NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petitions	**DETERMINATION**
Of	
AMERICAN BANKNOTE CORPORATION;	**TAT(H)03-31(GC)**
AMERICAN BANK NOTE CORP.;	**TAT(H)03-32(GC)**
AMERICAN BANK NOTE CO., INC.	**TAT(H)03-33(GC)**
AND COMBINED AFFILIATES	

Murphy, A.L.J.:

Petitioners American Banknote Corp (f/k/a United States Banknote Corp.)("AB Corp."), American Bank Note Corp. (successor in interest to USBC Holdings)("Holdings") and American Bank Note Co., Inc. and Combined Affiliates, filed Petitions with the New York City ("City") Tax Appeals Tribunal ("Tribunal") and requested the redetermination of deficiencies of City General Corporation Tax ("GCT") for the period July 26, 1990 through December 31, 1992 ("Tax Period").

Petitioners were represented by Stephen L. Solomon, Esq., and Kenneth I. Moore, Esq. of Hutton and Solomon LLP. Respondent Commissioner of Finance ("Respondent") was represented by Robert J. Firestone, Esq. and Martin Nussbaum, Esq., Assistant Corporation Counsels. Frances Henn, Esq., Assistant Corporation Counsel, participated in Respondent's Reply Brief.

A hearing was held on December 14, 2004 and December 15, 2004, at which time evidence was admitted and testimony taken. A stipulation agreeing to the identification of certain documents was submitted as a hearing exhibit.

Petitioners submitted a Brief in support of their position on April 25, 2006 and Respondent submitted a Brief on July 24, 2006. Petitioners submitted a Reply Brief on September 26, 2006 and Respondent submitted a Sur-Reply Brief on November 30, 2006.

ISSUE

Whether Petitioners AB Corp. and Holdings may file GCT returns for the Tax Period on a combined basis with related operating companies, American Bank Note Co., Inc. and Combined Affiliates, pursuant to City Administrative Code ("Code") §11-605.4, so that interest expense incurred by Holdings may be offset against the combined group's operating income.

FINDINGS OF FACT

1. U.S. Banknote Company, L.P. ("USBN") was a privately held limited partnership. For over 100 years USBN was engaged in the security printing business and was the second largest printer of security documents in the United States. USBN's products included stock and bond certificates, foreign currency, travelers checks and U.S. government treasury products. USBN was headquartered in the City and operated four printing facilities: two in Philadelphia and one each in Forest Park, Illinois and Los Angeles, California.

2. USBN held an 85% interest in Lasercard Company, L.P., a manufacturer and marketer of computer-generated identification systems. USBN also owned the securities printing division of Jeffries Banknote Company, which it purchased in January 1989.

3. During 1989, USBN had sales of approximately $54 million and incurred a loss of approximately $2 million.

4. International Banknote Company, Inc. ("IBN"), was a publicly traded company, headquartered in the City, which had been engaged in the printing business since the 1700s. IBN owned 100% of American Bank Note Company Inc. ("ABN") and 80% of American Banknote Holographics Inc.("ABH").

5. ABN, the largest printer of security documents in the United States, operated three printing facilities. Its security and commercial printing products included stock and bond certificates, foreign currency, travelers checks, U.S. postage stamps, U.S. food stamps and passports.

6. ABH was the world's largest producer of three-dimensional holograms used for security and product packaging applications. ABH operated two holographic facilities.

7. During 1989, IBN had sales of approximately $83 million and a loss of approximately $4 million (excluding the gain on the sale of a subsidiary not directly relevant to this proceeding).

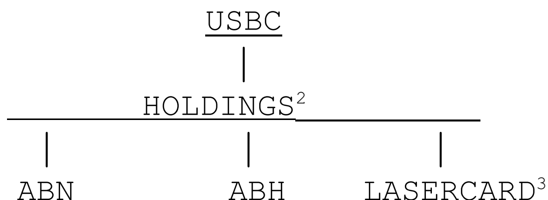
8. Before 1989, USBN and IBN were the two largest companies competing in the U.S. security printing business. As a result of the development of electronic transfers of securities, the business of printing security certificates and other documents declined. At that time, USBN had long-term debt of $49,080,000 and IBN had long-term debt of $23,231,000.

