "Finally, by allowing NSC's portion of the loss of the partnership to offset the income of NYT with only 11% intercorporate transactions, a distortion on a combined basis would result."

Northern SC, a Delaware corporation, did not file New York corporation franchise tax reports for 1981 or 1982. However, it filed a report for 1983 showing net tax of $250.00, the minimum tax. On the 1983 report, Northern SC allocated a loss of $51,610.00, .2513% of its "business loss for allocation" for 1983 of $20,537,158.00, to New York. The very minimal business allocation percentage of .2513% was calculated as follows:

	New York	Everywhere

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[22] On cross-examination, the auditor conceded that "[t]he regulation doesn't specifically mention holding companies within the regulation" (tr., p. 72). Nonetheless, the auditor emphasized that "a holding company does not have the substantial intercompany transactions to meet the qualifications" (tr., p. 73).

(i) Property		
Real estate owned by Northern SC	$ -0-	$ -0-
Northern SC's 75%[23] share of real property owned by Madison Paper Industries	-0-	16,140,140.00
Real estate rented by Northern SC	-0-	-0-
Northern SC's 75% share of real property rented by Madison Paper Industries	33,360.00	33,360.00
Inventories owned by Northern SC	-0-	-0-
Northern SC's 75% share of inventories owned by Madison Paper Industries	-0-	5,370,855.00
Other tangible personal property owned by Northern SC	-0-	-0-
Northern SC's 75% share of other tangible personal property owned by Madison Paper Industries	-0-	141,678,179.00
Totals	$33,360.00	$163,192,533.00
Percentage in NYS	.0204%	
(ii) Receipts		
Northern SC's 75% share of all sales of tangible personal property by Madison Paper Industries	$ -0-	$ 64,338,035.00
Percentage in NYS	0%	

[23]Michael Ryan testified that through 1987, petitioner through Northern SC, and Myllykoski Oy, a Finnish corporation, through its subsidiaries, divided profits and losses disproportionately at 75% for petitioner and 25% for Myllykoski Oy.

(iii) Payroll		
Wages, salaries and other compensation of employees	$ -0-	$ -0-
Northern SC's 75% share of wages, salaries and other compensation of employees for Madison Paper Industries	63,750.00	6,473,600.00
Percentage in NYS	.9848%	
Business allocation percentage	.2513%[24]	

The Federal corporation income tax returns for Northern SC reported losses of $31,562,567.00 and $46,794,256.00 for 1981 and 1982, respectively.

As noted in Finding of Fact "5", petitioner has equity interests in three Canadian newsprint companies. According to the testimony of Michael Ryan, petitioner's senior vice-president, paper at about $400,000,000.00 represents petitioner's "second largest cost . . . aside from labor costs, which is number one." As far back as 1896 when "Mr. Ochs . . . took [petitioner] over from bankruptcy . . . we have a participation in paper mills and that . . . would ensure not only the supply of paper on an ongoing basis but it would also be an offset of the costs, essentially of the raw material" (Ryan tr., p. 83). The cost of paper at approximately $400,000,000.00 per year represents approximately 30% of petitioner's total expenses. Similarly, petitioner determined that it would be wise for it to obtain an ownership interest in an operation that produced a special grade of paper known as "supercalendared" paper or "SC" paper which petitioner uses for "The New York Times Sunday Magazine" and special magazine supplements such as "Women's Fashions", "Home Design", "The Sophisticated Traveler", etc., known as "Part 2's". SC paper is a glossy

[24]Percentages for property, receipts (counted twice) and wages totalled and divided by four is .2513%.

paper that is capable of providing excellent photo reproduction and is both cheaper and lighter[25] than clay-coated papers normally used for high-quality reproduction in magazines. Supercalendaring describes the complex process of ironing raw paper stock until it becomes polished and is able to pick up inks almost the same as coated paper.

Prior to 1976, the Sunday Magazine was printed on relatively low-grade paper referred to as "roto". Because of the quality of the paper, the Sunday Magazine had limited ability to attract high-cost advertising and, in fact, was unable even to generate sufficient advertising to cover its costs of production. In 1976, petitioner tried SC paper for the Sunday Magazine and the response of advertisers was very positive and resulted in petitioner's decision to use SC paper permanently for the Sunday Magazine. The Sunday Magazine became a major profit center for petitioner. Revenues and profitability grew dramatically. Lance Primis noted that "for most of the '80s, [The New York Times Magazine] was the number one or number two advertising medium in America among all magazines, swapping places with Business Week" (Primis tr., p. 66). The Sunday Magazine was responsible for between 10 and 12% of all advertising revenues for the entire newspaper, and its profit margin ranged between 10 and 14%.

Initially, petitioner obtained its supply of SC paper from a Finnish paper cartel, known as FinnPap, because in the late 1970's there was no North American source of SC paper. To ensure a supply of SC paper, petitioner negotiated with FinnPap for longer-term supply contracts and for

backup contracts with other European SC paper producers in the event FinnPap was unable to meet petitioner's requirements.

Sometime in 1980, Myllykoski Oy ("Myllykoski"), a Finnish corporation and a member of the FinnPap cartel, informed petitioner

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[25]Circulation of the Sunday New York Times, including the Sunday Magazine, is approximately 2,000,000, so that the weight of the magazine has an impact on delivery costs.

that it had purchased a bankrupt paper mill in Madison, Maine, and that it planned to build a state-of-the-art SC paper machine ("PM-3") at Madison.[26] Myllykoski asked petitioner to consider entering into a long-term contract for the Madison mill's SC paper. In response, petitioner proposed that it and Myllykoski form a partnership to develop the new facility. Petitioner and Myllykoski eventually decided to form a new entity, Madison Paper Industries ("the partnership"). The ownership of the partnership was structured so that petitioner and Myllykoski would beneficially hold 40% and 60%, respectively, of the partnership's equity. Myllykoski, which was transferring its paper-making technology to North America, wanted to be the majority partner.

Petitioner held its investment in Madison Paper Industries indirectly through Northern SC, which was owned 80% by The New York Times Company and 20% by Columbier B.V., a subsidiary of Myllykoski. Myllykoski owned 50% of the partnership through its subsidiary, Madison Paper Corporation. Both partners, Northern SC and Madison Paper Corporation, were deemed general partners in the partnership agreement. Four of Northern SC's five directors were senior officers of petitioner. All of Northern SC's

officers were employees of petitioner, many of them senior officers as well. During the period at issue, Northern SC had no employees of its own, which is reflected in Finding of Fact "31", which shows no employees in the calculation of Northern SC's business allocation percentage. Petitioner's employees, in fact, carried out all of Northern SC's functions.

The ownership structure of Madison Paper Industries was carefully crafted by petitioner's legal and financial professionals to achieve three main objectives:

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[26]Petitioner's annual report for 1983 at page 12 (part of petitioner's Exhibit "129") includes a photograph of "PM-3", the SC papermaking machine which, according to the annual report, "operates at a capacity of 3,500 feet per minute."

(i) Through its control of Northern SC, petitioner obtained a significant voice in the management of the partnership;

(ii) By holding its investment through Northern SC, a separate corporation, petitioner obtained a measure of insulation from potential liabilities of the partnership; and

(iii) Petitioner's 80% interest in Northern SC enabled it to include Northern SC in its consolidated Federal tax returns.

