STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **CHRISTIAN SALVESEN, INC.** for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ended March 31, 1991 and March 31, 1992.	: : : : : :	DETERMINATION DTA NO. 813434

Petitioner, Christian Salvesen, Inc., One Enterprise Avenue, Secaucus, New Jersey 07094, 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 fiscal years ended March 31, 1991 and March 31, 1992.

A hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on August 7, 1995 at 9:30 A.M., and concluded at the same offices on January 25, 1996 at 9:30 A.M. with all briefs to be submitted by May 3, 1996, which date began the six-month period for the issuance of this determination. Petitioner filed its briefs on March 15, 1996 and May 3, 1996. The Division of Taxation filed its brief on March 27, 1996. Petitioner appeared by Price Waterhouse, LLP (Messiha F. Shafik, C.P.A.). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John O. Michaelson, Esq., of counsel).

ISSUE

Whether, in the process of calculating the business allocation percentage, petitioner has established that the inclusion of certain inventory in the property factor and the proceeds of certain sales in the receipts factor resulted in the taxation of extraterritorial values so thatthe Division of Taxation's refusal to exercise its power under Tax Law § 210(8) to adjust the business allocation percentage was erroneous.

FINDINGS OF FACT

1. Petitioner, Christian Salvesen, Inc. ("CSI"), was a Delaware corporation which maintained its headquarters in New Jersey. CSI provided refrigeration, cold storage and related services for the food industry. The majority of CSI's business was conducted outside of New York.

2. Historically, CSI's business activities in New York included providing refrigeration, storage and related services to one retail supermarket store ("Company A") at its Chester, New York warehouse. Company A began experiencing financial difficulties and, as a result, CSI entered into a contract, dated February 5, 1991, which effectively provided for the financing of the Company A's inventory in addition to CSI's providing of refrigeration storage services. It was CSI's opinion that in order to retain certain legal rights in the event of a default, CSI was required to structure the "inventory financing" agreement as a sales contract. CSI interpreted the agreement as requiring Company A to purchase inventory which was immediately sold to CSI. CSI refrigerated and stored the inventory. As the need arose, CSI sold the same inventory back to Company A. CSI charged Company A the cost of the inventory (which was the same cost charged by the the corporation to CSI) plus an amount equal to the prime rate plus 2.5 percentage points. Additionally, there were charges for refrigerated storage and handling. The transactions between CSI and the Company A were netted on a daily basis.

3. The agreement between CSI and Company A provided, in part, as follows:

> "1. <u>CSI'S Initial Purchase</u>
>
> As of today, CSI hereby purchases and [Company A] hereby sells the frozen food and ice cream inventory currently located at the CSI Chester, New York warehouse facility and more particularly described in schedule A attached hereto exclusive of products bearing any [Company A] tradename [sic] or trademark ("[Company A] Brand Products") (the "Inventory"). The purchase price paid by CSI for the Inventory is $3,560,212.52, which amount represents the fair market value of such Inventory to [Company A] as also shown on Schedule A. Receipt of the purchase price is hereby acknowledged by [Company A]. This Agreement shall constitute a bill of sale of the Inventory from [Company A] to CSI . . . .
>
> * * *
>
> "3. <u>[Company A] Purchasing Assistance and Inventory Control</u>

[Company A] agrees to purchase products at the request of CSI and immediately to resell to CSI at invoiced cost such products; provided the products are to be purchased from companies with which [Company A] will be placing an order within three months following CSI's request. . . . [Company A] agrees to provide, without any additional charge, inventory control assistance in the same manner and kind as has historically been provided by [Company A] at CSI's Chester, New York facility. . . .

* * *

"4. <u>CSI Agreement to Accommodate [Company A] Stocking Requirements</u>
Subject to the provisions of this paragraph, CSI shall stock products in its inventory in accordance with advice and requests from [Company A] delivered from time to time. CSI will not be obligated to honor [Company A's] advice and requests to the extent that:

(a) the aggregate cost of the inventory (inclusive of the initial purchase pursuant to paragraph 1 of this Agreement plus additional purchases for that facility less amounts sold from that facility by CSI) would exceed CSI's then current budget levels. (CSI's current maximum inventory-carrying amount is $4.5 million);

* * *

"8. <u>Miscellaneous</u>

A. Nothing in this Agreement shall be deemed to restrict the ability of CSI to sell any of the inventory or other products purchased from [Company A] to parties other than [Company A]. It is understood, however that [Company A] shall have priority as to availability of the Distribution Inventory.

