STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Campbell Sales Company for Redetermination of a Deficiency or a Revision of a Determination or a Refund of Corporation Franchise Tax under Article 9A of the Tax Law for the Fiscal Year Ended 7/31/77.	:	AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 20th day of May, 1983, he served the within notice of Decision by certified mail upon Campbell Sales Company, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Campbell Sales Company
P.O. Box 391
Camden, NJ 08101

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
20th day of May, 1983.

David Parchuck

Connie A. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Campbell Sales Company for Redetermination of a Deficiency or a Revision of a Determination or a Refund of Corporation Franchise Tax under Article 9A of the Tax Law for the Fiscal Year Ended 7/31/77.	AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 20th day of May, 1983, he served the within notice of Decision by certified mail upon George J. Noumair the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George J. Noumair
Whitman & Ransom
522 Fifth Ave.
New York, NY 10036

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
20th day of May, 1983.

David Parchuck

Connie A. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

May 20, 1983

Campbell Sales Company
P.O. Box 391
Camden, NJ 08101

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
George J. Noumair
Whitman & Ransom
522 Fifth Ave.
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

CAMPBELL SALES COMPANY

for Redetermination of a Deficiency or for Refund of Franchise Tax on Business Corporations under Article 9-A of the Tax Law for the Fiscal Year Ended July 31, 1977.

DECISION

Petitioner, Campbell Sales Company, P.O. Box 391, Camden, New Jersey 08101, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the fiscal year ended July 31, 1977 (File No. 26893).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 19, 1982 at 1:15 P.M., with all briefs to be submitted by October 19, 1982. Petitioner appeared by Whitman & Ransom, Esqs. (George Noumair, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly required petitioner to file a franchise tax report on a combined basis with its parent corporation, Campbell Soup Company, and seven other Campbell Soup Company subsidiaries for the fiscal year at issue.

II. Whether petitioner is entitled to a refund in the amount of $190,309.00, representing the difference between the tax petitioner calculated and paid pursuant to a 1941 agreement with the Tax Commission and the tax which would have been due had petitioner calculated its tax under the statutory method.

FINDINGS OF FACT

1. On April 10, 1979, the Audit Division issued to petitioner, Campbell Sales Company, a Notice of Deficiency asserting additional franchise tax due under Article 9-A of the Tax Law for the fiscal year ended July 31, 1977 in the amount of $544,626.00, plus interest thereon. The Statement of Audit Adjustment, under the same date, explained that the deficiency was based on a field audit and set forth the following computation:

Combined entire net income per field audit	$152,747,499.00
Business allocation percentage per field audit	4.0713
Allocated business income	6,218,807.00
Tax at 10 percent	621,881.00
Subsidiary capital tax per field audit	1,159.00
Subtotal	623,040.00
20 percent surcharge	124,608.00
Surcharge credit	(5,000.00)
Minimum tax (7 subsidiaries)	1,750.00
Total tax	744,398.00
Tax per report	199,772.00
Deficiency	544,626.00

The asserted deficiency was reduced by a credit to Campbell Foods Distributing Corp. (sic) in the amount of $6,144.00.

2. Petitioner, a wholly-owned subsidiary of Campbell Soup Company ("Soup"), is a New Jersey corporation with its principal office in Camden, New Jersey. Petitioner maintains 40 offices in 34 states, including 2 offices in New York where it has been qualified to do business since 1941.

3. Soup is a manufacturer and processor of food and food products. Since its organization in 1922, petitioner has been engaged in the business of acting as sales representative or broker in the food business, soliciting orders for the products of Soup and Soup's affiliates. (Petitioner does not represent other food manufacturers because of the large volume of work it handles for

Soup.) The orders are transmitted to Soup's offices in Camden for acceptance and credit approval. The goods are then shipped directly from one of Soup's plants to the wholesaler or distributor, and payment therefor is made directly to Soup.

4. During the year under consideration, petitioner had approximately 1,000 employees who worked exclusively for petitioner. In Alaska and Hawaii, petitioner retained food brokers to solicit orders for Soup's products. Petitioner also utilizes brokers from time to time to solicit orders for new products.

5. The compensation received by petitioner for the work that it does is governed by an agreement between petitioner and Soup entered into in 1947. There are no other agreements or understandings between petitioner and Soup regarding petitioner's income or expenses. The agreement provides for a payment to petitioner equal to petitioner's costs plus 4 percent thereof.