Michael Ryan testified that because of the high risk "[w]e felt that we had to put up neon lights and let everybody know . . . that this is not The New York Times Company" (Ryan tr., p. 202). Nonetheless, petitioner entered into a so-called "Northern Back-Up Agreement" (Pet. Ex. "5") dated February 12, 1980 in which petitioner became obligated to ensure that Northern SC had sufficient funds to meet its obligations under the partnership's equity subscription agreement. Furthermore, Francis X. Flood, the partnership's chief financial officer, noted, in telling testimony, that 300 of the partnership's 310 employees viewed petitioner as one of the owners of the partnership (Flood tr., p. 84). According to Mr. Flood, the mill had gone bankrupt a few times in the past and its employees were relieved to have petitioner as an owner.

Petitioner and Myllykoski allocated management responsibilities for the partnership as follows: Myllykoski was responsible for providing technical expertise in the construction of PM-3 and in all aspects of paper-making. Petitioner, acting through Northern SC, was to have primary responsibility for the partnership's legal, financial, administrative and tax affairs, both with regard to long-range planning and with

day-to-day management. Northern SC had three representatives on the partnership's owners' committee who were senior executives of petitioner. The other members of that committee consisted of three representatives of Madison Paper Corporation, the subsidiary of Myllykoski which held 50% of Myllykoski's 60% interest in the partnership. (The 20% interest of Colombier B.V., another subsidiary of Myllykoski, in Northern SC represented the additional 10% interest in the partnership since Northern SC held a 50% interest in the partnership, i.e., 20% of a 50% interest represented Myllykoski's additional 10% interest.) In addition, the partnership's chief executive officer, Jack Chinn,[27] was on the owners' committee. The partnership's executive committee was made up of one representative of Northern SC (which was petitioner's senior vice-president, Michael Ryan), one representative of Madison Paper Corporation and Mr. Chinn. Northern SC was responsible for chairing the partnership's administrative committee,

which was responsible for supervising the legal, financial and administrative affairs of the partnership.

In practice, at the monthly owners' committee meetings, Northern SC, by petitioner's employees, played an active role in managing all significant aspects of the partnership's business, including strategic planning, formulation of budgets, and determination of all major financial, management and marketing issues facing the partnership. Petitioner's vice-president of advertising, Fred Thompson, ran the partnership's marketing efforts, and a member of petitioner's accounting department, Francis Flood, served as the partnership's chief financial officer. Petitioner's executives were involved on a regular basis

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[27]Jack Chinn was, prior to his position with Madison Paper Industries, the president of the Canadian division of International Paper. Michael Ryan testified that it was a major coup for the partnership to attract Mr. Chinn to the venture because "Jack Chinn was a big, well-known executive in the forest products business" (Ryan tr., p. 177). Petitioner, by its president, director and chief operating officer, Walter E. Mattson, persuaded Mr. Chinn to join the partnership's management. Myllykoski, on its own, had been unable to do so.

in evaluating the performance of the partnership's executives.

The new paper machine (PM-3), constructed to produce SC paper, cost approximately $240,000,000.00, and petitioner's employees, on behalf of Northern SC, were involved in its financing. Northern SC agreed to contribute $41,000,000.00 in equity to the partnership, and Madison Paper Corporation contributed approximately $21,000,000.00 in cash plus land and equipment. Because Northern SC and Madison Paper Corporation could not finance the entire construction costs directly, the partnership turned to bank financing for the majority of the construction costs. A syndicate of four banks provided credit totalling $160,000,000.00 for construction costs and Northern SC and Madison Paper Corporation also agreed that, in the event of cost overruns, they would lend up to $11,000,000.00 to the partnership. They eventually were required to make these loans.

Neither Northern SC nor Myllykoski could have obtained third-party financing for the project, and it fell to petitioner to play the central role in obtaining bank financing. In order to obtain the necessary funds, petitioner was required to exert substantial influence with its lending institutions, effectively putting its financial relationships on the line. In addition, before the banks would agree to the transaction, petitioner had to agree to several significant concessions including guaranteeing Northern SC's equity and cost overrun obligations and entering into an unusually long-term contract to purchase SC paper from the partnership. The banks also required an oral commitment that petitioner would not permit the partnership to go into bankruptcy. In sum, petitioner, on behalf of Northern SC, provided funds for equity and debt financing, arranged third-party financing and managed[28] all aspects of the partnership's loans.

Petitioner provided Northern SC with millions of dollars on non-arm's-length terms to enable it to lend funds to the partnership. On

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[28]Petitioner's employees coordinated all borrowings under the loan agreements including determining when borrowings would be made and in what amounts, choosing the applicable interest rates, conducting substantial due diligence, preparing extensive paperwork and arranging each closing with the banks.

numerous occasions, petitioner lent funds to Northern SC without receiving a signed promissory note at the time of the loan, something petitioner would not have done with an independent party. Northern SC was never asked to repay its loans to petitioner and, as of the date of the hearing herein, 10 years later, it had not paid these loans. Michael Ryan candidly compared petitioner's investment in the paper mill, through Northern SC, to junk bonds:

> "Northern was created because it had limited liability, and this was an extremely risky project for which the banks were compensated for in terms of high interest rates. Junk bonds
>
> weren't around, but that's basically what it was" (Ryan tr., p. 94).

Northern SC, through petitioner's employees, developed a sophisticated accounting and management information system ("MIS"),[29] had primary responsibility for tax planning and reporting, acted as primary legal counsel, and established and maintained a cash management system for the partnership.

Northern SC did not compensate petitioner for any of the services described above, nor did it compensate petitioner for its guarantees of Northern SC's financial obligations. The only activity described above for which petitioner received compensation was the salary and partial benefits of Francis Flood, who acted as chief financial officer of the partnership, and this compensation came directly from the partnership.

By the end of the years at issue, petitioner was obtaining 50% of its SC paper from the partnership:

> "[I]t was half our needs . . . . We had given our oral commitment to FinnPap that regardless of what we did with Myllykoski in the United States, because they had been in on the original deal . . . they could look forward to always having us as a 50% customer of FinnPap . . . . We still get 50% of the magazine's requirements from Finland and the other 50% from our mill" (Ryan tr., p. 110).

SC paper represents 10% of petitioner's total paper consumption. In addition, petitioner's purchase of SC paper from the partnership represents a maximum of 10% of the mill's output.

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[29]Petitioner introduced into evidence as its Exhibit "81" a copy of a "Pre-Operational Review of the New Automated Management Information System" of Madison Paper Industries dated March 1983. It is of note that Madison Paper Industries on the cover of the report is described as "a partnership of Myllykoski Oy and The New York Times Company."

A review of petitioner's Exhibit

"7", a photocopy of an agreement dated April 1, 1980 between petitioner and the partnership, discloses that petitioner agreed to purchase 50% of its annual SC paper needs, approximately 15,000 tons, from the partnership for a 20-year period beginning January 1, 1982 through December 31, 2001 at a price per ton of 133.33% of the current market price of newsprint plus $20.00. Francis X. Flood, the chief financial officer of the partnership, testified that the mill had 100 customers, but 96% of its business was "concentrated in approximately 20 customers" (Flood tr., p. 59).