* * *

C. [Company A] agrees to indemnify CSI for any liability (other than liability arising as a direct result of the negligence or willful misconduct of CSI) and for any and all liability or expenses, including without limitation expenses incurred in defending actual or threatened claims and litigation, in connection with the sale of defective or allegedly defective products." (Division's exhibit "N".)

4. The foregoing agreement provided that it would expire upon the earlier of June 13, 1994, the the date that either party "may so choose upon the material default of the non-terminating party in any of its material obligations . . . or . . . the expiration of six months after notice of termination is given by either party to the other." (Division's exhibit "N").

5. CSI's contractual arrangement with the Company A is the only contract of this type CSI has entered into. Petitioner does not finance the inventory of any other customer.

6. CSI filed a General Business Corporation Franchise Tax Return for the fiscal years ended March 31, 1991 and March 31, 1992. Each of the return's stated that CSI's business

activity was refrigeration and storage. For the fiscal year ended March 31, 1991, CSI included in its receipts and property factors, respectively, the gross sales and inventory values arising from the contract with Company A for the approximately two months of the fiscal year that the contract was in existence. For the fiscal year ended March 31, 1992, as a result of including the gross receipts from the sale of inventory to Company A in the receipts factor, CSI's New York receipts factor increased from approximately 5 percent to approximately 46 percent. For the same fiscal year, as a result of including the value of inventory in both the numerator and denominator of the property factor, the property factor increased from approximately 7 percent to 12 percent.

7. The schedule on the franchise tax returns showing the computation of CSI's business allocation percentage reported the following amounts with respect to inventories owned:

Fiscal year ended	1/31/91	1/31/92
New York State	$1,859,091.00	$4,105,649.00
Everywhere	$1,859,091.00	$4,105,649.00

8. The schedule on the franchise tax returns showing the computation of CSI's business allocation percentage reported, among other things, the following with respect to the receipts for the fiscal year ended December 31, 1991:

	New York State	Everywhere
Sales of tangible personal property shipped to points within New York State	$11,305,541.00	
All sales of tangible personal property		$58,513,315.00

9. The schedule on the franchise tax return showing the computation of CSI's business allocation percentage reported, among other things, the following with respect to receipts for the fiscal year ended December 31, 1992:

	New York State	Everywhere
Sales of tangible personal property shipped to points within New York State	$55,454,864.00	
All sales of tangible personal property		$100,715,220.00

10. CSI was audited by the Division for the fiscal years ended March 31, 1990 and March 31, 1991. Upon the conclusion of the audit, petitioner paid the tax due which pertained to adjustments not at issue here.

11. In a letter dated March 27, 1992, petitioner's representative requested that an interpretation letter be issued allowing CSI to adjust its business allocation percentage to:

> "(1) [r]eflect the receipts related to CSI's refrigeration and cold storage business activities conducted in New York State and only the "inventory financing" element of its contractual arrangement with [Company A]; and
>
> (2) [e]xclude from its property factor the value related to the inventory on behalf of [Company A]."

The letter explained that the basis for its request was, in part, as follows:

> "Based upon the statutes and regulations cited above [Tax Law §§ 210(3), 210(8); 20 NYCRR 4-4.6(b),(c)], CSI should be allowed to adjust its BAP to exclude its activity of buying and selling inventory which is limited to its contractual arrangement with . . . [Company A], since such activity distorts CSI's receipts and property factors.
>
> "CSI is engaged in the business of providing refrigeration, cold storage and related services to the food industry. CSI is not in the business of buying and selling inventory or inventory financing. However, since income is realized from the inventory financing agreement, the related amounts will be included in the receipts factor. This activity is provided to accommodate . . . [Company A] during a period of financial distress and is not an activity CSI is involved in anywhere else or plans to be involved in the future."