> "The Soup Company agrees to pay to the Sales Company for the services which shall be performed by the Sales Company under this Agreement, the actual net cost to the Sales Company of the operation and carrying on of the business of the Sales Company so far as the same shall relate to the sale of the products above mentioned while this Agreement shall be in force and effect, including all salaries and wages of officers and employees of the Sales Company, all payments made by the Sales Company to The Prudential Insurance Company of America under the Campbell's Soups Retirement and Pension Plan, effective July 1, 1938, as amended, and all payments made by the Sales Company to The Travelers Insurance Company under the Campbell's Soups Group Life Insurance Plan, effective March 1, 1947; plus four (4) per cent of such actual net cost...".

The compensation paid by Soup to petitioner for each of the fiscal years 1954 through 1977, expressed as a percentage of Soup's sales generated by petitioner was as follows:

FYE JULY 31	PERCENTAGE
1954	2.0921%
1955	2.3572
1956	2.6862
1957	2.7520
1958	2.3505
1959	2.4290
1960	2.3796
1961	2.3790
1962	2.3057
1963	2.3398
1964	2.2702
1965	2.4143
1966	2.3769
1967	2.4164
1968	2.4295
1969	2.4785
1970	2.4752
1971	2.5253
1972	2.5937
1973	2.4802
1974	2.4165
1975	2.4735
1976	2.4851
1977	2.5112

The payments have been, for most years, the equivalent of a sales commission of 2 to 2½ percent. A 2 to 2½ percent commission for the work which petitioner does is a fair and reasonable commission and is not less than, and is probably more than, the equivalent of the amount that would be paid for such work on an arm's length basis involving unrelated parties. For example, in 1977, petitioner paid its broker in Hawaii a 2 percent commission on the sale of Soup's products.

6. Petitioner pays its own expenses (wages, salaries, rentals, etc.), most of which are to unrelated third parties.

7. Petitioner's president, who works full time for petitioner, holds the office of vice-president in Soup.

8. From time to time employees of Soup's marketing office accompany petitioner's employees on their routes to ascertain whether a particular product is selling well and to gather information for promotional materials.

9. Certain of petitioner's administrative functions, including the accounting and legal functions, are performed for it by Soup.

10. Petitioner maintains its own books of account and bank accounts.

11. (a) The sales of Soup and the amounts and percentages thereof made to New York customers for the years 1974 through 1977 were as follows:

YEAR	TOTAL SALES	SALES TO N.Y. CUSTOMERS	PERCENT N.Y. SALES TO TOTAL SALES
1974	$1,229,936,937	$ 99,487,906	8.0889
1975	1,240,256,044	95,948,894	7.7362
1976	1,307,918,713	94,237,765	7.2052
1977	1,426,203,583	110,845,606	7.7721

(b) Petitioner's operating expenses and the portion thereof actually incurred with respect to New York for the years 1974 through 1977 were as follows:

YEAR	TOTAL EXPENSES	EXPENSES RELATED TO N.Y.	PERCENT N.Y. EXPENSES TO TOTAL EXPENSES
1974	$26,376,484	$2,500,974	9.4818
1975	27,152,042	2,783,962	10.2532
1976	29,102,837	2,676,431	9.1963
1977	32,605,526	2,915,653	8.9422

(c) The total amount paid by Soup to petitioner as a percentage of its sales everywhere, and the amount paid in respect of New York sales as a percentage of New York sales for the years 1974 through 1977 were as follows:

YEAR	COMPENSATION AS A PERCENTAGE OF TOTAL SALES	N.Y. COMPENSATION AS A PERCENTAGE OF N.Y. SALES
1974	2.4165%	2.7601%
1975	2.4735	3.0176
1976	2.4851	2.7978
1977	2.5112	2.7356

12. Since 1941, petitioner has calculated its New York franchise tax liability pursuant to a formula agreed upon (and modified in 1947) by petitioner, Soup and the Tax Commission. For purposes and in the implementation of this agreement, petitioner computes its gross income as 4 percent (adjusted in the

event Soup's advertising expenses fall below 3½ percent of its sales) of Soup's total sales for the year, subtracts its expenses, and allocates the net income to New York in the proportion which petitioner's expenses incurred with relation to New York bear to petitioner's total expenses. Petitioner's computation of its tax liability for the fiscal year at issue is shown below.