Petitioner presented the opinion, as well as factual testimony, of John Coblentz, a certified public accountant who is a partner of the accounting firm of Deloitte & Touche. During the years at issue, he was "the lead client service partner on our services to The New York Times Company" (tr., p. 327). Mr. Coblentz testified that petitioner's financial statements misstated its revenues and expenses because petitioner bore the costs of all of the activities of Northern SC without any compensation. In Mr. Coblentz's opinion, separate tax reporting by petitioner and Northern SC results in tax returns which do not accurately reflect either taxpayer's true cost of doing business and, therefore, combined reporting is necessary to avoid distortion in the reporting of petitioner's income and expenses to New York.

In his testimony, Mr. Coblentz emphasized various ways in which separate reporting by petitioner and Northern SC results in a distortion of the companies' income and expenses. He testified that if Northern SC had been independent of petitioner, it would have faced significantly greater operating costs, need for borrowing and cost of funds.

Operating costs would have been significantly greater because Northern SC would have had to incur significant costs in maintaining a work force and facilities of its own, costs which in reality were borne entirely by petitioner. In addition, Northern SC incurred no costs for third-party services because any necessary services were paid for by petitioner. Furthermore, by using petitioner's own employees to perform types of services which they also performed for

petitioner, there were benefits resulting from economies of scale. But petitioner received none of these benefits, while Northern SC received all of the benefits of these economies of scale.

Northern SC's need for borrowing was substantially reduced by petitioner's active inducement of lenders to provide financing for the partnership on substantially better terms than they otherwise would have done. By helping to reduce the partnership's overall need for borrowing, petitioner also helped Northern SC reduce its own borrowing needs.

Furthermore, the cost of Northern SC's borrowed funds was significantly reduced. Mr. Coblentz testified that without the support of petitioner, Northern SC probably could not have obtained financing at all, since it had no near-term prospects of being able to pay off any loans. Even if Northern SC had been able to borrow from third parties, it would have had to pay substantially higher interest rates than it got from petitioner since it had no cash flow and had only heavily encumbered assets to offer as security for its loans. An examination of the interest rates on petitioner's loans to Northern SC confirms that they were not the equivalent of arm's length. Petitioner loaned funds to Northern SC at the prime rate, which is generally available only to the most creditworthy companies. At other times, petitioner lent to Northern SC at rates equal to rates used for the partnership, despite the fact that Northern SC, as an equity holder of a highly leveraged venture, presented a substantially poorer credit risk than the partnership. In short, petitioner's loans to Northern SC were not designed with market considerations in mind, particularly with the level of risk involved, and thus did not reflect arm's-length terms.

Petitioner submitted 86 proposed findings of fact. Proposed findings of fact "1", "3" through "30", "32" through "36", "38", "39", "41" through "84" and "86" are accepted and incorporated into this determination.

Proposed findings of fact "2", "31", "37", "40" and "85" are accepted in part. The accepted parts are incorporated into this determination. The rejected parts are as follows:

(i) Proposed finding of fact "2" includes the incorrect statement that "Sales' business consisted of several activities, each taking place outside the New York metropolitan

area." As noted in Appendix B, Sales Inc. had some presence in New York. In particular, during 1981 and 1982, Sales Inc. rented real estate in New York and, in 1982, it had employees in New York.

(ii) Proposed finding of fact "31" includes a general reference to "a formula that took into account several different financial statistics" for purposes of allocating "management and supervisory charges" which is more exactly addressed in proposed finding of fact "20";

(iii) Proposed findings of fact "37" and "40" are in the nature of ultimate findings of fact which are more appropriately addressed in the Conclusions of Law; and

(iv) Proposed finding of fact "85" includes the statement that the auditor testified that the relationship between petitioner and Sales Inc. was an arm's-length relationship which does not reflect his later backtracking noted in Finding of Fact "14".

SUMMARY OF THE PARTIES' POSITIONS

The Division maintains that petitioner's franchise tax liability during the years at issue "is properly reflected only when Petitioner files its franchise tax reports . . . on a combined basis with its wholly-owned subsidiary, New York Times Sales Corporation" (Division's brief, p. 29). The Division argues that:

> "[t]he unity of stock ownership by [petitioner] of Sales, the substantial intercorporate transactions between these entities, and the fact that Sales was engaged in the unitary business of [petitioner] are sufficient bases to permit the Division to require [petitioner] to file its New York franchise tax reports for the period in issue on a combined basis with Sales" (Division's brief, p. 29).

The Division asserts that petitioner has failed to establish that the intercorporate transactions between it and Sales Inc. were at "arm's length" so as to shoulder its burden of rebutting the presumption of distortion:

> "As petitioner's witnesses confirmed that the NYT-Sales relationship, memorialized in the agreements between the parties, was unique in the publishing industry, there are no available comparable uncontrolled pricing arrangements to review" (Division's brief, p. 55).

Furthermore, the Division maintains that the facts do not support petitioner's claim that it and Sales Inc. equitably participated in the development of the intangible asset, the daily editorial

content of the newspaper:

> "Pursuant to the circulation and advertising agreement, NYT only agreed to compensate Sales for specific advertising, circulation and production activities . . . . Sales only agreed to reimburse NYT for specific expenses which NYT incurred in the production of newspapers which Sales distributed in the northeast corridor.
>
> "There is no specific agreement that Sales participate in developing intangibles" (Division's brief, p. 57; emphasis in original).

The testimony of petitioner's expert may be rejected because it was "unsupported by a plain reading of the NYT-Sales compensation agreements" (Division's brief, p. 58).

The Division also contends that petitioner is not entitled to file a combined report with Northern SC because "Northern is not engaged in a unitary business with NYT, nor are there substantial intercorporate transactions between these corporations" (Division's brief, p. 59). According to the Division, there is no functional integration and/or centralization of management between the two nor are there any "economies of scale" present in the relationship between them. Northern SC merely holds a partnership interest in Madison Paper Industries. The Division claims that the "occasional transactions between Northern and NYT were at arm's length, as evidenced by the computation of interest" (Division's brief, p. 64). In conclusion, the Division maintains that petitioner has not shown "that, notwithstanding the absence of a unitary business or substantial intercorporate transactions, income and/or franchise tax liability is inaccurately reflected on [a separate reporting basis]" (Division's brief, p. 71).

Petitioner counters that the Division's auditor "after reviewing the method of income and expense allocation used by The Times and Sales . . . came to the opinion that the relationship between The Times and Sales was an arm's length relationship" (Petitioner's brief, p. 66). It emphasizes that it did not contest the presence of a unitary business with Sales Inc. and that there were substantial intercorporate transactions between the two. Rather, through a massive offering of proof, it has established that the income of The New York Times Company and of New York Times Sales Corp. is accurately reflected on separate reports:

> "[T]he Division engages in extensive discussion [22 pages in its brief] of issues that are not in dispute, namely whether The Times and its subsidiary, The New York Times Sales, Inc. form a unitary business and whether there are substantial intercorporate transactions between them" (Petitioner's reply brief, p. 2;

emphasis in original).

Petitioner maintains that it has established that the revenues of Sales Inc. were carefully matched with petitioner's costs so as to be properly considered the equivalent of arm's length. Therefore, petitioner and Sales Inc. cannot be required to file a combined report because separate reports result in no distortion.