12. In a letter dated June 23, 1992, the Division advised petitioner's representative that the Corporation Tax Policy Committee had decided that section 4-6.1(c) of the Commissioner's regulations required CSI to file its March 31, 1992 report and compute the tax due by following the statutory formula. CSI was also told that it should file a claim for Credit or Refund of Corporation Tax Paid. The letter directed that the refund claim should show a recomputed business allocation percentage which excluded the inventory and receipts associated with the

contract between CSI and the Company A. It was explained that upon receipt of the claim for refund, the Corporation Tax Policy Committee would decide if a discretionary adjustment to the business allocation percentage was warranted.

13. On June 7, 1993, the Division received CSI's Claims for Credit or Refund of Corporation Tax Paid for the fiscal years ended March 31, 1991 and March 31, 1992. The basis for the refund claims was the same as that set forth in the request for an interpretation letter (Finding of Fact "11").

14. In a letter dated September 3, 1993, petitioner's representative was advised that his request for permission to vary from the statutory method of computing petitioner's New York State tax liability was denied. The Policy Committee felt that the statutory formula properly reflected CSI's activities in New York.

SUMMARY OF THE PARTIES POSITIONS

15. Petitioner argues that CSI is in the regular business of providing refrigeration and storage services throughout the country and that its code for principal business activity for Federal tax purposes is strictly for the provision of storage services. According to petitioner, CSI is not classified as a financier, lender or bank. Petitioner submits that the financing agreement in question was a one-time contract, which was entered into for the purpose of assisting Company A in New York. Petitioner posits that its' activities with respect to the financing contract are not integrated with the operation of the refrigeration business and can be quantified. Relying upon Hans Rees' Sons v. North Carolina (283 U.S. 123, 75 L Ed 879), Matter of Sheraton Bldgs. v. Tax Commn. (15 AD2d 142, 222 NYS2d 192, affd. 13 NY2d 802, 242 NYS2d 226), Matter of Bonner Properties, Inc. (State Tax Commn., April 6, 1984) and Matter of A. E. Bruggemann & Co. v. State Tax Commn. (42 AD2d 459, 349 NYS2d 28), petitioner submits that the application of the three-factor formula would produce an unfair and inequitable result. Petitioner contends that the inventory financing arrangement was structured as a sales contract only to provide CSI with certain legal rights in the event of a default by Company A and that the inventory financing arrangement is the only such contractual

arrangement of its kind entered into by CSI. In order to show that a departure from the statutory formula is appropriate, petitioner analogizes to 20 NYCRR 4-4.6(b) and (e) as instances where there is an authorized departure from the statutory formula.

With respect to the magnitude of the distortion, petitioner contends that:

> "[a]pplication of New York's three-factor formula to CSI's situation would result in an approximate 863 percent increase of its receipts factor, from approximately 5 percent to approximately 46 percent, and an approximate 163 percent increase in its property factor, from approximately 7 percent to more than 12 percent. The increase in CSI's receipts factor is significantly greater than the 500 percent factor increase in Hans Rees,[1] which the U.S. Supreme Court held to be 'unreasonable and arbitrary.' Further, the 163 percent increase in CSI's property factor is also meaningfully distortive." (Petitioner's brief, p. 11.)

16. In order to rectify the asserted distortion, CSI requests the following modifications in computing its business allocation percentage:

> "(1) inclusion of those receipts related only to CSI's refrigeration activities in New York and the 'inventory financing' element (i.e., net proceeds or interest from the inventory financing contract) of its contractual arrangement with its New York customer, Company A, in both the numerator and denominator of the receipts factor of CSI's BAP, and (2) exclusion of the value related to Company A's inventory, merely held by CSI pursuant to the financing agreement, from the numerator and denominator of the property factor of CSI's BAP." (Petitioner's brief, p. 12.)