(1) Campbell Soup Company sales		$1,327,379,763
(2) Amount computed thereon for apportionment purposes at agreed-on rate as follows: 4% of sales, plus the number of percentage points by which advertising expenses fall short of 3½% of sales but not exceeding 5%		
(a) Advertising expenses	$ 62,784,017	
(b) Sales	1,327,379,763	
(c) Advertising expenses	4.7%	
(d) Amount under 3½%	---	
(e) Agreed-on rate for period 8/2/76 to 7/31/77		4%
		$ 53,095,191
(3) Expenses of petitioner		32,605,526
(4) Amount computed for apportionment		$ 20,489,665
(5) Total expenses of petitioner (exclusive of state franchise taxes)	$ 32,387,204	
(6) Expenses incurred with relation to N.Y. (exclusive of franchise tax)	$ 2,697,293	
(7) Percentage relation of N.Y. expense to total expense		8.328268%
(8) Product of line (4) and line (7)		$ 1,706,434
(9) Tax at 10%		$ 170,654

Neither the Audit Division nor petitioner has a copy of the agreement. According to Paul Hellberg, a tax accountant with Soup responsible for preparing petitioner's franchise tax reports, "I was told this was agreed upon and you would do this...People who were around in '41 decided that is how we should file." According to the Audit Division, the agreement represented a recognition on the part of the corporations and the state that petitioner's New York franchise tax liability would not be properly reflected by filing on an individual basis under the statutory business allocation formula.

For the fiscal years 1970 through 1977, the tax which would have been computed under the statutory formula and the tax computed and paid by petitioner pursuant to the 1941 agreement were as follows:

FYE	TAX PER STATUTORY FORMULA	TAX PER AGREEMENT
08/02/70	$ 6,408	$ 71,207
08/01/71	8,196	86,473
07/30/72	13,714	97,498
07/29/73	10,316	116,892
07/28/74	11,348	230,564
08/03/75	16,204	159,819
08/01/76	16,620	212,051
07/31/77	9,463	199,772

13. In April or May, 1977 (that is, 2 to 3 months prior to the expiration of petitioner's 1977 fiscal year), the Audit Division instituted a review of petitioner's method of calculating its tax liability. The corporation tax examiner requested and was granted access to petitioner's records for the years 1974, 1975 and 1976 and conferred with, among others, Mr. Hellberg. The examiner concluded that: (a) there was no basis upon which to continue the 1941 agreement; and (b) combined reports embracing Soup, petitioner and 8 other Soup subsidiaries should be required. On February 27, 1978, the examiner, other members of the Audit Division and petitioner's representatives met to discuss the Audit Division's proposal for retroactive combined filing for the years 1974, 1975 and 1976. The Audit Division thereafter determined that combined reports would be required, but commencing with fiscal year 1977; it accordingly requested petitioner and Soup to supply the information needed to compute the tax on such combined basis.

Besides petitioner, the corporations the Audit Division sought to include in the combined report were as follows:

(1) Soup (incorporated in New Jersey in 1922) - the parent corporation.

(2) Joseph Campbell Company (incorporated in New Jersey in 1972) - a wholly-owned subsidiary of Soup which grows and purchases vegetables, all of which it sells to its parent.

(3) Champion Valley Farms, Inc. (incorporated in New Jersey in 1969) - a wholly-owned subsidiary of Soup which produces pet foods, all of which it sells to its parent.

(4) Valley Tomato Products, Inc. (incorporated in California in 1966) - a wholly-owned subsidiary of Soup which manufactures tomato paste, all of which it sells to its parent.

(5) Southeastern Wisconsin Products Company (incorporated in Wisconsin in 1965) - a wholly-owned subsidiary of Soup which sells food flavorings to its parent. All sales are to the parent.

(6) Campbell Soup Co. (Sumter Plant), Inc. (incorporated in South Carolina in 1965) - a wholly-owned subsidiary of Soup which manufactures frozen dinners and processes poultry. Approximately 70 percent of its sales are to the parent.

(7) Campbell Frozen Foods Distributing Co. (incorporated in New Jersey in 1955) - a wholly-owned subsidiary of Soup which purchases frozen dinners from the parent and re-sells them to institutional customers under the name "EfficienC". All of its purchases are from Soup.

(8) Campbell's Soup Inter-America, Inc. (incorporated in New Jersey in 1969) - a wholly-owned subsidiary of Soup. This company is a Western Hemisphere trading corporation which sells Soup's products to Puerto Rico.

(9) Campbell's Export Sales, Inc. - a commission DISC for sales of its parent's products to points outside the United States.