Petitioner argues that a financial arrangement that meets the standards of Internal Revenue Code § 482 accurately reflects the income of the taxpayers and avoids distortion. According to petitioner, "as long as the arrangements between taxpayers meet the arm's length standard under Section 482, it is irrelevant whether a Federal Section 482 audit was conducted" (Petitioner's brief, p. 79). The cost-sharing arrangement between petitioner and Sales Inc. meets the standards of section 482 and allocates the costs in proper relationship to the benefits received:

> "The cost-sharing formula used by The Times and Sales covers all costs relevant to the development of the editorial content and the production by The Times of Newspapers distributed by Sales, and excludes those costs and revenues more properly borne by Sales alone, such as the costs and revenues from the production and distribution of the National Edition of The Times, which activities were undertaken solely by Sales. The methodology incorporated in the arrangement ensured that all costs and benefits -- whether related to costs of goods sold, intangibles, or administrative services -- were appropriately attributed. The benefits to be received by each of the corporations determined the portion of each category of costs that was borne by each corporation.
>
> "Because Sales bore costs in relation to its revenues from advertising sales and circulation and distribution within the Northeast Corridor, . . . the sharing of costs is in direct relationship to the benefits earned. Thus, The Times and Sales achieved a relationship in which costs were carefully matched with the anticipated benefits. This matching is the overarching principle incorporated in the cost-sharing method for achieving an arm's length arrangement. Accordingly, as Ms. Janger [petitioner's expert] testified, such an arrangement is a bona fide cost-sharing agreement under Section 482. In light of her experience with the IRS and her particular expertise in the publishing industry, Ms. Janger concluded that the cost-sharing arrangement implemented by The Times and Sales satisfactorily established an arm's length relationship.
>
> * * *
>
> "Moreover, the comparison of the operating margins of The Times and Sales to each other and to those of several competing newspapers revealed that, for two of the three years in issue, The Times' operating margins were higher than those of Sales, while Sales' operating margin was higher in one year. There was thus no pattern of shifting income from The Times to Sales. Further, when compared with

> the operating margins of competing newspaper publishing companies, the operating margins for both The Times and Sales fell well within the range of the sample group's operating margins. In particular, The Times' operating margin was markedly similar to that of The Washington Post, the newspaper in the sample group with characteristics most similar to those of The Times" (Petitioner's brief, pp. 81-84).

Petitioner emphasizes that the Division failed to respond to any of the "sophisticated economic testimony" presented by its expert (Petitioner's brief, p. 84). During the audit, the auditor decided combination was required merely based upon the three regulatory requirements: common ownership, unitary business and substantial intercompany transactions. Petitioner dismisses the testimony of the Division's expert:

> "Mr. Friedson has no experience with application and administration of the standards of Section 482 . . . . He also apparently limited his investigation to the written agreement itself, even though he conceded that the agreement did not contain several items that had been incorporated in practice" (Petitioner's brief, p. 85).

Petitioner also argues that the Division abused its discretion by denying it permission to include Northern SC in a combined report because the two met all requirements for combined reporting:

> "First, The Times owns 80% of Northern's capital stock. Second, during the period at issue, Northern was run as a mere division or alter-ego of The Times, and the companies were part of one unitary business. Third, all of Northern's functions were carried out by employees of The Times, and Northern's financial relationship with The Times was far from arm's length, making it impossible to determine what Northern's business, activities, or income would have amounted to as an independent entity" (Petitioner's brief, p. 93).

Petitioner emphasizes that it and Northern SC "carried 'centralization of management' to the point where the two entities were virtually indistinguishable" because there was "complete integration of Northern SC's functions" with those of petitioner. In addition, the two companies achieved significant economies of scale, a third indication of unitary business. The regulations specify that distortion will be presumed if there are substantial intercorporate transactions between the corporations, and at 20 NYCRR 6-2.3(f)(4), an example illustrating substantial intercorporate transactions between a manufacturing corporation and its subsidiary whose only activity is to own a new factory built by the parent is on point. Furthermore, distortion may nevertheless exist where substantial intercorporate transactions are not present, and "is likely to

arise when different corporations contribute to the overall value of the enterprise in ways that are not accurately reflected in each company's expenses and income" (Petitioner's brief, p. 124). In addition, citing Wurlitzer Co. v. State Tax Commn. (42 AD2d 247), petitioner argues that a subsidiary, which is a shell corporation, is properly combinable with the parent. Finally, separate reporting by petitioner and Northern SC results in an inaccurate portrayal of the two companies' taxable incomes:

> "The Times made extensive contributions to the business, activities, and economic results of Northern that were not quantified in any meaningful way. Since Northern paid nothing for the services it received, the net result is certainly distortive" (Petitioner's brief, p. 135).

CONCLUSIONS OF LAW

A. Tax Law § 211.4 provides, in relevant part, as follows:

"In the discretion of the tax commission,[30] any taxpayer, which owns or controls either directly or indirectly substantially all the capital stock of one or more other corporations . . . may be required or permitted to make a report on a combined basis covering any such other corporations . . . ; provided, further, that no combined report covering any corporation not a taxpayer shall be required unless the tax commission deems such a report necessary, because of inter-company transactions or some agreement, understanding, arrangement or transaction referred to in subdivision five of this section, in order properly to reflect the tax liability under this article."

B. Tax Law § 211.5 provides, in relevant part, as follows:

"In case it shall appear to the tax commission that any agreement, understanding or arrangement exists between the taxpayer and any other corporation or any person or firm, whereby the activity, business, income or capital of the taxpayer within the state is improperly or inaccurately reflected, the tax commission is authorized and empowered, in its discretion and in such manner as it may determine, to adjust items of income, deductions and capital, and to eliminate assets in computing any allocation percentage provided only that any income directly traceable thereto be also excluded from entire net income, so as equitably to determine the tax."

C. The Division's regulations provide that the Division may require or allow the filing of

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[30] Effective September 1, 1987, under Tax Law § 2026 references to the State Tax Commission in the Tax Law, in all instances other than in relation to the administration of the administrative hearing process, are deemed to refer to the Division of Taxation or Commissioner of Taxation and Finance.

a combined report where three conditions are met: (1) a stock ownership test (20 NYCRR 6-2.2[a]); (2) a unitary business test (20 NYCRR 6-2.2[b]); and (3) a distortion of income test (20 NYCRR 6-2.3). The distortion of income test provides, in part, that 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[a]).

D. With its decision in Matter of Standard Manufacturing Co. (Tax Appeals Tribunal, February 6, 1992), the Tax Appeals Tribunal rejected the Division's position that:

> "the question of income distortion is not applicable where the Division seeks to require combination between a non-taxpayer[31] and a taxpayer corporation on the basis of substantial intercorporate transactions between the two."