17. The Division takes issue with the facts set forth in petitioner's brief and asserts that there is nothing in the record to support petitioner's version of the facts. According to the Division:

> "[T]he petitioner has not submitted any evidence to support its position. The evidence submitted by the Division demonstrates that the petitioner owned the inventory in question and was free to sell it to anyone willing to purchase it. The Division repeatedly requested justification for the petitioner's request for the discretionary adjustments. The petitioner was unable to provide the explanation and support for its position either to the Division of Taxation or the Division of Tax Appeals. Indeed, the hearing record is remarkable for the paucity of evidence submitted by the petitioner in its attempt to controvert the reasonable conclusion reached by the Division in denying the discretionary adjustment to the petitioner's business allocation percentage.
>
> The arguments of the petitioner must be dismissed as specious. It is undeniable that the petitioner did, in fact, own the inventory which it is now

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[1] Hans Rees' Sons v. North Carolina, supra.

> attempting to exclude from the computation of the business allocation percentage. The petitioner did, in fact, obtain gross receipts from the sale of the inventory. Further, the petitioner has not submitted any evidence which supports its contention that it should be allowed a discretionary adjustment of its business allocation percentage"
> (emphasis in original) (Division's brief, p. 9).

18. In response to the Division's argument that there is no evidence in the record to support petitioner's position, petitioner contends that the documents submitted into evidence by the Division during the hearing on August 7, 1995, provide support for each of the facts for which the Division states that there is no evidence. According to petitioner, if there had been disputed facts they should have been raised by the Corporation Tax Policy Committee when it considered petitioner's request for a discretionary adjustment to the business allocation percentage or by counsel at the hearing.

Petitioner also reiterates its position that it has demonstrated that the application of the statutory apportionment formula to this isolated and unique transaction would reach profits that cannot be rationally attributable to New York State. According to petitioner, it has established, in accordance with the standard in Hans Rees' Sons v. North Carolina (supra), that the application of the New York statutory formula would inaccurately and unfairly attribute to New York income "out of all appropriate proportion" to the business transacted in New York.

Petitioner's brief also repeats its analogy to the alternate method of apportionment for security and commodity brokers prescribed by 20 NYCRR 4-4.6(b) and concludes that statutory and regulatory provisions cannot reasonably address every circumstance and every industry. Petitioner submits that "[a]s in the situation with brokers, inclusion of gross receipts from the sales of inventory back to Company A would substantially overstate the extent of CSI's business activities in New York State." (Petitioner's reply brief, p. 12.) Petitioner's reply brief concludes with its proposed adjustment mentioned earlier.

CONCLUSIONS OF LAW

A. The Division maintains that there is no evidence in the record to support certain statements of fact set forth in petitioner's brief. In reviewing the evidence, certain principles are instructive. A taxpayer may sustain his burden of proof through the presentation of direct

proof (Matter of Jericho Delicatessen, Inc., Tax Appeals Tribunal, July 23, 1992.) This is "evidence which tends to prove a fact without the intervention of any other fact" (Matter of Jericho Delicatessen, Inc., supra, citing Black's Law Dictionary 546 [4th ed 1957]). It has been recognized that relevant and probative hearsay evidence is admissible in administrative proceedings (Matter of Flanagan v. State Tax Commn., 154 AD2d 758, 546 NYS2d 205). Further, said evidence may constitute substantial evidence to support an administrative agency's determination (Matter of Flanagan v. State Tax Commn., supra).

B. The specific statements which the Division objects to and the evidence relied upon by petitioner are as follows:

1. Petitioner's brief states: "CSI's New York State business activities historically include the provision of refrigeration, storage, and related services to only one retail supermarket store ('Company A')." (Petitioner's brief, p. 1.) The Division states that there is no evidence is the record that CSI provided services to only one retail supermarket store.

This argument is rejected. The evidence to support this statement may be found in the "Request for Interpretation Letter" which was received in evidence as the Division's exhibit "I". Although the statements set forth in this letter are hearsay, they are admissible and constitute substantial evidence to support the corresponding finding of fact (Matter of Flanagan v. State Tax Commn., supra).

2. Petitioner's brief states: "[i]n February of 1991, CSI entered into a unique inventory financing agreement to accommodate Company A, which was then experiencing financial difficulties. This is the only such contractual arrangement of its kind entered into by CSI. CSI has not provided and does not currently provide inventory financing for any other customers." (Petitioner's brief, p. 2.) The Division submits that there is nothing in the record to support these allegations. It is also argued that this allegation is inconsistent with petitioner's contention that it provided services to only one customer.