The franchise tax asserted to be due from each of the corporations (excepting the DISC) was as follows:

CORPORATION	TAX
Campbell Soup Company*	$743,048
Campbell Sales Company	(199,522)
Campbell Frozen Foods Distributing Co.	(5,454)
Southeastern Wisconsin Products Company*	250
Valley Tomato Products, Inc.*	250
Campbell Soup Co. (Sumter Plant), Inc.*	250
Joseph Campbell Company*	250
Champion Valley Farms, Inc.*	250
Campbell's Soup Inter-America, Inc.*	250
	$539,752

*Previously not a N.Y. taxpayer

14. Petitioner maintains that the Audit Division's computation allocates (combined) business income to New York in the amount of $6,218,807.00 with the following results:

(a) Petitioner's "imputed" gross income for fiscal year 1977 was $107,276,598, representing 8.08 percent of the parent's sales.

(b) Petitioner's "imputed" net income was $74,671,000, representing 69.6 percent of its gross compensation and 36.14 percent of the parent's pre-tax consolidated net income.

(c) The ratio of petitioner's "imputed" net income to its actual net worth is 2,220 percent. (The ratio of petitioner's actual net income to its actual net worth is 21.7 percent.)

This argument turns upon the assumption that the Audit Division imputed the combined income of the 9 corporations to petitioner itself.

15. Included in petitioner's brief were 50 proposed findings of fact all of which have been, in essence, adopted and incorporated into this decision with the following exceptions: proposed findings 13 and 15, which incorporate several factual statements rendering it difficult to rule thereon, are rejected; proposed findings 38 and 48 are rejected as not established by the evidence.

16. Included in the Audit Division's brief were 12 proposed findings of fact all of which have been, in essence, adopted and incorporated into this decision, with the exception of proposed findings 1 and 6, which are rejected as not established by the evidence.

CONCLUSIONS OF LAW

A. That subdivision 4 of section 211 of the Tax Law, in pertinent part, provides:

> "In the discretion of the tax commission, any taxpayer, ...substantially all the capital stock of which is owned or controlled either directly or indirectly by one or more other corporations..., may be required or permitted to make a report on a combined basis covering any such other corporations and setting forth such information as the tax commission may require; provided, however, ...that no combined report covering

> any corporation not a taxpayer shall be required unless the tax commission deems such a report necessary, because of intercompany 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."

In interpreting the above-quoted subdivision, the Court of Appeals held that this Commission is expressly empowered thereby to require a combined report because of intercompany transactions, where certain conditions are found to exist; and further, that "when the Commission acts pursuant to the power conferred by subdivision 4, it is not a condition precedent that the income or capital of the taxpayer be improperly or inaccurately reflected" since subdivisions 4 and 5 of section 211 cover separate situations. Wurlitzer Co. v. State Tax Comm., 35 N.Y.2d 100, 105. Compare 20 NYCRR 6-2.5, effective for taxable years commencing on or after January 1, 1976. Finally, there is no requirement in the statute or the regulations promulgated thereunder that there exist any unfairness in the transactions between the affiliated corporations. Wurlitzer Co., supra.

B. That after the stock ownership or control requirement has been met, as is clearly the case here, the Commission, in determining whether to permit or require combined reports, considers the following two key factors: (1) whether the corporations are in substance parts of a unitary business conducted by the entire group, and (2) whether there are substantial intercorporate transactions among the corporations. 20 NYCRR 6-2.3. The substantial intercorporate transaction requirement is likewise clearly satisfied in the instant case. All of petitioner's receipts are derived from selling the products of its parent and sister corporations, under a written agreement with the parent in force since 1947, which accord guarantees petitioner a profit each year. Furthermore, petitioner is unquestionably part of a unitary business conducted by Soup and the other subsidiaries sought to be encompassed in the combined report by the Audit Division. Petitioner solicits sales only for the Campbell group, and the products of the group are sold only through petitioner's concerted efforts. Where the businesses of corporations are so unified and interassociated (having due regard for their separate corporate existences), a proper reflection of their New York franchise tax liability is impossible without combination.

C. That petitioner's tax liability being properly reflected on a combined basis as aforesaid, petitioner is not entitled to a refund in the amount of the excess of its franchise tax as determined pursuant to the 1941 agreement over the tax as would have been determined on a separate basis pursuant to sections 208 and 210 of the Tax Law. The 1941 agreement was not a written agreement of the Tax Commission entered into under the authority granted by subdivision eighteenth of section 171; it is therefore not final and conclusive with regard to the franchise tax at issue herein. <u>Matter of Petrie Stores Corporation</u>, State Tax Comm., January 2, 1980.

D. That the petition of Campbell Sales Company is hereby denied, and the Notice of Deficiency issued on April 10, 1979 is sustained in full.

DATED: Albany, New York

MAY 20 1983

STATE TAX COMMISSION

PRESIDENT

Francis R. Koenig
COMMISSIONER

COMMISSIONER