Rather, the Tribunal decided in Standard Manufacturing that the Commissioner's discretion to require inclusion of a non-taxpayer in a combined report must "be based on the rationale that such combination is necessary to properly reflect franchise tax liability." Therefore, the Tribunal's "inquiry" in Standard Manufacturing was "to determine whether petitioner has introduced sufficient evidence to show that its income would be properly reflected if it reported on a separate basis . . . ." The Tribunal concluded:

> "In sum, we find no reason to alter the determination of the Administrative Law Judge that petitioner has offered sufficient proof to show that its intercorporate

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[31] In the matter at hand, it is noted that Sales Inc. is a "taxpayer" as the term is used in Tax Law Article 9-A (Tax Law § 208.2). As noted in Finding of Fact "11", Sales Inc., although a Delaware corporation, was subject to tax under Article 9-A and filed New York franchise tax reports. In Matter of Standard Manufacturing Co. (supra), the Division attempted to avoid the effect of its regulation at 20 NYCRR 6-2.3. This regulation sets forth the presumption of distortion if there are substantial intercorporate transactions between taxpayers and the concomitant principle that such presumption may be rebutted by the taxpayer's introduction of sufficient evidence to show that separate reporting results in a proper reflection of tax liability. The Division argued that this regulation was not applicable to whether the taxpayer in Standard Manufacturing may be required to file a combined report with its non-taxpayer subsidiary. As noted in Conclusion of Law "C", the Tax Appeals Tribunal rejected this argument.

> transactions with [its subsidiary] were at arm's-length and that reporting on a separate basis resulted in a proper reflection of petitioner's tax liability."

As a result, with its decision in Matter of Standard Manufacturing Co., the Tribunal made the law clear. A presumption of distortion of income arises when a parent and a subsidiary have substantial intercorporate transactions and are part of a unitary business. However, a taxpayer may rebut this presumption of distortion by its introduction of "sufficient evidence to show that its income would be properly reflected if it reported on a separate basis . . ." (Matter of Standard Manufacturing Co., supra).

E. Subsequent to its decision in Matter of Standard Manufacturing Co. (supra), the Tax Appeals Tribunal has applied the principles established in Standard Manufacturing to four additional fact patterns (Matter of Sears, Roebuck and Co., Tax Appeals Tribunal, April 28, 1994; Matter of Campbell Sales Co., Tax Appeals Tribunal, December 2, 1993; Matter of Medtronic, Inc., Tax Appeals Tribunal, September 23, 1993; and Matter of USV Pharmaceutical Corp., Tax Appeals Tribunal, July 16, 1992). As in Standard Manufacturing, the Tribunal in these additional cases (except for Matter of Medtronic, Inc., supra) decided that the presumption of distortion (arising from findings of substantial intercorporate transactions and unitary business) was successfully rebutted by the introduction of sufficient evidence to show that income was properly reflected by reporting on a separate basis. As a result, forced combination by the Division was rejected. A review of the nature of the taxpayers' evidence in these matters is helpful in resolving the matter at hand.

In Matter of Standard Manufacturing Co. (supra), the parent corporation established that its purchases of goods from its Puerto Rican subsidiary were priced at arm's length. The taxpayer introduced sufficient evidence to show that in pricing the goods it utilized a cost-plus formula that conformed to the requirements of an Internal Revenue Service ("IRS") revenue procedure (Rev Proc 63-10, 1963-1 CB 490), which provided guidelines to be followed in the application of Internal Revenue Code § 482 in cases involving the allocation of income and expenses between U.S. companies and their manufacturing affiliates in Puerto Rico. It is

observed that the years at issue in Standard Manufacturing were subsequent to the years which were audited by the IRS. The IRS had adjusted the pricing of goods purchased by the parent corporation in those earlier years. The credible testimony of the taxpayer's accountant in Standard Manufacturing established that the taxpayer applied the same (IRS-approved) cost-plus formula in calculating the pricing of goods during the years then at issue.

In Matter of Campbell Sales Co. (supra), the petitioner operated two New York sales offices out of which salesmen solicited sales. The Division sought to force the petitioner to file a combined return with its parent corporation, Campbell Soup Company, which was a non-New York taxpayer having no activities in New York. Campbell Soup Company's only connection with New York consisted of its shipment of goods from outside New York to customers in New York. The Tribunal noted that under the Internal Revenue Code § 482 regulations, arm's-length pricing may be established by showing that the transactions between two related companies were "at a price that an unrelated party would have paid under the same circumstances for the same property involved in the controlled sale" (Treas Reg § 1.482-2[e][1][i]). The Tribunal decided that the petitioner in Campbell Sales Co.:

> "had established that the commission-equivalent charge to Soup for brokerage services was not less than what was charged for similar services in an arm's-length transaction under similar circumstances . . . ."

In Matter of Sears, Roebuck and Co. (supra), the Division sought to require Sears, Roebuck and Co., the nationwide retailing company, to file a combined return with its wholly-owned subsidiary, Sears Roebuck Acceptance Corporation ("SRAC"), whose business was described as follows:

> "to obtain funds by (a) direct placement of commercial paper notes in the open market, (b) demand borrowings under agreements with bank trust departments, and (c) private placement with bank trust departments of variable interest rate notes collectible after 13 months. SRAC also obtained funds through the sale of medium-term notes on a directly-placed basis with institutional investors. SRAC loans funds to Sears and receives in return Sears' promissory notes. The rate charged by SRAC . . . was derived by a formula intended to fix SRAC's ratio of earnings to fixed charges at 1.5 to 1."

The Division argued that loan rates were not set at arm's length because SRAC was guaranteed a profit by the use of the 1.5 to 1 factor.

In an analysis very similar to its earlier analysis in Campbell Sales Co., the Tribunal noted:

> "In determining whether the transactions at issue were arm's length, we are guided in our analysis by the principles underlying section 482 of the Internal Revenue Code [citation omitted].
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> * * *
>
> "We need to determine whether [the interest rate that SRAC charged Sears, Roebuck and Co.] is the rate which SRAC would have charged to an unrelated corporation."

The Tribunal decided that the evidence provided by the taxpayer in Sears, Roebuck and Co., consisting of the testimony of three experts, who all agreed that the rate SRAC charged its parent corporation was comparable to marketplace rates, was sufficient to show that SRAC's income was properly reflected by reporting on a separate basis.

In Matter of Medtronic, Inc. (supra), the Division sought to require Medtronic, Inc. ("Medtronic"), a manufacturer and marketer of artificial heart pacemakers, to file a combined return with two wholly-owned Puerto Rican subsidiaries. The Tribunal decided that Medtronic failed to establish that its purchases from its subsidiaries, as well as the subsidiaries' purchases from the petitioner and its divisions, were at arm's-length prices. First, the Tribunal noted that the petitioner failed to show that its intercorporate pricing with its subsidiaries had been examined by the IRS. Proof that a Federal audit had been conducted was insufficient because the Federal form showing income tax examination changes did "not establish that the transactions between petitioner and the subsidiaries were examined by the Internal Revenue Service." The Tribunal then evaluated the evidence and testimony presented by the taxpayer to determine whether it had proven arm's-length intercorporate transactions by applying IRS § 482 guidelines. In its footnote "8" in Medtronic, Inc., the Tribunal observed, in relevant part:

> "We look to section 482 with full knowledge that the regulations thereunder are applied by the Internal Revenue Service in an audit context, not in the context of an adversarial hearing. We are also acutely aware that the Division conducted its audit with no inquiry whatsoever into the pricing structure between petitioner and its affiliates. As a result, the hearing before the Administrative Law Judge was the first time that the subject on arm's-length pricing was addressed by the parties . . . ."