The foregoing argument is also without merit. The statement in question is directly supported by exhibit "I". In addition, as noted by petitioner in its brief, it may be inferred that

Company A was experiencing financial difficulties from the presence of clauses in the contract which provided for the the possibility of Company A filing for bankruptcy or defaulting on a financial obligation. Lastly, contrary to the Division's argument, petitioner did not contend that it provided services to only one customer. Rather, petitioner maintained that, in New York State, it provided services to one supermarket retail store.

3. The Division asserts that there is no support for the allegation in petitioner's brief that: "[t]o preserve certain legal rights in case of default by Company A, the inventory financing arrangement was structured as a sales contract." (Division's brief, p. 3.)

This statement is also directly supported by exhibit "I". Moreover, the terms of the contract strongly support the inference that the contract, while structured as a sales contract, was intended to be a financing mechanism. First, the contract allowed Company A to purchase products at the request of CSI. The agreement contemplated CSI reselling the inventory back to Company A at the cost of the inventory plus an amount equal to the prime rate plus 2.5 percent. As noted by petitioner, tying the price into the prime rate is indicative of a financing contract. Second, under the contract, Company A agreed to provide "without any additional charge" inventory control of the items in storage. (Exhibit "N", ¶ 3.) As noted by petitioners, it is unlikely that Company A would examine the inventory without an additional charge unless Company A viewed the inventory as its own. Third, there was an agreed-upon limit to the amount of inventory that CSI would purchase. This provision would make little sense unless it was understood that the inventory was being purchased in order to be resold to Company A. Lastly, the contract provided that Company A "agrees to indemnify CSI for . . . any and all . . . expenses, including without limitation expenses incurred in defending actual or threatened claims and litigation, in connection with the sale of defective or allegedly defective products." (Exhibit "N", ¶ 8[C].) Company A's willingness to indemnify CSI for all liabilities in relation to the product supports the inference that Company A considered the product to be its own.

4. Petitioner's brief states: "[t]he essence of the contract, however, was a financing arrangement, as evidenced by the indemnification and default provisions in the contract. As

part of the financing arrangement, Company A agreed to indemnify CSI for any liability or expenses incurred in connection with the inventory. Such a provision would not be found in an ordinary sales contract." (Petitioner's brief, p. 2.) According to the Division, the record does not support the allegation that this contract was a financing arrangement. It is also averred that there is no evidence to support the allegations regarding the uniqueness of the indemnification and default provisions.

The foregoing arguments are also without merit. The evidence supporting the allegation that this contract was a financing arrangement was discussed above. Moreover, the point of petitioner's allegation regarding the uniqueness of the indemnification and default provisions was that they supported the assertion that Company A was in financial distress. This is a reasonable inference to draw from the evidence.

5. The Division objects to the statement in petitioner's brief that: "[t]he financing agreement essentially allows Company A to purchase products directly from their vendors and have the orders delivered to CSI's warehouse facility." (Petitioner's brief, p. 2.) According to the Division, there is nothing in the contract to support this statement.

This argument is also rejected. The third paragraph of the contract states that "[Company A] agrees to purchase products at the request of CSI and immediately resell to CSI at invoiced cost such products. . . ." The fourth paragraph states, in part, "CSI shall stock products in its inventory in accordance with advice and requests from [Company A] delivered from time to time." In view of the foregoing, it is concluded that the Division's objection to the foregoing statement is meritless. Contrary to the Division's argument, the foregoing provisions are not inconsistent.

6. The Division submits that the following statement in petitioner's brief is not supported by the record: "[a]s stipulated by the contract, at no time does the cost of inventory financed by CSI exceed $4.5 million." (Petitioner's brief, p. 2.)

Contrary to the Division's argument, at the time the contract was entered into, CSI did not have an obligation to finance inventory in excess of $4,500,000.00 (Finding of Fact "3").

Second, the schedules on the franchise tax returns setting forth the computation of CSI's business allocation percentage show that the average value of the inventories in New York was less than $4,500,000.00 during each of the fiscal years in issue.

7. The Division objects to the statement in petitioner's brief that including the inventory in its business allocation percentage results in distortion. According to the Division, the record supports neither the allegations of distortion nor the computations regarding the percentages of distortion. It is further argued that petitioner has not provided any evidence regarding the uniqueness of the contractual relationship.