9. The poor financial condition of USBN and IBN prior to the Tax Period was the direct result of competition between themselves and with European companies, as well as of a declining market for printed products.

10. USBN and IBN determined that the best course for their businesses would be to merge. On May 24, 1989, a merger agreement was signed between USBN and IBN and the companies were restructured ("Merger").[1]

11. The Merger occurred in two stages: the acquisition phase and the merger/restructuring phase. During the acquisition phase, USBN formed USBN Acquisition Inc. which acquired 66-2/3% of the outstanding shares of IBN. The merger/restructuring phase involved several transactions. USBN Acquisition Inc. was merged into IBN to form United States Banknote Corporation ("USBC"), which transaction was accounted for as a purchase transaction. USBN's fixed assets and operations and the Jeffries subsidiary were then merged into ABN. USBC Holdings ("Holdings"), a wholly-owned subsidiary of USBC, was established to hold the stock of the ABN, ABH and Lasercard ("Operating Companies").

12. The post-merger legal structure was as follows:



[1] The United States Justice Department was concerned that the proposed merger might be anti-competitive. In December 1989, the Justice Department conditionally agreed to the transaction provided USBN sell the Ramapo equipped manufacturing facility to an unrelated entity. USBN complied with this requirement.

[2] Holdings also owned 80% or more of several other corporations which are not the subject of these proceedings.

[3] In 1991, this corporation was merged with a Paris-based company to form Idmates International. *See, Annual Report 1990.*

13. ABN became the primary operating company for the post-Merger group of corporations.

14. The officers of the Operating Companies included five individuals from USBN (Messrs. Weissman, Kreitman, Gorman, Cantor and Christophersen) and three individuals from IBN (Messrs. Ivey, Reddy and Gentile).

15. USBC and Holdings had no employees during the Tax Period. ABN, ABH and Lasercard had their own employees and officers.

16. The Merger was funded by: (a) a $122 million loan from Citibank (the "Loan"); (b) proceeds from the sale of certain USBN and IBN assets;[4] and (c) a cash contribution by IBN. The costs of the Merger included: the purchase of the IBN stock for $76 million; replacing $63 million debt of the merged companies; and Merger fees and expenses of $13 million.[5]

17. Citibank required that all prior existing indebtedness of the pre-Merger entities be replaced by Citibank financing.

18. As a condition for the Loan, Citibank further required that Holdings be formed to hold the stock of the operating companies unencumbered.[6] The Loan was secured by perfected security interests in each subsidiary, the subsidiaries' capital

[4] For example, Monetary Management Corporation (a USBN subsidiary) and the Ramapo ABN facility were sold and the proceeds were used to finance the merger.

[5] The costs of certain executive and union contract settlements were taken as expenses on the books of USBC and Holdings.

[6] Patrick Gentile, Chief Financial Officer of Petitioner corporations and affiliates, testified that under the terms of the Loan, if there was a default, Citibank would be able to liquidate the stock of the subsidiaries to pay off the debt. Tr. 207.

stock and a pledge of any intercompany subsidiary debt. Holdings guaranteed repayment of the Loan through (1) upstream payments guaranteed to Holdings by the subsidiaries and (2) the pledge of USBC stock as security. Holdings itself could not service the Citibank debt because it had minimal resources,[7] and the structure of the Loan precluded Holdings transferring the debt to the Operating Companies.

19. The Loan restricted the Operating Companies ability to incur further indebtedness and limited the types of transactions into which they might enter. Substantially all of the assets of the Operating Companies secured the Loan and the Operating Companies guaranteed the Loan.

20. About two percent of the proceeds of the Loan were used to provide a working capital facility for the Operating Companies' needs, in the following amounts for the noted periods: $2,321,000 for 1990; $1,350,000 for 1991; and $2,850,000 for 1992.

21. Holdings repaid the Loan principally from cash transferred from ABN. Chief Financial Officer Patrick Gentile categorized these transactions in testimony as "sweeps." Tr. 208. There were no loan agreements between Holdings and ABN and ABN did not charge interest. The transactions were reported as inter-company loans on individual company balance sheets and Federal consolidated income tax returns.

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[7] For example, on the combined group's 1990 Federal consolidated income tax return, Holdings reported interest income of $24,158, management fees of $20,833 and partnership income of $222,012; and for 1991, Holdings reported interest income of $18,782, management fees of $8,334 and partnership income of $70,272.

22. Pursuant to the Loan, the proceeds from any sale of the Operating Company's assets also were required to be used to pay down the Citibank debt.[8]

23. Prior to the Merger, in addition to administrative and executive offices, USBN operated the following four printing facilities: Caroline Road, Philadelphia, Pennsylvania (which produced travelers checks, food stamps and web intaglio special products); 55th Street, Philadelphia, Pennsylvania (which produced stocks and bonds); Forest Park, Illinois (which produced treasury checks); and the Jeffries plant in Los Angeles, California (which produced travelers checks and currency). Prior to the Merger, in addition to its administrative and executive offices, ABN operated three printing facilities in the following locations: Horsham, Pennsylvania (which produced travelers checks and food stamps); Ramapo, New York (which produced stocks and bonds); and Bedford Park, Illinois (which produced stocks, bonds, commercial printings, postage stamps and web intaglio special products).

24. Following the Merger, pursuant to a plan of consolidation, four manufacturing plants and IBN's headquarters and administrative facilities were vacated and three manufacturing facilities remained: the ABN plants at Horsham, Pennsylvania, and Bedford Park, Illinois and the USBN plant at Los Angeles, California. The manufacture of similar products was consolidated into the plants which contained the most efficient equipment, and the overall number of employees was reduced. Limiting manufacturing to three plants resulted in reducing operating costs, while at the same time maintaining broad sales and service coverage and distribution capability.

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[8] For example, in 1990 Citibank required that ABN sell certain archival proofs and specimens at auction.

25. Also following the Merger, the executive/administrative offices and sales offices of the Operating Companies were located in the City. Tax returns were centrally prepared and employee benefits were managed by USBC.

26. In 1992, USBC made a public debt and equity offering to refinance its indebtedness and to obtain funds for operations and for expansion.[9] USBC sold stock and issued senior notes. It used the proceeds of those transactions to pay off the Loan and to provide working capital. As a direct result of the repayment, Holdings was merged into USBC and the new debt was transferred to the books of the parent corporation.

27. In 1995, USBC changed its name to American Banknote Corporation ("AB Corp.").

28. USBC, Holdings and the Operating Companies were included in consolidated U.S. Corporation Income Tax Returns (Forms 1120) filed for the Tax Period.[10] The business activities of USBC and Holdings were reported to be "holding company" and/or "financing/investment." The business activity of ABN was reported as "printing," and of ABH as "holography."[11]

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[9] The U.S. government had awarded the Operating Companies a contract to print postage stamps which would require Petitioner to have $20 million to fund the project. At that time Citibank did not want to advance additional debt.

[10] The federal consolidated returns included several wholly-owned subsidiary corporations which were not included in the City GCT returns, some of which were foreign corporations (*e.g.*, Jeffries Banknote (Singapore) Pte. Ltd.) and most of which were identified on affiliations schedules as "inactive."

[11] The business activities of other subsidiary corporations included research and development, manufacturing, mail order sales, real estate holding and marketing.

29. For the Tax Period, USBC, Holdings, ABN and ABH filed City GCT returns on a combined basis.

30. For the tax year ended December 31, 1990, Holdings reported interest expense of $8,460,381. For the tax year ended December 31, 1991, Holdings reported interest expense of $16,940,546. For the tax year ended December 31, 1992, Holdings reported interest expense of $5,054,629.

31. For the tax year ended December 31, 1990, USBC reported a loss of $5,587,012; Holdings a loss of $10,097,953; ABN taxable income of $3,219,283; and ABH taxable income of $1,878,262. For the tax year ended December 31,1991, USBC reported taxable income of $1,064,087; Holdings a loss of $17,154,461; ABN taxable income of $12,562,982; and ABH taxable income of $7,151,801. For the tax year ended December 31,1992, USBC reported a loss of $22,561,443; Holdings a loss of $5,226,511; ABN taxable income of $18,166,898; and ABH taxable income of $6,124,897.

32. For the tax year ended December 31, 1990, ABN paid compensation to officers of $437,340 and ABH paid compensation to officers of $611,203. For the tax year ended December 31, 1991, ABN paid compensation to officers of $1,875,833 and ABH paid compensation to officers of $285,205. For the tax year ended December 31, 1992, ABN paid compensation to officers of $2,804,716 and ABH paid compensation to officers of $204,062.

33. In 1994, City Department of Finance ("Department") Auditor Ira Elias, performed an audit of Petitioners' books and records ("Audit"). The Audit was initially scheduled to cover the period July 26, 1990 through December 31, 1993, but the Department decided not to review the tax year ended December 31, 1993. The

audit period therefore covered July 26, 1990 through December 31, 1992.

34. Mr. Elias determined that USBC (now AB Corp.) and Holdings ("Holding Companies") were passive holding corporations which could not be included in a City combined GCT report. He confirmed that the Operating Companies should be included in a City combined GCT report as they were engaged in a unitary business and shared facilities, a customer base and officers. Mr. Elias further concluded that interest expense and other deductions claimed by Holdings were deductions directly attributable to subsidiary capital.

35. Following the Audit, the Department issued Notices of Determination of GCT due to the following corporations in the following amounts on the noted dates:

Taxpayer	Amount	Date of Notice
American Bank Note Company and Combined Affiliates	$512,426.65	December 14, 2001
AB Corp. (f/k/a USBC)	($18,436.19)	December 18, 2001
American Banknote Corp. (Successor to Holdings)	$6,095.23	December 18, 2001

Interest was computed on each of the deficiency amounts to December 31, 2001. No penalties were asserted.

36. Petitioner had computed and reported GCT liability for the combined group against a basis comprised of combined entire net income allocated to the City. As a result of the Audit, the auditor eliminated the Holding Companies from the combined group. The GCT asserted against AB Corp. was computed against a basis

comprised of allocated subsidiary capital and the minimum tax of $300 was asserted for each of the periods. The GCT asserted against Holdings was also computed against a basis of allocated subsidiary capital and the minimum tax was assessed. The GCT asserted against the Operating Companies was computed against the basis of their allocated combined entire net income.[12]

37. On August 14, 2003, Conciliation proceedings in these matters were discontinued.

38. Petitioners timely filed Petitions protesting the Notices of Determination, dated November 4, 2003.

39. Before the close of proceedings, Respondent made certain adjustments to the Notices. By letter dated December 10, 2004, which was introduced at hearing, Respondent allowed ABN's deduction of certain wage payments, reducing the deficiency asserted against American Bank Note Co. and Combined affiliates to $481,100. By letter dated November 1, 2005, Respondent increased the amount of the overpayment computed for AB Corp. to $24,781.40 based on an adjustment of Holdings' reported investment allocation percentage. These adjustments have not been challenged.

STATEMENT OF POSITIONS

Petitioners assert that they are entitled to file City GCT reports on a combined basis as they meet the statutory ownership requirements, are engaged in a unitary business and have, as between themselves, substantial intercorporate transactions.

[12] There also were other adjustments involved in the computation of additional GCT which are not in dispute, including: the disallowance of certain losses, the application of net operating losses, the addback of Holdings' wages claimed by ABN and the addback of deductions attributable to subsidiary capital.

Petitioners argue that as the Holding Companies were "financier" corporations for the group, combined filings are appropriate. Respondent asserts that the income and tax liability of the Holding Companies is more properly reflected by filing GCT reports on a separate reporting basis. Respondent's position is that the Operating Companies may file GCT reports on a combined basis, but those combined reports may not include the Holding Companies as the Holding Companies were not engaged in the unitary business of the Operating Companies, nor did they have substantial intercorporate transactions with the Operating Companies.

CONCLUSIONS OF LAW

The Code imposes a franchise tax on corporations which do business in the City computed against an allocated entire net income base. Code §§11-603.1; 11-604.1.E(a)(1). Each corporation doing business in the City is presumed to be a separate taxable entity required to file its own report. Code §11-605.1; City GCT Rules ("Rules") §11-91(a). However, during the Tax Period, a taxpayer could request permission to file GCT reports on a combined basis covering itself and defined related corporations, if certain statutory stock ownership criteria were met.[13] The Code provides that the City may require a taxpayer to file a combined report with related corporations where the filing is "deem[ed] . . necessary because of inter-company transactions . . . in order to properly reflect . . . tax liability." Code §11-605.4.

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[13] Code §11-605.4 recites the ownership criteria as follows: " . . . any taxpayer which owns or controls either directly or indirectly substantially all the capital stock of one or more other corporations, or substantially all the capital stock of which is owned or controlled either directly or indirectly by one or more other corporations or by interests which own or control either directly or indirectly substantially all the capital stock of one or more other corporations . . .."

The Rules provide that a taxpayer may request a combined filing where the following criteria are met: (1) stock ownership among the corporations to be combined is at least 80%; (2) the corporations to be combined are engaged in a "unitary business;" and (3) filing on a separate report basis "distorts the activities, business, income or capital" of the taxpayer. Rules §11-91(e)(1)(A)-(C).

Rules §11-91(e) specifically considers whether holding corporations might be included in combined filings in the following example:

> The taxpayer, a manufacturing corporation forms a holding company which is also subject to tax. The holding company owns all of the manufacturing company's stock. The only activity of the parent-holding company is to receive dividends from the manufacturing corporation. The corporations are not conducting a unitary business. Rules §11-91(e)(2)(iii)(3).

The stock ownership requirements clearly are met here as AB Corp. held all of the stock of Holdings and Holdings held all of the stock of ABN and eighty per cent of the stock of ABH.

The determination whether a group of corporations is engaged in a unitary business is made by taking into consideration whether the activities of the taxpayer are related to the activities of other corporations in the group. Rules §11-91 identifies indicia of a unitary business such as whether the corporation is "manufacturing or acquiring goods or property or performing services" for others in the group, or whether the taxpayer is engaged in the "same or related lines of business" as other group members. Rules §11-91(e)(2)(i-iii).

The constitutional prerequisite to a finding of unitary business is a flow of value. *Container Corp. of Am. v. Franchise Tax Bd.,* 463 U.S. 159, 178 (1983). Three factors are analyzed to determine whether a unitary business exists: functional integration, centralization of management and economies of scale. *Allied-Signal, Inc. v. Director, Div. Of Taxation,* 504 U.S. 768, 778, 781-2 (1992). The presence of these three elements is evidenced by an absence of arm's length transactions between the subject corporations, as well as a "management role by the parent corporation which is grounded in its own operational expertise and operational strategy." *Matter of British Land [Maryland]*, DTA No. 806894 (NYS Tax Appeals Tribunal, September 3, 1992), *citing to Allied-Signal, supra*; confirmed, *Matter of British Land [Maryland] v. Tax Appeals Tribunal,* 202 A.D.2d 867, 609 NYS2d 439, *rev'd on other grounds,* 85 NY2d 139,623 NYS2d 772 (1995). The intercompany activities must be sufficiently interconnected that reporting on a separate basis does not properly reflect income or tax liability.

Petitioners correctly note that financing companies can be included in combined fillings. *See, e.g., Matter of Sears, Roebuck and Co.,* DTA No. 801732 (New York State Tax Appeals Tribunal, April 28, 1994) (wholly-owned financing subsidiary was found to be part of a unitary business with its parent, but separate reporting was appropriate because the transactions between the related corporations were at arms' length). However, while the proceeds of the Loan were paid to Holdings and the debt was repaid through Holdings, these facts are insufficient to confirm that Holdings was a financing corporation. The relationship between the Holding Companies and the Operating Companies was not characterized by the "overwhelming interdependence" that is required to support a combined filing. *Sears, supra at 40-41*.

The record demonstrates that there was no apparent functional integration, centralization of management or economies of scale between the Holding Companies and the Operating Companies.[14] Petitioners rely on the terms of the Loan to support their position that the Holding Companies are entitled to file on a combined basis with the Operating Companies. However, neither the terms of the Loan nor the actual transactions attributable thereto are intercorporate transactions of a nature that compel finding a unitary relationship.

Presumably due to the precarious financial position of the original corporations (USBN and IBN), Citibank required that Holdings be established as a separate corporate entity which would be interposed between the merged parent (AB Corp (USBC)), and the Operating Companies. That corporation would receive the borrowed funds and guarantee repayment, holding unencumbered the security for those borrowings (*i.e.*, the stock of the surviving Operating Companies) and pledging the stock of its parent, AB Corp. (USBC). The guaranteed payments were to be made from the Operating Companies' income. Holdings had no other business purpose or activity which could generate significant income. The limited scope of Holdings' corporate purposes is confirmed by its subsequent dissolution once the group was able to issue its own debt instruments.

Although Petitioner characterizes the sweeps of cash from the Operating Companies as "intercompany loans," there were no borrowing agreements between Holdings and the Operating Companies.

[14] Post-Merger there was clear functional integration, centralization of management and economies of scale between the two operating companies and their affiliates. In fact, the intended purpose of the Merger was to maximize the use of resources and technologies by consolidating the Operating Companies. See, generally, Findings of Fact ¶¶ 24, 25, *supra*.

There is no evidence that the Operating Companies intended to loan the cash to Holdings, nor were any arrangements for its repayment made, including any provision for the payment of interest (although the lack of a specific provision for interest is not necessarily determinative of the issue).

The majority of the Loan proceeds were borrowed to effect the Merger and not to finance the operations of the Operating Companies. Therefore, it cannot be said that cash payments by subsidiaries to Holdings were made because the Operating Companies had an implied obligation to "repay" Holdings. *See, e.g., Matter of Heidelberg Eastern*, DTA Nos. 806890, 807829 (New York State Tax Appeals Tribunal, May 5, 1994); *Matter of British Land [Maryland], supra at* 870. Neither are there facts which suggest that the Operating Companies had an expectation of Holdings' repayment of the income sweeps. As primarily a stockholding company, Holdings did not have any significant source of income to repay either Citibank or the Operating Companies. Therefore, it was inevitable that Holdings could only use income earned by its subsidiary investments, the Operating Companies, to service the Loan.

The Loan proceeds were used to fund an equity investment and the cash sweeps were used to repay Citibank, the unrelated lender of the Loan. These transactions were not qualifying intercorporate transactions and do not support a finding of unitary business between the Holding Companies and the Operating Companies. It cannot be concluded that if AB Corp and Holdings file GCT reports on a separate basis, the City income and activities of the Holding Companies or the Operating Companies would be distorted.

Although the Rules presume that income is distorted where there are defined substantial intercorporate transactions (Rule 11-

91(f), such intercorporate transactions must be “directly connected” with the business of the taxpayer. Rules §11-91(f)(3). At a minimum, fifty per cent (50%) of a corporation’s receipts must be from “qualified activities.” *Id.* This standard has not been met here.

The caselaw confirms that pure holding companies are not included in combined filings where they do not meet the articulated statutory and regulatory tests for unitary business. *See, Matter of Panavision*, DTA No.816660 (New York State Tax Appeals Tribunal, June 6, 2002) (a holding company could not be included in a State combined filing); *see, also, Allied-Signal, supra* at 553 (merely guaranteeing repayment of a loan is insufficient to establish engaging in a unitary business). *Contra, A.G.Becker Paribas Group*, DTA Nos.806842 and 806843 (New York State Tax Appeals Tribunal, April 21, 1994) where the holding company was also involved in the management of subsidiaries, and, thus, was found to be part of a unitary business.

The State decision in *Panavision, supra,* is particularly on point. That case involved the issue of whether three companies (a holding company, Lee Panavision International (“LPI”); Lee International Acquisitions (“Acquisitions”) which was a holding company wholly-owned by LPI; and Panavision (which was wholly-owned by Acquisitions)) could file State franchise tax reports on a combined basis. During the late 1980s, the related Lee corporations were in financial difficulties and had incurred large debt. In 1991, the group was reorganized and the debt restructured. The restructured debt was paid by LPI from cash “sweeps” (often on a daily basis) from Panavision and other related operating companies. The only income which LPI earned was interest and dividend income. Panavision argued that all three corporations

should file on a combined basis because they were engaged in a unitary business and the cash sweeps represented substantial intercorporate transactions in the form of unsubstantiated intercorporate loans on which no interest had been charged or paid.

To determine whether LPI, Acquisitions and Panavision could be combined, the State Tax Appeals Tribunal analyzed the sweep transactions to see if they met the legal characteristics of loans. *See, generally, Panavision, supra, citing to Williams v. Commissioner*, 627 F.2d 1032, 80-2 USTC ¶9550 (10th Cir. 1980). They concluded:

> . . . the facts of this matter demonstrate that the "cash sweeps" were nothing more than constructive dividends, not loans. Panavision was closely held by LPI, the beneficiary of the payments. Petitioner declared no dividends in 1991. The payments themselves were not evidenced by notes and were not scrutinized. Panavision received no repayments and no maturity date was established for repayment. The payments had no established ceiling to limit their amounts and LPI was not in a financial position to repay nor was any attempt made to do so. *Id. at* 17.

Here, as in *Panavision,* the cash contributions from the Operating Companies to Holdings also were not intercompany loans. As the State Tax Appeals Tribunal noted in *Panavision:*

> The issue of whether amounts paid to shareholders are dividends or loans is a factual issue and depends upon the good faith intent . . . . to repay the amounts received and the intent of the corporation to require repayment. *Id. at* 16.

There are no facts which support an intent on the part of Holdings to repay the Operating Companies for the sweeps; nor is there any evidence that repayment was required. Holdings did not loan money to the Operating Companies for their operations; nor did the Operating Companies agree to repay the Loan on favorable terms. Finally, the borrowings were for the most part <u>not</u> used to finance the Operating Group's business operations. The essential fact is the Operating Companies were the only members of the group generating income sufficient to pay the Loan. As in *Panavision*, it appears that the "goal [of the sweeps from the Operating Companies] was to strip as much cash from the profitable [corporations] as possible to pay down the significant debt of the group." *Id. at* 15. Rather the sweeps are more appropriately considered to be constructive dividends.

While there may be instances where a holding company is engaged in more than passive stockholding, and it therefore might appropriately be included in a combined filing, such is not the case here. *See, e.g., Matter of Autotote Limited,* DTA No. 805477 (New York State Tax Appeals Tribunal, April 12, 1990) (where the holding company borrowed money and lent the proceeds to the operating company subsidiary to reduce debt and fund operations). There was no flow of value between the Holding Companies and the Operating Companies; nor was there any functional integration. The cash contribution transactions were not intercompany loans. The Operating Companies were the only group members generating income; Holdings and USBN did not independently earn any significant income. Nor can it be found that the Operating Companies had an expectation of repayment of the funds they transferred to Holdings.

The subsequent elimination of Holdings upon the liquidation of the Loan supports a finding that the funds transferred from the

Operating Companies were more likely constructive dividends than intercompany loans. *Pananvision*, *supra at 17.* There is no evidence in this record that the monies were loaned to Holdings, rather than merely transferred from the lender. There were no written agreements; there is no evidence of an intent to repay the advances; nor was any interest charged. The monies from the cash sweeps were never repaid to the subsidiaries, apparently even after the Loan was extinguished. Nor were the proceeds of the Loan held and distributed for the operating needs of the subsidiaries. *See, e.g., Matter of Heidelberg Eastern*, *supra.* In addition, Holdings did not provide any significant operational funding for ABN and ABH, while at the same time it used the majority of the subsidiaries' profits to pay off the Loan.

ACCORDINGLY, it is found that the Holding Companies were not engaged in the unitary business of the Operating Companies, and they may not request to file GCT reports on a combined basis. Therefore, the Petitions are denied and the Notices of Determination issued to American Bank Note Co., Inc. and Combined Affiliates on December 14, 2001, and to American Bank Note Corp. and American Bank Note Corporation on December 18, 2001, as modified pursuant to Footnote 12 and Finding of Fact 39, *supra*, are sustained with interest thereon.

DATED: May 30, 2007
New York, New York

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ANNE W. MURPHY
Administrative Law Judge