The Tribunal decided that Medtronic failed to establish a "comparable uncontrolled price" known as "a cup" and therefore "petitioner's direct evidence does not establish that the purchases by petitioner from [its Puerto Rican subsidiaries] were at arm's-length prices." Because the testimony of Medtronic's expert witness consisted of "broad assertions . . . which were largely unsupported by facts in the record", the Tribunal concluded that "petitioner has failed to establish that the purchases from its subsidiaries, as well as the subsidiaries' purchases from petitioner and its divisions, were at arm's-length prices."

Finally, in Matter of USV Pharmaceutical Corp. (supra), the Tribunal decided that the taxpayer had rebutted the presumption of distortion by proof of adjustments made by the IRS pursuant to Internal Revenue Code § 482 for the specific years at issue in that matter. Such adjustments were treated as establishing arm's-length pricing.

F. Internal Revenue Code § 482 provides as follows:

> "In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses. In the case of any transfer (or license) of intangible property (within the meaning of section 936(h)(3)(B)), the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible."

During the years at issue, Internal Revenue Code § 482 did not include the last sentence noted above which was added in 1986. The Committee Report of P.L. 99-514 (Tax Reform Act of 1986) which added this provision noted:

> "The basic requirement of the bill is that payments with respect to intangibles that a U.S. person transfers to a related foreign corporation . . . must be commensurate with the income attributable to the intangible . . . . The committee intends to make it clear that industry norms or other unrelated party transactions do not provide a safe-harbor minimum payment for related party intangible transfers" (1993 Stand Fed Tax Rep [CCH] ¶ 22,280; emphasis added).

G. The Tax Appeals Tribunal's footnote "27" in its decision in Matter of USV Pharmaceutical Corp. (supra) includes the following summary of the regulations under Internal Revenue Code § 482:

> "The regulations adopted by the Commissioner of Internal Revenue implementing section 482 deal with the transfer of tangible property (Treas Reg § 1.482-2[e][1]) and intangible property (Treas Reg § 1.482-2[d][1] and [2]) between commonly controlled entities. Both provide for adjustments to reflect the arm's-length price for the transaction.
>
> * * *
>
> "The regulations describe and rank four methods for determining arm's-length prices: (1) the 'comparable uncontrolled prices method,' which looks at prices in sales between unrelated parties that involve identical or nearly identical products and conditions; (2) the 'resale price method,' which subtracts an appropriate markup from the price for which goods that the taxpayer purchases from an affiliate are resold to outside parties; (3) the 'cost plus method,' which begins with the transferor's production costs and adds an 'appropriate gross profit percentage' to arrive at an arm's-length price to the transferee; and, in the event that none of these methods applies, arm's-length prices may be determined by (4) 'some appropriate method of pricing other than the listed methods, or variations on such methods' (see, Treas Reg § 1.482-2[e][1][iii])."

H. It is observed that the regulations under section 482, as published in the 1993 Standard Federal Tax Reports (CCH), include regulations applicable to tax years beginning on or before April 21, 1993, and which are codified at pages 41,718 through 41,735. These regulations include the letter "A" to reflect, apparently, that they are a so-called "A" version of the regulations. The regulations cited in the Tribunal's footnote "27" noted in Conclusion of Law "G" were the "A" version of the regulations. For example, the first reference by the Tribunal is to Treas Reg § 1.482-2(e)(1) which, in the 1993 Standard Federal Tax Reports (CCH), is referenced as Treas Reg § 1.482-2A(e)(1) (emphasis added).

At pages 41,735 through 41,746 of the 1993 Standard Federal Tax Reports (CCH) are the portion of the proposed regulations under section 482 which were issued on January 30, 1992 and which were not subsequently withdrawn. However, the only proposed regulation, which was issued on January 30, 1992, and not subsequently withdrawn was proposed regulation section 1.482-2(g) setting forth cost-sharing provisions.

Finally, at pages 41,746 through 41,818 of the 1993 Standard Federal Tax Reports (CCH) are so-called "Temporary Regulations" under section 482 which were adopted on January 13, 1993.

I. Petitioner's massive presentation in this matter shows a solicitous attention to the Tax

Appeals Tribunal's legal analysis in the ever-growing area of combined reporting cases.[32] Its presentation shows a good understanding of petitioner's burden: to prove arm's-length intercorporate transactions by applying IRS § 482 guidelines. However, its task is great given its burden of showing proof of an arm's-length relationship[33] by a method that is ranked below the more customary methods described in the regulations. However, these more customary methods are not applicable herein because the relationship between petitioner and Sales Inc. is not merely that of one entity purchasing goods from another entity as in Matter of Standard Manufacturing Co. (supra). As noted in Finding of Fact "21", there is an overwhelming interdependence between petitioner and Sales Inc. and petitioner has no choice but to attempt to prove an arm's-length relationship by proof of a so-called cost-sharing arrangement that allocates costs between two entities in proper relationship to the benefits received. Petitioner argues that it has done so by its proof of a cost-sharing arrangement that meets the requirements of Treas Reg § 1.482-4T.

J. First, petitioner is correct that it and Sales Inc. are benefitting from the editorial content of The New York Times newspaper, which is an

intangible within the meaning of Treas Reg § 1.482-4T(b), the provision cited by petitioner, which provides:

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[32]It is observed that the Tax Appeals Tribunal permitted petitioner's representative to file an amicus curiae brief in Matter of Standard Manufacturing Co. (supra) in response to the representative's motion (Matter of Standard Manufacturing Co., Tax Appeals Tribunal, July 11, 1991 [which granted leave to file an amicus brief but denied a request for oral argument on the Division's exception to the Administrative Law Judge's determination]).

[33]"True taxable income" is defined in section 482 regulations to mean:

> "in the case of a controlled taxpayer, the taxable income (or, as the case may be, any item or element affecting taxable income) which would have resulted to the controlled taxpayer, had it in the conduct of its affairs . . . dealt with the other member . . . at arm's length" (Treas Reg § 1.482-1A[a][6]).

"For purposes of section 482, the term 'intangible' means any commercially transferable interest in any item included in the following six classes of intangibles, that has substantial value independent of the services of any individual --

"(1) Patents, inventions, formulae, processes, designs, patterns, or know-how;

"(2) Copyrights and literary, musical, or artistic compositions;

"(3) Trademarks, trade names, or brand names;

"(4) Franchises, license, or contracts;

"(5) Methods, programs, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, or technical data; and

"(6) Other similar items."

The editorial content of The New York Times clearly has substantial value independent of the services of any individual in a fashion similar to literary compositions listed in subparagraph (2) in the above regulation, and it was the use of the editorial content of The New York Times from which Sales Inc. benefitted by its sales of advertising and circulation sales. Consequently, if petitioner can show that it and Sales Inc. allocated costs between them in proper relationship to the benefits each received, it must necessarily prevail.

K. It is observed that, for the years at issue, none of the versions of the regulations under section 482 concerning transfers of intangible property are specifically applicable. Nonetheless, the principles set forth in the regulations may properly be reviewed for purposes of evaluating whether petitioner has established that its relationship with Sales Inc. was at arm's length (see, Matter of Sears, Roebuck and Co., supra).

Treasury Regulation § 1.482-2A(d)(4) (which is applicable to IRS audits for tax years beginning after 1986 and before April 22, 1993) provides as follows:

"Sharing of costs and risks. Where a member of a group of controlled entities acquires an interest in intangible property as a participating party in a bona fide cost sharing arrangement with respect to the development of such intangible property, the district director shall not make allocations with respect to such acquisition except as may be appropriate to reflect each participant's arm's length share of the costs and risks of developing the property. A bona fide cost sharing arrangement is an agreement, in writing, between two or more members of a group of controlled entities providing for the sharing of the costs and risks of developing intangible property in return for a specified interest in the intangible property that may be produced. In order for the arrangement to qualify as a bona fide

> arrangement, it must reflect an effort in good faith by the participating members to bear their respective shares of all the costs and risks of development on an arm's length basis. In order for the sharing of costs and risks to be considered on an arm's length basis, the terms and conditions must be comparable to those which would have been adopted by unrelated parties similarly situated had they entered into such an arrangement. If an oral cost sharing arrangement, entered into prior to April 16, 1968, and continued in effect after that date, is otherwise in compliance with the standards prescribed in this subparagraph, it shall constitute a bona fide cost sharing arrangement if it is reduced to writing prior to January 1, 1969." (Emphasis added to phrase underlined in the body of the regulation.)

It is noted that Treasury Regulation § 1.482-7T (which is applicable to tax years beginning after April 21, 1993) duplicates this earlier regulation on cost sharing.

It is concluded that the circulation and advertising agreement, described in detail in Finding of Fact "15", together with the evidence in the record concerning the agreement's implemention (in particular, the videotaped testimony and affidavit of Alfred J. Forbes), was sufficient to establish that petitioner and Sales Inc. acted in good faith "to bear their respective shares of all the costs and risks of development on an arm's length basis" of the newspaper's editorial content.

As noted in Finding of Fact "20" and accompanying footnotes, petitioner has detailed the specific expenses which Sales Inc. incurred and reported on its tax returns so that income was properly reported by petitioner and not shifted to Sales Inc. by manipulating the reporting of expenses. In addition, petitioner's expert, as noted in Finding of Fact "23", specified the basis for her opinion and concluded that petitioner and Sales Inc. were engaged in a cost-sharing arrangement that was the equivalent of an arm's-length transaction. It is also noted that petitioner's expert successfully countered the particular points raised by the Division's expert, as noted in Finding of Fact "27".

L. It should also be emphasized that, as noted in Finding of Fact "10", petitioner created Sales Inc. for reasons clearly unrelated to the avoidance of New York tax. Moreover, there is no evidence in the record that Sales Inc. was used by petitioner to shift income out of New York by using its control over Sales Inc. to manipulate revenues and expenses so that income would be shifted to Sales Inc. and expenses to petitioner (cf., Capital District Better TV v. Tax Appeals Tribunal, ___ AD2d ___, 606 NYS2d 930).

Combination with Northern SC

M. The same three conditions, described in Conclusion of Law "C", must be met to permit petitioner to file a combined report with Northern SC. Therefore, petitioner must meet (1) the stock ownership test, (2) the unitary business test and (3) the distortion of income test in order to properly file a combined report with Northern SC.

N. Petitioner owned 80% of the outstanding stock of Northern SC. Therefore, the first requirement was met.

O. In Matter of British Land (Maryland), Ltd. (Tax Appeals Tribunal, September 3, 1992, confirmed ___ AD2d ___, 609 NYS2d 439), the Tribunal summarized the current status of the unitary business principle:

> "The constitutional prerequisite to an acceptable finding of unitary business is a flow of value (Container Corp. of Am. v. Franchise Tax Bd., 463 US 159, 178). The constitutional test focuses on functional integration, centralization of management and economies of scale (Allied-Signal, Inc. v. Director, Div. of Taxation, supra, 112 S Ct 2251, 2252, 2261). In Allied-Signal, the Supreme Court recently clarified the meaning and application of these factors by stating that these essentials could respectively be shown by: transactions not undertaken at arm's length, a management role by the parent which is grounded in its own operational expertise and operational strategy, and the fact that the corporations are engaged in the same line of business (Allied-Signal, Inc. v. Director, Div. of Taxation, supra, 112 S Ct 2251, 2264). The Allied-Signal decision credits the decision in Container as having identified these factors as evidence of a unitary business and cites to specific parts of the Container decision for each factor. The citations are instructive in understanding the factors and applying them to the instant facts.
>
> "First, with respect to the non-arm's length transaction, the Court in Allied-Signal identified this as an element to prove functional integration and referred to that part of its Container decision where it noted that there was a flow of capital resources from Container to its subsidiaries through loans and loan guarantees, which were not shown to be at arm's length and which obviously resulted in a flow of value (Allied-Signal, Inc. v. Director, Div. of Taxation, supra, 112 S Ct 225, 2264, citing Container Corp. of Am. v. Franchise Tax Bd., supra, at 180, n. 19."

P. A review of the record herein supports the conclusion that petitioner and Northern SC were engaged in a unitary business. The relationship between the two shows centralization of management, functional integration and economies of scale.

Four of Northern SC's five directors were officers and employees of The Times, and all of Northern SC's officers were employees of The Times. Northern SC's managerial responsibilities to the partnership's owner's committee, executive committee and administration

committee were filled by petitioner's executives, who were assisted in these activities by other employees of The New York Times Company. In short, the management of Northern SC was by petitioner's own employees, confirming the existence of centralized management.

The activities of Northern SC were functionally integrated with petitioner's. Northern SC had no employees of its own, no offices, no facilities, and was completely dependent on petitioner to carry out its business. With the exception of a single Myllykoski representative on its board of directors, all of Northern SC's directors, officers and representatives were petitioner's employees, and all of the activities of Northern SC, including internal management and fulfillment of its responsibilities to the partnership, were carried out by employees of The Times.

Finally, the arrangement between petitioner and Northern SC resulted in significant economies of scale. Because all of the activities of Northern SC were carried out by petitioner's employees, Northern SC did not have to incur any costs for maintaining offices, hiring employees, obtaining necessary services from third parties, or any other costs associated with the conduct of its business. All of these costs were absorbed by petitioner. This structure eliminated the need for duplication of facilities, employees and third-party services, and therefore petitioner was able to conduct its own and Northern SC's businesses at significantly lower cost than if the two corporations had acted independently of each other.

Q. As noted in Conclusion of Law "C", the applicable regulation provides that distortion will be presumed if there are substantial intercorporate transactions among corporations. The Division contends that there were no substantial intercorporate transactions between petitioner and Northern SC. However, petitioner correctly points to an example in the regulations which supports a conclusion that there are substantial intercorporate transactions between the two. 20 NYCRR 6-2.3(f), example 4 in the Division's 1983 regulations, provides as follows:

> "Corporation C is a manufacturer. At the bank's insistence, its new factory building in New York State is owned by an 80 percent or more owned subsidiary. This is the only activity of the subsidiary. The manufacturer pays a rent to the subsidiary equal to principal, interest and taxes of the factory building. Corporation C and its subsidiary are taxpayers. Because there are substantial intercorporate transactions, it is presumed that reporting on a separate basis will result in a distortion of the

> activities, business, income or capital of Corporation C and its subsidiary" (emphasis added).