As the question of distortion pertains to the issue of whether there is a basis to make a discretionary adjustment to the business allocation percentage, the first part of the Division's argument will be addressed in the course of the discussion of the next issue. The contention that the arrangement with Company A was unique is supported by the Request for Interpretation Letter. (Division's exhibit "I.")

C. The next issue presented is whether petitioner has established that the inclusion of the New York inventory in the property factor and the inclusion of the receipts from the sale of inventory in the receipts factor results in the taxation of extraterritorial values and, if so, whether the Division's failure to use its power under Tax Law § 210(8) to revise the business allocation percentage was erroneous.

Every corporation subject to Article 9-A franchise tax must allocate its business income within and without New York using a three-factor formula taking into account its property, receipts and payroll (Tax Law § 210[3]; 20 NYCRR 4-2.2). The formula is intended to reflect a taxpayer's activities within New York (Matter of AlliedSignal Inc., __AD2d __, 645 NYS2d 895). Tax Law § 210(8) grants the Commissioner of Taxation the discretion to vary the statutory formula if it does not properly reflect the activity, business, income or capital of the taxpayer in New York.

The Court of Appeals has outlined the Constitutional considerations as follows:

> "[T]he Due Process and Commerce Clauses of the United States Constitution prevent a State from taxing income of a nondomiciliary corporation arising out of

> extraterritorial activities unless there is a 'minimal connection' or 'nexus' between the outside activities and the taxing State, and a 'rational relationship between the income attributed to the State and the interstate values of the enterprise.' Under a long and unbroken line of Supreme Court precedent, if the nondomiciliary corporation engages in business in the taxing State . . . , the taxing State need not identify and select out its specific intrastate income-producing activities so long as the corporation is operating a unitary business enterprise and the income is derived from he unitary business; it may then apply an apportionment formula to tax an appropriate proportional share of the interstate income of the enterprise" (citations omitted). (Matter of British Land (Maryland) Inc. v. Tax Appeals Tribunal, 85 NY2d 138, 623 NYS2d 772, 775).

The foregoing principles are limited by the proposition that a State's apportionment formula may not tax income "which cannot in fairness be attributed to the taxpayer's activities within the State" (Matter of British Land (Maryland) Inc. v. Tax Appeals Tribunal, 85 NY2d 139, 623 NYS2d 772, 775, quoting, Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768, 780, 119 L Ed 533). Under this limitation, a taxpayer will establish that the application of a statutory apportionment formula is unconstitutional and that the Division should have exercised its power under Tax Law § 210(8) when the taxpayer presents "clear and cogent evidence" that the application of the statutory formula attributes to the taxpayer New York income which is "out of all appropriate proportion to the business transacted by it in that State" (Matter of British Land (Maryland) Inc. v. Tax Appeals Tribunal, supra, at 623 NYS2d 772, 776, quoting, Hans Rees' Sons v. North Carolina, 283 U.S. 123, 75 L Ed 879). Alternatively, the question presented is whether the New York apportionment formula reaches "profits which are in no sense attributable to transactions within its jurisdiction" (id. at 134.)

D. The matter which must be resolved is whether CSI was engaged in a unitary business. The Tax Appeals Tribunal has outlined the following criteria for determining whether there is a unitary business:

> "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." Matter of British Land (Maryland), Inc. (Tax Appeals Tribunal, September 3, 1992, determination confirmed, Matter of British Land (Maryland), Inc. v. Tax Appeals Tribunal 202 AD2d 867, 609 NYS2d 639, reversed on other grounds, 85 NY2d 139, 623 NYS2d 772.)

E. On the limited record presented, it is concluded that CSI was engaged in a unitary business. Initially it is noted that there is no evidence in the record with respect to whether transactions were undertaken at arm's length or with respect to the management role of the parent. Since petitioner bears the burden of proof on these points (Matter of British Land (Maryland), Inc. v. Tax Appeals Tribunal [supra], Tax Appeals Tribunal, September 3, 1992), the lack of evidence leads to the conclusion that, if evidence had been presented, it would have supported the position that petitioner was engaged in a unitary business.