As in the example, Northern SC has no activity independent of petitioner.

R. But even if there were no substantial intercorporate transactions between petitioner and Northern SC, the record supports a conclusion that separate franchise tax reports would distort the income and tax liability of both corporations (see, 20 NYCRR 6-2.3[d] [wherein distortion may be shown despite the lack of substantial intercorporate transactions]). Petitioner's relationship with Northern SC was replete with non-arm's-length transactions. Management, legal, administrative, tax and accounting services were provided by petitioner on behalf of Northern SC to the partnership without any compensation. Petitioner made numerous loans that Northern SC probably could not have obtained from third parties at all and, in any event, could not have obtained at comparable rates of interest. In short, petitioner has demonstrated that it did not relate to Northern SC on arm's-length terms, and thus the financial statements of both corporations do not accurately reflect the costs and income resulting from each corporation's activities (see, Matter of Heidelberg Eastern, Tax Appeals Tribunal, May 5, 1994 [wherein the Tribunal decided that a parent corporation which facilitated a flow of capital resources to its subsidiary should be permitted to file a combined return with its subsidiary]).

S. Furthermore, petitioner's citation to Wurlitzer Co. v. State Tax Commn. (42 AD2d 247, 346 NYS2d 471 [3d Dept 1973], affd 35 NY2d 100, 358 NYS2d 762 [1974]) in support of its position is persuasive. In Wurlitzer, the Appellate Division confirmed the forced combination of Wurlitzer Company, the manufacturer of organs, juke boxes and pianos, with its wholly-owned subsidiary, Wurlitzer Acceptance Corp., which the court described as a "shell" corporation (Wurlitzer Co. v. State Tax Commn., supra, 346 NYS2d at 475). All activities of Wurlitzer Acceptance Corp. were performed by employees or officers of the parent. In return, the "shell" corporation paid a fee to the parent. In the matter at hand, Sales Inc. paid no fee to petitioner for services provided which makes the relationship between petitioner and Sales Inc. even more indicative of a distortion of income. It is noted that in Wurlitzer the taxpayer merely "submitted information that the 3% and 4% charge for collections provided a reasonable profit

[to the parent]" and did not introduce satisfactory proof of an arm's-length relationship to rebut the presumption of distortion which results from substantial intercorporate transactions (id., 346 NYS2d at 475). Furthermore, the majority in the Court of Appeals' 4-3 decision affirming the Appellate Division noted that "[o]n this record, the Commission could properly conclude that separate reports would not accurately reflect the taxable income or the taxable liability" (Wurlitzer Co. v. State Tax Commn., 35 NY2d 100, 358 NYS2d 762, 766 [the dissent would have shifted the burden onto the Division to make a finding of "unfair distortion" before requiring a combined return (Wurlitzer Co. v. State Tax Commn., supra, 358 NYS2d at 770)]).

T. Having met the capital stock, unitary business and distortion tests, it must be concluded that the Division's refusal to permit petitioner to file a combined report with Northern SC was in error.

U. The petition of The New York Times Company is granted and the notices of deficiency dated May 8, 1989 are cancelled, and the refund claim dated July 17, 1990 is granted.

DATED: Troy, New York
July 21, 1994

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE

APPENDIX A - THE NEW YORK TIMES COMPANY

	1981		1982		1983	
	New York	Everywhere	New York	Everywhere	New York	Everywhere
(1) Average value of:						
Real estate owned	$ 44,380,574.00	$ 67,941,110.00	$ 49,522,840.00	$ 77,527,822.00	$ 54,369,924.00	$ 88,138,135.00
Real estate rented	5,740,688.00	11,387,912.00	6,281,760.00	12,412,024.00	6,810,808.00	12,416,248.00
Inventories owned	5,923,768.00	13,040,164.00	6,920,719.00	17,819,875.00	5,956,398.00	17,965,200.00
Other tangible personal property owned	74,064,673.00	156,797,677.00	88,740,298.00	191,075,775.00	101,027,868.00	230,504,018.00
Total	$130,109,703.00	$249,166,863.00	$151,465,617.00	$298,835,496.00	$168,164,998.00	$349,023,601.00
% in New York State	52.21789%	50.68528%	48.18155%			
(2) Receipts from:						
Sales of tangible personal property						

shipped to points within N.Y.S.	$ 40,585,730.00		$ 49,828,879.00		$ 41,738,707.00	
All sales of tangible personal property		$ 72,088,331.00		$ 89,640,593.00		$ 80,074,416.00
Services performed	468,251,118.00	483,517,379.00	277,371,825.00	525,456,825.00	321,992,247.00	650,235,516.00
Rentals of property	335,080.00	335,080.00	312,912.00	312,912.00	362,245.00	362,247.00
Royalties	40,000.00	40,000.00	80,157.00	80,157.00	28,000.00	28,000.00
Other business receipts	2,239,521.00	2,573,241.00	1,884,748.00	1,969,023.00	2,089,490.00	2,519,348.00
Total	$511,451,449.00	$558,554,031.00	$329,478,521.00	$617,459,510.00	$366,210,691.00	$733,216,527.00
% in New York State	91.56705%	53.36034%	49.94578%			

	1981 New York	1982 Everywhere	1983 New York	Everywhere
(3) Wages, salaries and other compensation of employees, except general executive officers	$190,831,115.00	$117,692,292.00 $125,050,839.00	$175,736,406.00 $175,736,406.00	$124,614,707.00
% in New York State		66.97092%	65.30104%	60.40425%
Business Allocation Percentage[34]		75.58073%	55.67675%	52.11934%

[34] The percentages for property, receipts and wages are totalled (with the receipts percentage added in twice) and then divided by four to calculate the business allocation percentage. For example, for 1981, 48.18155% plus 49.94578% plus 49.94578% plus 60.40425% equals 208.47736% divided by four equals 52.11934%.

APPENDIX B - THE NEW YORK TIMES SALES, INC.

	1981		1982	1983		
	New York	Everywhere	New York	Everywhere	New York	Everywhere
(1) Average value of:						
Real estate owned		$ 780,334.00		$ 788,886.00		$ 627,756.00
Real estate rented	$332,696.00	1,603,616.00	$595,920.00	2,780,816.00		3,276,104.00
Inventories owned		113,807.00		172,486.00		265,772.00
Other tangible personal property owned	64,324.00	1,865,235.00	44,847.00	1,977,865.00	$20,761.00	2,337,804.00
Total	$397,020.00	$ 4,362,992.00	$640,767.00	$ 5,720,053.00	$20,761.00	$ 6,507,436.00
% in New York State	9.09972%	11.20212%	0.31904%			
(2) Receipts from:						
Services performed	$ 78,252.00	$82,252,534.00	$ 83,625.00	$105,840,545.00	None	$110,421,320.00
% in New York State	.095136%	.07901%	0%			

(3) Wages, salaries and other compensation of employees, except general executive officers		$ 2,145,263.00	$196,309.00	$ 2,455,524.00	None	$ 2,121,362.00
% in New York State	0%		7.99458%	0%		
Business Allocation Percentage	2.75061%[35]	4.83868%	0.07976%			

[35] The auditor changed this percentage to 2.32250%, which is the correct arithmetic: percentages for property, receipts (counted twice) and wages totalled and divided by four is 2.32250.