The record shows that CSI conducted the same type of activity in New York as was conducted elsewhere. CSI's business activities in each state consisted of providing refrigeration, cold storage and related services for the food industry. It appears that the financing of Customer A in New York was in order to keep that customer operating so that CSI could continue to provide refrigeration, storage and related services to the retail supermarket store in New York.

F. The next question presented is whether petitioner has meet its heavy burden of showing by "clear and cogent" evidence that the utilization of the apportionment formula resulted in the taxation of extraterritorial values (Matter of British Land (Maryland), Inc. v. Tax Appeals Tribunal, supra, at 623 NYS2d 772, 776).

The New York statutory formula, which bases an interstate corporation's apportionment of income on the averages of New York's proportionate shares of tangible personal property, payroll and gross receipts, has been deemed fair (Matter of British Land (Maryland), Inc. v. Tax Appeals Tribunal, supra at 623 NYS2d 772, 776). The factors relied upon in New York are presumptively valid because they reflect the activities by which value is generated (id).

Citing, among other cases, Hans Rees' Sons v. North Carolina, (supra), Matter of Sheraton Bldgs. v. Tax Commn., (supra), and Matter of Bonner Properties, Inc., (supra), petitioner asserts that it has shown that the apportionment formula results in the taxation of extraterritorial values by demonstrating that the inclusion of the receipts from the sale of inventory would increase the receipts factor from approximately 5 percent to approximately 46 percent for the year ending March 31, 1992. Similarly, petitioner argues that it has satisfied its burden of proof by showing that the inclusion of the inventory arising from the contract with Company A results in an increase in the property factor from approximately 7 percent to approximately 12 percent for the same fiscal year. According to petitioner, the distortion presented here is greater than that presented in Hans Rees' Sons v. North Carolina (supra) and similar in magnitude to the distortion shown in Matter of Sheraton Bldgs. v. Tax Commn. (supra).

The foregoing argument is rejected. In Matter of British Land (Maryland), Ltd. v. Tax Appeals Tribunal (supra) the Court of Appeals specifically rejected the argument that Hans Rees' Sons v. North Carolina (supra) and Matter of Sheraton Bldgs. v. Tax Commn. (supra) hold that "a tax on extraterritorial values can be established simply by showing that the taxpayer's formula-based intrastate income is many times greater than the income reflected in a separate geographical accounting." (Matter of British Land (Maryland), Ltd. v. Tax Appeals Tribunal, supra at 623 NYS2d 772, 777). Citing Exxon Corp. v. Wisconsin Dept. of Revenue (447 U.S. 207, 65 L Ed 2d 66), the Court noted that the application of an apportionment formula has been upheld even when the result has been to transform substantial losses calculated in a separate accounting into substantial net profits (id).[2]

It is noted that petitioner's reliance upon Matter of Bonner Properties, Inc. (supra) and Matter of A. E. Bruggermann v. State Tax Commn. (supra) is misplaced because in each instance it was concluded that the business outside of New York was distinct from the business

[2]A similar result was reached in Butler Bros. v. McColgan (315 US 501, 86 L Ed 991) where the taxpayer was unable to prove that the application of the apportionment formula resulted in extraterritorial values being taxed where the taxpayer showed that the apportionment formula converted a loss under a separate accounting system of $82,851.00 into a profit of over $93,500.00.

in New York. Additionally, petitioner's attempt to analogize to 20 NYCRR 4-4.6(b), which concerns receipts by security and commodity brokers, and 20 NYCRR 4-4.6(e), which addresses receipts from the sale of capital assets, is unpersuasive. The fact that the Commissioner's regulations make a special provision for certain transactions does not have any bearing on whether an adjustment to the statutory allocation formula is warranted here.

Since it is concluded that petitioner was conducting a unitary business and that CSI has not established that the statutory formula attributes to it income which is out of all appropriate proportion to the amount of business transacted in New York, petitioner has not established that it was an abuse of descretion for the Division to decline to exercise its authority under Tax Law § 210(8).

G. The petition of Christian Salvesen, Inc. is denied.

DATED: Troy, New York
October 31, 1996

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE