STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

CAPITAL DISTRICT BETTER TV, INC.

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1981 through November 30, 1982.

In the Matter of the Petition

of

AMERICAN TELEVISION & COMMUNICATIONS CORPORATION

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1981 through February 29, 1984.

In the Matter of the Petition

of

AMERICAN TELEVISION COMMUNICATIONS CORPORATION D/B/A AMERICAN CABLEVISION OF WEBSTER

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1981 through February 29, 1984.

In the Matter of the Petition

of

GREATER ROCHESTER CABLEVISION, INC. F/K/A AMERICAN CABLEVISION OF ROCHESTER

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1981 through February 29, 1984.

DECISION
DTA NOS. 802530, 802529, 802531, 802532 AND 802533

In the Matter of the Petition

of

CAPITAL CABLEVISION SYSTEMS, INC.

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1981 through February 29, 1984.

Petitioners Capital District Better TV, Inc., American Television & Communications Corporation, American Television Communications Corporation d/b/a American Cablevision of Webster, Greater Rochester Cablevision, Inc. f/k/a American Cablevision of Rochester and Capital Cablevision Systems, Inc., all bearing the mailing address of 160 Inverness Drive West, Englewood, Colorado 80112 filed an exception to the determination on remand of the Administrative Law Judge issued on December 27, 1991 with respect to their petitions for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1981 through November 30, 1982 for petitioner Capital District Better TV, Inc. and for the period June 1, 1981 through February 29, 1984 for each of the other petitioners. Petitioners appeared by Meister, Leventhal & Slade, Esqs. (Ronald W. Meister, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Mark F. Volk, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter in lieu of a brief in response, and asked that the Tax Appeals Tribunal refer in addition to the brief filed by the Division of Taxation in response to petitioners' first exception. Petitioners responded with a reply brief. Petitioners' request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly concluded that payments to subcontractors for improvements to the special franchise cable system are subject to sales tax for failure to meet the criteria of a capital improvement under the Tax Law.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge in her determination on remand except for findings of fact "5" and "8" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Capital District Better TV, Inc., American Television & Communications Corporation, American Television Communications Corporation d/b/a American Cablevision of Webster, Greater Rochester Cablevision, Inc. f/k/a American Cablevision of Rochester and Capital Cablevision Systems, Inc. (hereinafter referred to as "petitioners") are five affiliated cable television companies operating in New York State engaged in the business of providing entertainment programs and information services to their subscribers in the upstate area. In order to deliver their television signals, petitioners construct distribution systems of coaxial cables, amplifiers and filters in conduits under the public streets and in above-ground easements and, when requested by subscribers, physically connect the subscribers' television sets to the trunk systems.

During the periods at issue, petitioners employed subcontractors to perform the connection services between the subscribers' premises and petitioners' distribution systems. These subcontractors billed petitioners for the connection service and petitioners in turn billed the service to their subscribers in the form of a nonrecurring installation charge. The amount of the installation charge was prescribed by the franchise agreement with each municipality in which petitioners operate. Petitioners collected sales tax on the installation charge, stated it separately in its billing procedure and remitted it to New York State. It is stipulated between the parties that petitioners properly collected and remitted sales tax on these installation fees.

Petitioners recorded the payments to subcontractors for such installation services, also referred to as hook-ups, in two separate accounts, one labeled "X" and one labeled "R". It was

disclosed during the hearing that it would have been more proper to record payments for hook-ups only in the "X" account and as a result, an assessment of additional tax in the amount of $48,133.00 (rounded) for an amount charged to the "R" account was erroneously assessed. It is undisputed between the parties and agreed that the notices of determination and demands for payment of sales and use taxes due, described below, must be reduced for this purpose by $48,132.92.

Petitioners' "X" account represented payments to subcontractors who performed hook-up services to subscribers. Upon completion of the audit, the Division of Taxation (hereinafter the "Division") assessed tax on 40% of the payments to subcontractors that were included in the "X" account. The auditor testified that the "X" account represented labor which was used to install materials from the telephone poles to the house and throughout the house. He further testified that during the course of the audit he received information from petitioners that 40% of the payments to subcontractors represented installation within the house (i.e., within the structure). This amount, through further discussion, was raised to 60%. Thus, the auditor concluded that 40% of the payments to subcontractors represented installation from the pole to the house and 60%, determined as nontaxable, represented installation inside the structure. The Division clearly distinguished labor charges for the installation from the telephone pole across the private property of the subscriber to the structure, which was not considered to be resold, from the connection services taking place within the walls of the structure, which were considered to be resold. The disputed tax as a result is $40,496.00 as indicated in Appendix "A".

Aside from the erroneous charge to the "R" account of hook-up payments, the prime purpose of the "R" account was to record payments to subcontractors who were responsible for installing the distribution system in the main trunk line.

We modify finding of fact "5" of the Administrative Law Judge's determination on remand to read as follows:

> The municipalities in which petitioners operate granted them a "special franchise" to run cables from their origination points through the public way. The New York State Real Property Tax Law § 102(17) defines special franchise as:

> "the franchise, right, authority or permission to construct, maintain or operate in, under, above, upon or through any public street, highway, water or other public place, mains, pipes, tanks, conduits, wires or transformers, with their appurtenances, for conducting water, steam, light, power, electricity, gas or other substance."
>
> In general, petitioners executed long-term franchise agreements with municipalities for the purpose of obtaining special franchise rights. Petitioners agreed to pay the municipalities where they operate franchise fees of up to 3% of their annual gross revenues. In addition, they pay a separate franchise tax assessed by the New York State Board of Equalization and Assessment that is based on the miles of cable installed.[1]

During the periods at issue, petitioners employed subcontractors to install cable in the special franchises for the purpose of expanding their services and increasing the value of the franchise.

Petitioners introduced into evidence an agreement between the City of Ithaca and American Television & Communications Corporation. This agreement was executed in 1978 and had a term of ten years, with a renewal option at the end of the term. Mr. Esposito, president of American Television & Communications Corporation, indicated that this agreement was in effect for the years at issue in this audit. This agreement did not contain a provision addressing the removal or retention of the trunk line and cable system.

Prior to the introduction of this agreement, the record indicates an off-the-record discussion. Subsequent to the discussion, the Administrative Law Judge indicated, for the record, only that the discussion concerned "the submission of a large number of franchise agreements and legal information pertaining to each of petitioners" (Tr., p. 25). Later in the hearing, in response to a question by the Administrative Law Judge to petitioners' representative concerning whether he wished redirect examination of Mr. Esposito, petitioners' representative answered:

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[1] We modified finding of fact "5" of the Administrative Law Judge's determination to delete the sentence that stated "[t]he intention at all times is for the installation of the trunk system to become a permanent installation to real property." We deleted this statement because the record does not support the application of this unqualified declaration to all of the installations at issue.

> "No...only to state what I mentioned off the record before, that we have with us, and they are available (to the Division's representative) and to (the Administrative Law Judge), other franchise agreements for our purposes. We don't see the need to submit them into evidence" (Tr., p. 37).

The Administrative Law Judge then asked petitioners to submit into the record, for purposes of example, an agreement which had a termination clause in it. In response to this request, petitioners introduced an agreement, executed in December 1984, between the Town of Colonie and Capital District Better TV, Inc. Although it did not pertain to the periods at issue, petitioners' representative indicated that "he (did not) believe the language in the earlier period varied" (Tr., p. 38). Petitioners' representative also indicated that:

> "in some of the franchise agreements petitioners operate under, the municipalities have the theoretical right to come to us at the end of the franchise period and ask us to remove the cable, but no one has ever asked us to do that" (Tr., p. 16).

Mr. Esposito also stated that several of the agreements contained removal provisions (Tr., p. 36).

The removal provision in the Town of Colonie agreement stated:

> "DISPOSITION OF TERMINATED FRANCHISE
>
> In the event of a termination then, the Company shall execute such documents as may be necessary to transfer title of the system to the Town, whereupon the Town shall proceed to hold a sale and sell the system. The system shall be priced at Fair Market Value and sold as a going business and the recent sales of similar CATV systems shall be taken into consideration as a basing price for any sale. After deducting any amounts owed the Town, including legal fees, the balance of the proceeds shall be returned to the Company. The Town reserves the right to require the Company to remove its supporting structures, poles, transmission and distribution systems and appurtenances from the streets, ways, lanes, alleys, parkways, bridges, highways, and other public places in, over, under or along which they are installed and to restore the areas to their original condition. If such removal is not completed within six (6) months of such termination, the Town may deem any property not removed as having been abandoned."

We modify finding of fact "8" of the Administrative Law Judge's determination on remand to read as follows:

> Petitioners presented two credible and competent witnesses who provided complete testimony as to the organization of the cable companies, a history of their operations and an explanation of the technical components of the system. These witnesses testified that the installation of the cable is intended to be permanent, that it is not feasible to remove the cable and that such removal is impossible without causing material damage. If the cable is in fact removed, the

> distribution system is destroyed and the cable itself cannot be reused. One of these witnesses, a leading expert on the cable systems in New York State, Dr. Anthony Esposito, testified that no cable company in the history of New York State has ever been required to remove its cable installations in spite of the provision in the franchise agreements which frequently allows the municipality to retain the right to request such removal.[2]

With respect to the charges to the "R" account representing the improvements to the special franchise cable system, the Division determined that the charges are not capital improvements and that the expenditures are for tangible personal property subject to tax, or are for labor to install or maintain tangible personal property subject to tax.

Another issue raised at the hearing pertained to sales taxes of $725.00 imposed upon the payment to a subcontractor for construction of a road. Both parties agreed at the hearing that the notice of determination with respect to Capital Cablevision Systems should be reduced by $725.00 since this was a nontaxable transaction and the tax was imposed in error.

Records requested and made available by petitioners during the audit included sales tax returns and related worksheets, depreciation schedules, distribution summary reports, sales journal, sales invoices, purchases journal, purchase invoices and the general ledger. There is no issue in this case as to whether the records were complete and adequate, nor as to whether they were appropriately made available for review by the Division.

Petitioners, by signature of their controller, executed numerous consents ultimately extending the period of limitation for assessment of sales and use taxes for the period June 1, 1981 through February 28, 1982 to June 20, 1985. On June 20, 1985, as a result of the field audit of petitioners, the Division issued five separate notices of determination and demands for payment of sales and use taxes due under Articles 28 and 29 of the Tax Law containing the following explanation:

> "The tax assessed herein has been determined to be due in accordance with the provisions of Section 1138 of the Tax Law and may be challenged through the appeal process by filing a petition within 90 days."

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[2] We modified finding of fact "8" by substituting in the beginning of the second sentence the words "[t]hese witnesses testified" for the words "[t]heir testimony collectively indicated."

The amount of tax and interest due for the quarterly periods pertaining to each of the petitioners was as follows:

American Cablevision of Rochester

Period	Tax	Interest	Total
8/31/81	$111,368.87	$ 53,658.74	
11/30/81	81,393.94	35,828.67	
2/28/82	34,085.05	13,611.86	
5/31/82	32,843.51	11,783.36	
8/31/82	76,795.42	24,435.99	
11/30/82	30,544.44	8,493.18	
2/28/83	11,353.98	2,739.03	
5/31/83	9,218.02	1,971.62	
8/31/83	8,220.32	1,533.51	
11/30/83	17,449.83	2,790.89	
2/29/84	30,778.76	4,095.16	
	$444,052.14	$160,942.01	$604,994.15

American Cablevision of Webster

Period	Tax	Interest	Total
8/31/81	$ 27,305.26	$ 13,155.97	
11/30/81	17,170.07	7,558.07	
2/28/82	6,710.76	2,679.94	
5/31/82	19,731.44	7,079.11	
8/31/82	41,358.24	13,160.02	
11/30/82	6,998.43	1,945.98	
2/28/83	7,441.96	1,795.30	
5/31/83	1,151.45	246.28	
8/31/83	922.50	172.09	
11/30/83	3,372.98	539.47	
2/29/84	1,345.42	179.01	
	$133,508.51	$ 48,511.24	182,019.75

Capital Cablevision Systems, Inc.

Period	Tax	Interest	Total
8/31/81	$ 12,772.26	$ 6,153.81	
11/30/81	10,369.74	4,564.64	
2/28/82	12,649.66	5,051.64	
5/31/82	46,863.65	16,813.41	
8/31/82	4,491.20	1,429.08	
11/30/82	6,056.43	968.65	
2/28/83	15,208.19	3,668.82	
5/31/83	5,340.54	1,142.28	
8/31/83	12,023.51	2,243.00	
11/30/83	13,522.76	2,162.80	
2/29/84	9,948.88	1,323.71	
	$149,246.82	$ 45,521.84	194,768.66

American Television & Communications Corp. (Ithaca)

Period	Tax	Interest	Total
8/31/81	$ 2,427.33	$ 1,169.51	
11/30/81	1,863.12	820.12	
2/28/82	7,683.38	3,068.36	
5/31/82	3,220.92	1,155.58	
8/31/82	2,379.97	757.30	
11/30/82	1,063.37	295.68	
2/28/83	1,592.07	384.07	
5/31/83	2,728.42	583.58	
8/31/83	5,694.18	1,062.26	
11/30/83	2,363.72	378.05	
2/29/84	9,323.91	1,240.56	
	$ 40,340.39	$ 10,915.07	51,255.46

Capital District Better TV, Inc.

Period	Tax	Interest	Total
8/31/81	$ 2,838.69	$ 1,367.71	
11/30/81	2,674.46	1,177.27	
2/28/82	570.98	228.02	
5/31/82	857.45	307.63	
8/31/82	197.36	62.80	
11/30/82	370.75	103.09	
	$ 7,509.69	$ 3,246.52	10,756.21
TOTALS	$774,657.55	$269,136.68	$1,043,794.23

The field audit reports indicated that the additional tax liabilities were comprised of analyses of the "R" account, "X" account, an account entitled "Other", and an amount for

recurring purchases reviewed for test periods. The "R" account amounts assessed pertained to the erroneous portion of the hook-up payments that should have been included in the "X" account, as well as payments to subcontractors who installed the distribution system in the main trunk line. The additional tax determined with respect to the "X" account related to the subscriber hook-up and installation services. This account was determined to be 40% taxable and 60% nontaxable according to the audit report. The "Other" account related to tax not paid on purchases of certain assets. The audit report further indicated that recurring purchases were examined for two locations and, pursuant to a review of several test months, additional taxable recurring purchases for the combined petitioner locations for the period totalled $108,195.87. An additional tax liability for those recurring purchases relating to each of the five petitioners is indicated in Appendix "A", item 4.

In her initial determination, the Administrative Law Judge held that the payments to subcontractors for the services of installing the cable service from petitioners' distribution systems to the subscribers' premises were purchases for resale and were not subject to tax. The Administrative Law Judge rejected the assertions of the Division that only the portion of the installation cost relating to the installation inside the subscriber's home was not taxable, and that the cost of installing the service on private property outside the subscriber's home was subject to tax. The Administrative Law Judge determined that the services are for hook-up at the request of a subscriber for cable television installation. Therefore, the payments for such service should be nontaxable in their entirety as purchases for resale.

In addition, the Administrative Law Judge held that the payments to subcontractors to install cable in the special franchises failed to meet the criteria of a capital improvement under the Tax Law and were subject to tax. The Administrative Law Judge urged caution with regard to reliance on the franchise agreements offered into evidence, i.e., the Ithaca and Colonie agreements, and determined that the decision in Matter of Manhattan Cable Tel. v. New York State Tax Commn. (137 AD2d 925, 524 NYS2d 889, lv denied 72 NY2d 808, 534 NYS2d 666) required the conclusion that the cable installation was not a capital improvement.

Petitioners excepted to the Administrative Law Judge's conclusion that the payments to install cable in the special franchise property are subject to tax, asserting that the installation of the cable in the special franchise property met all of the tests for a capital improvement contained in Tax Law § 1101(b)(9). Petitioners asserted that the evidence produced at the hearing and found as facts by the Administrative Law Judge establish that the installation of the cable added to the value of the special franchise, that removal of the cable was not possible without causing material damage to the cable and the distribution system, and that the installation of the cable was intended to be permanent. Petitioners asserted that the Administrative Law Judge, having found facts which satisfy each element of the statutory definition of capital improvement, could not determine that petitioners' installation of cable was not a capital improvement. Petitioners rely on Matter of Rochester Gas and Elec. Corp. v. New York State Tax Commn. (128 AD2d 238, 516 NYS2d 341, affd 71 NY2d 931, 528 NYS2d 810), Matter of Flah's of Syracuse v. Tully (89 AD2d 729, 453 NYS2d 855) and Matter of Nu-Look Specialists (Tax Appeals Tribunal, November 3, 1988). Petitioners argued that these facts distinguish it from Manhattan Cable and, therefore, the installation costs are for capital improvements and should be held not to be taxable.

The Division excepted to the Administrative Law Judge's determination that the costs of installing the cable from petitioners' system to the outside of the subscriber's premises were not taxable as purchases for resale. The Division asserted that only the installation of the cable system inside the subscriber's home is subject to the resale exclusion. The cost of installing the cable from petitioners' system to the subscriber's premises, the Division argued, is not resold and is, therefore, taxable.

The Tax Appeals Tribunal (hereinafter the "Tribunal") agreed with the determination of the Administrative Law Judge that for purposes of the exclusion there is no valid legal distinction between the hook-up from petitioners' system to the subscriber's premises and the installation within such premises. In short, in order for the subscriber to get what it is paying for, i.e., cable service, it must be fully hooked up to petitioners' system. Petitioners employed

subcontractors to perform the connection services between the subscriber's premises and petitioners' distribution system. These subcontractors billed petitioners for the connection service and petitioners, in turn, billed the service to their subscribers in the form of a nonrecurring installation charge. The amount of this charge was prescribed by the franchise agreement. Petitioners collected sales tax on the installation charge and remitted it to the State.

With respect to the Tribunal's opinion as to how the costs for installing the cable system should be treated, the Tribunal found the pivotal element to be whether petitioners intended the installation of the cable to be permanent. The Tribunal noted that the Administrative Law Judge made specific findings of fact that petitioners installed cable in the special franchises for the purposes of expanding their services and increasing the value of the franchise; that petitioners presented two credible and competent witnesses and that the testimony of these witnesses collectively indicated "that the installation of the cable is intended to be permanent, that it is not feasible to remove the cable and such removal is impossible without causing material damage. If the cable is, in fact, removed, the distribution system is destroyed and the cable cannot be reused." In short, and as petitioners assert, these findings would appear to indicate that petitioners' installation of cable met the statutory criteria for a capital improvement in Tax Law § 1101(b)(9).

The Tribunal noted that, notwithstanding these facts, the Administrative Law Judge determined that the decision in Manhattan Cable (supra) dictated the result in this case, and applied Manhattan Cable to all of petitioners' installations based on a review of the two agreements submitted into the record: the Ithaca agreement which did not contain language obligating petitioners to remove the cable at the end of the franchise agreement, and the Colonie agreement which did contain such language. The Tribunal pointed out that apparently the fact that Manhattan Cable concerned the installation of cable in a special franchise and that the franchise agreement contained a removal clause similar to that contained in the Colonie agreement were persuasive to the Administrative Law Judge's conclusion and dictated the result notwithstanding the findings of fact made by the Administrative Law Judge. The Tribunal then

concluded that there was an insufficient basis in the record to sustain the result reached by the Administrative Law Judge that the decision in Manhattan Cable dictates the issue with regard to all of petitioners' installations, and remanded the matter back to the Administrative Law Judge for further proceedings in accordance with their decision.

The Tribunal noted in their decision that petitioners' intent must be deduced from all the facts and circumstances at the time the capital improvement was installed (see, Matter of Grumman Aerospace Corp., Tax Appeals Tribunal, April 11, 1991 and cases cited therein), and further that the terms of the documents governing the use of such real property are clearly a relevant factor in determining intent. The Tribunal determined the record clearly reflected the fact that petitioners' franchise agreements varied with regard to their provisions concerning removal of cable at the end of the franchise. However, the Tribunal found the record somewhat confusing as to what transpired at the hearing concerning the submission of franchise agreements into evidence. The Tribunal noted that with respect to the off-the-record discussion between the Administrative Law Judge and the representatives of the parties, there was no indication of what result, if any, was reached during the discussion regarding the introduction of the franchise agreements.

The Tribunal emphasized that petitioners' intent as to the permanency of the cable installation is dependent on all of the facts and circumstances of the case and, in this particular instance, the franchise agreements are an important factor. The Tribunal expressed concern that the statements of the Administrative Law Judge during the off-the-record discussion may have been the cause for all of the franchise agreements not being introduced into evidence. For this reason, the Tribunal remanded the matter to the Administrative Law Judge to reopen the record to allow petitioners the opportunity to introduce the agreements. After giving the parties an opportunity to comment on the additional evidence, they requested the Administrative Law Judge to issue a determination deciding the capital improvement issue based on the additional evidence.

The Division of Tax Appeals thereafter scheduled the remanded matter for hearing on November 19, 1991.

Prior to the scheduled hearing date petitioners' representative, Ronald W. Meister, Esq., contacted the Assistant Chief Administrative Law Judge of the Division of Tax Appeals to express a desire to have the record stand with no further introduction of evidence. He confirmed the same in correspondence received by the Administrative Law Judge on November 6, 1991. The content of such correspondence is reproduced below:

> "We represent petitioners in the five consolidated petitions referred to above, which the Tax Appeals Tribunal has remanded to permit petitioners to introduce additional evidence, if they desire. With the concurrence of Mark Volk, Esq., of the Division of Taxation, we write to state that all parties agree that the hearing afforded us was fair and comprehensive, and that neither party desires to introduce additional evidence.
>
> In particular, Mr. Volk and I agree that both sides were given the opportunity to introduce all the evidence they desired to be included in the record, and that neither side was misled or influenced by any conversation held off the record.
>
> Petitioners continue to believe, as we discussed in our post-hearing memorandum at pages 10-13, that their purchases to improve the special franchise are exempt capital improvements, and that provisions of any franchise agreement theoretically requiring removal of cable at the conclusion of a long-term franchise are insufficient to negate the specific finding in this case that the installations were intended to be permanent -- especially since it is the taxpayer's intent that controls under Troncillito and Dairy Barn, not the municipality's. The testimony in this case, that no system has ever been removed, and that removal without causing material damage is impossible, was unrebutted, credible, and confirmed by specific findings of fact. For those reasons, we believe that the contrary conclusion of law is unsupported by the facts, and that Manhattan Cable, which was decided on a record without this testimony about permanence and non-removability, is distinguishable.
>
> While disagreeing with that position, Mr. Volk joins in our view that re-opening the record is unnecessary, and in our request that the matter be returned to the Tax Appeals Tribunal for resolution of the capital improvement issue."

The Administrative Law Judge received correspondence on November 12, 1991 from Mark F. Volk, Esq., representing the Division's position of concurrence with petitioners regarding the re-opening of the hearing. His letter is reproduced below:

> "I have received Mr. Ronald W. Meister's letter of November 1, 1991 and concur that both sides were given the opportunity to introduce all the evidence they desired to be included in the record and that neither side was misled or influenced by any off the record conversation. As stated in Mr. Meister's letter the Division of

Taxation agrees that the hearing was fair and comprehensive and we do not wish to introduce any additional evidence.

The Division of Taxation continues to contend that the petitioner's purchases to install cable distribution systems in the public way are not tax exempt capital improvements. The facts of the case are identical to those in Manhattan Cable. As was found in Manhattan Cable, the petitioner failed to submit sufficient evidence suggesting any intention of permanence. For this reason and other reasons enumerated previously our position remains the same. To reopen the record now when neither party has any new evidence or testimony will serve no useful purpose and is unnecessary. Please advise as to what procedure will be followed at this juncture."

As a result of the position taken by the parties, the scheduled hearing of November 19, 1991 was cancelled, and no further information was submitted for consideration by the Administrative Law Judge.

OPINION

The Administrative Law Judge, in her determination on remand, merely repeated verbatim her prior conclusion in the matter,[3] that under Matter of Manhattan Cable Tel. v. New York State Tax Commn. (supra), the special franchise cable systems did not constitute capital improvements under the Tax Law and, therefore, the payments to subcontractors for improvements to these systems are subject to sales tax. The Administrative Law Judge, after reducing the notices of determination in accordance with conclusion of law "A" (see, footnote 3, supra) of the determination dated August 9, 1990, and pursuant to findings of fact "2" and "10," otherwise sustained the notices.

Petitioners take exception to the Administrative Law Judge's conclusion that the payments to install cable in the special franchise property are subject to tax, claiming that the Administrative Law Judge's fact findings support their assertion that the installation of the cable in the special franchise property met all three prongs of the test for a capital improvement under Tax Law § 1101(b)(9). Namely, petitioners contend that the installation of the cable added to the value of the special franchise, that removal of the cable was not possible without causing material damage to both the cable and the distribution system, and that the installation of the cable was

[3]The Administrative Law Judge also made a prior conclusion (referred to as conclusion of law "A") regarding the issue of the taxability of installation charges, however, that conclusion, having been affirmed by the Tribunal in our earlier decision, and not being at issue on remand, was not reiterated by the Administrative Law Judge.

intended to be permanent. Petitioners argue that the Administrative Law Judge, after having found that each of the elements of the statutory definition of capital improvement had been satisfied, cannot then determine that petitioners' installation of cable was not a capital improvement. Petitioners ask that the determination be reversed on this point, and that the installation costs not be held taxable.

In response, the Division challenges petitioners' assertion that: "the Tribunal held that the facts found by the Administrative Law Judge established that petitioners' installations of the cable distribution systems were capital improvements exempt from tax" (Division's letter in lieu of brief in response, p. 1, quoting petitioners' brief on exception, p. 4). The Division asserts that this characterization of the Tribunal's holding is misleading, and, if true, would mean the Tribunal had no reason to remand the case because it had already ruled in petitioners' favor. The Division maintains that a more accurate assessment of the Tribunal's determination is that the Administrative Law Judge's findings seem to indicate that the installation of cable met the statutory criteria for a capital improvement, however, in order to reach a definitive conclusion on the matter, it is necessary to deduce petitioners' intent from all the facts and circumstances at the time the cable was installed, including the franchise agreements.

The Division adds that since the burden of proof in this proceeding is upon petitioners, it was incumbent upon them to produce the franchise agreements for which the matter was remanded. The Division urges that only the "strongest possible inference" -- that the franchise agreements [not introduced into evidence] contain removal provisions -- be drawn from the fact that petitioners decided not to take advantage of this opportunity to submit the relevant franchise agreements (Division's letter in lieu of brief in response, p. 2). For these cited reasons, the Division requests that the Administrative Law Judge's determination be upheld.

We affirm the determination of the Administrative Law Judge in part, and reverse in part.

Judging from the letters submitted by petitioners and the Division to the Administrative Law Judge prior to the issuance of her determination on remand, we are satisfied that petitioners did not originally and did not on remand wish to submit any further franchise agreements into

evidence and that petitioners wish us to address the merits of the issue based on the evidence as submitted at the hearing below.

Turning to the merits of the issue, Tax Law § 1105(c)(3) imposes a tax on the receipts from every sale, except for resale, of the service of installing tangible personal property, except, inter alia, for "installing property which, when installed, will constitute an addition or capital improvement to real property, property or land . . ." (Tax Law § 1105[c][3][iii]). Tax Law § 1101(b)(9) defines "capital improvement" as:

> "[a]n addition or alteration to real property which: (A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and (B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and (C) Is intended to become a permanent installation."

It is true, as petitioners note, that, in analyzing an imposition statute, ambiguities are construed against the Division and in favor of the taxpayer (see, Matter of Grace v. New York State Tax Commn., 37 NY2d 193, 371 NYS2d 715, 718, lv denied 37 NY2d 708, 375 NYS2d 1027); however, as we stated in Matter of Philipp Bros. (Tax Appeals Tribunal, June 4, 1992, citing Matter of Petrolane Northeast Gas Serv. v. State Tax Commn., 79 AD2d 1043, 435 NYS2d 187, 189, lv denied 53 NY2d 601, 438 NYS2d 1027), this principle does not change the rule that petitioners have the burden of proving the assessment erroneous. The issue presented here is whether petitioners have established that the cables were intended to be a permanent installation.

First, we will address the installation by Capital District Better TV, Inc. in the Town of Colonie.[4] With respect to this installation, we agree with the Administrative Law Judge that Matter of Manhattan Cable Tel. v. New York State Tax Commn. (supra) requires the conclusion that it has not been established that the Colonie installation was intended to be permanent.

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[4]We will, based on the statements of petitioners' representative, assume that the removal provision of the agreement in evidence is the same as that for the earlier period in question (see, Hearing Tr., p. 38).

In Manhattan Cable, under the contract, the petitioner was required at the end of the 20-year franchise to allow the City to purchase the cable system, or, in the alternative, the petitioner was required to remove the system from the ground to the satisfaction of the Commissioner of Highways. Ruling on the issue of the petitioner's intent to make the system permanent under this contract, the Appellate Division held that: "[w]here petitioner reserves the right to remove the installed property, a finding of permanency is unlikely" (citing Matter of Merit Oil of New York v. New York State Tax Commn., 124 AD2d 326, 508 NYS2d 107, emphasis added), but where the petitioner "has actually obligated itself to remove the improvement upon demand," there is even more compelling evidence of an intention that the improvement not be permanent (Matter of Manhattan Cable Tel. v. New York State Tax Commn., supra, 524 NYS2d 889, 891, emphasis added). Thus, the fact that if the City did not wish to purchase the system, the petitioner had to remove it, was significant to the court because this meant that the power of the decision to remove the system or not (i.e., the power over whether the system would be permanent or not) lay with the City, not the petitioner.

The court's finding is most relevant to the matter at hand. The Colonie franchise agreement evidences that the power to remove the cable system at the termination of the lease rests with the Town, not with Capital District Better TV, Inc. Firstly, Section 10 of the agreement, entitled "Termination of Franchise" details five separate reasons for which the Town could elect to terminate the contract (i.e., not consensual termination). Secondly, Section 11 of the agreement, entitled "Disposition of Terminated Franchise" provides, in pertinent part:

> "[i]n the event of a termination then, the Company shall execute such documents as may be necessary to transfer title of the system to the Town, whereupon the Town shall proceed to hold a sale and sell the system . . . . The Town reserves the right to require the Company to remove its supporting structures, poles, transmission and distribution systems and appurtenances from the streets, ways, lanes, alleys, parkways, bridges, highways, and other public places in, over, under or along which they are installed and to restore the areas to their original condition. If such removal is not completed within six (6) months of such termination, the Town may deem any property not removed as having been abandoned" (emphasis added).

This language makes clear that Capital District Better TV, Inc. could not have had an intent at the time of installation to make the installation permanent, because petitioners did not have the ultimate control over whether the installation would eventually be removed or not.

Petitioners dispute this, asking us, in effect, to ignore the language of this contract in favor of their testimony and the reality that "never -- ever in the history of New York State has any municipality, no matter what the relations have been with the cable operator, demanded or required removal of the plant" (Hearing Tr., p. 30). In other words, petitioners claim that, regardless of what the contract says, petitioners knew going into this contract that the system installation would be permanent because no municipality had ever demanded removal of a cable system once installed.

However, when a similar contention was raised by the petitioners in Matter of Emery Air Freight Corp. (Tax Appeals Tribunal, October 17, 1991), we held that the intent of the parties should be gleaned from the terms of the contract, rather than from contradictory testimony, for "absen[t] . . . fraud, accident or mistake, the parol evidence rule prohibits resort to extrinsic evidence to vary the meaning of a contract when the language of the contract is unambiguous" (citations omitted). Similarly, in Matter of Merit Oil of New York v. New York State Tax Commn. (supra, 508 NYS2d 107, 109), the Appellate Division rejected the petitioner's claim that the language of the contracts in question did not accurately represent the petitioner's true intent under the contracts, holding that "the clear language of the . . . leases provides substantial evidence to support respondent's determination that the improvements were not permanent," adding that the petitioner "certainly could have provided in all its leases that the installed property [was intended to be permanent because it] would pass to the landlord." Furthermore, as we held in Matter of Dairy Barn Stores (Tax Appeals Tribunal, October 5, 1989):

> "[t]he controlling intent is not petitioner's secret or subjective intention at the time the units were acquired, but rather the intention the law objectively will deduce from all the circumstances at the time the property is annexed to the realty to see whether it may fairly be found that the purposes [sic] of the annexation was to make the unit a permanent part of the freehold" (citing Voorhees v. McGinnis, 48 NY 278; Marine Midland Trust Co. of Binghamton v. Ahern, 16 NYS2d 656, 659).

In view of the reasons set forth above, we hold that petitioners did not prove that the cable system installation under the Colonie agreement was intended to be permanent. Therefore, because the installation cannot be considered a capital improvement under Tax Law § 1101(b)(9), the installation is properly subject to tax.

Next we will address the other installation for which a franchise agreement was introduced, the American Television & Communications Corporation installation in the Town of Ithaca. The Ithaca agreement did not contain a removal provision. Notwithstanding her conclusions that petitioners presented credible and competent witnesses who testified that the installation of the cables was intended to be permanent, the Administrative Law Judge concluded that petitioners failed to prove that the Ithaca installation was permanent. The Administrative Law Judge stated that with respect to the Ithaca agreement "[o]ne could not assume that the absence of a disposition provision was meant to be an affirmative expression of an intention as to permanence and nonremoval of the cable system."

We agree with the Administrative Law Judge that Manhattan Cable and the other relevant cases (Matter of Glenville Cablesystems Corp. v. State Tax Commn. 142 AD2d 851, 531 NYS2d 137; Matter of Merit Oil of New York v. New York State Tax Commn., supra) establish that where there is a contractual provision under which the tenant or franchisee has reserved the right to remove the installation or has obligated itself to do so, such a provision will make highly unlikely a finding that the installation was intended to be permanent. However, we find nothing in these cases which supports the Administrative Law Judge's implicit holding that the intention of permanency can only be established through a provision in the relevant contract. Instead, we believe that in the absence of a lease or franchise agreement provision, the intention of the parties can be determined from the other relevant factors concerning the installation. This conclusion is consistent with the stated policy of the Division.[5]

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[5]In TSB-M-83(17)S, entitled, "Taxable Status of Leasehold Improvements for or by Tenants," the Division stated: "[i]n the absence of a lease provision, other factors such as the nature of the installation, or written agreements other than a lease provision may be considered in determining the intention of the parties with respect to the permanence of the installation."

The other relevant factors in this case are, as found by the Administrative Law Judge, derived from the credible and competent testimony of two witnesses which indicated that the installation of the cable is intended to be permanent, that it is not feasible to remove the cable, and that such removal is impossible without causing material damage to the cable. We believe that this credible testimony, absent any evidence to the contrary, is sufficient to prove that petitioner American Television Communications Corporation intended the cable it installed in Ithaca to be a permanent installation. Since there is no dispute that the other aspects of the definition of capital improvement were satisfied, we find in favor of American Television Communications Corporation on this installation.

Finally, we address all of the remaining installations, for which petitioners introduced no franchise agreements. With respect to these, we conclude that petitioners did not sustain their burden of proving that the installations were not subject to tax. As noted above, the pertinent franchise agreements are not only relevant, they could be dispositive of the intent of the installer at the time of the installation (see, Matter of Manhattan Cable Tel. v. New York State Tax Commn., supra, 524 NYS2d 889, 891). Petitioners had ample opportunity to introduce the franchise agreements in question which, petitioners' representative makes clear on the record, were in petitioners' possession (Hearing Tr., p. 37). Petitioners chose to submit only the Colonie and Ithaca agreements. We agree with the Division that it is:

> "incumbent upon the taxpayers to produce the franchise agreements. The taxpayers have failed to do so . . . [and therefore] the strongest possible inference [should] be drawn from this inaction. It should be inferred that the franchise agreements contain the removal provision for if they did not the taxpayers would have produced them to bolster their case" (Division's letter in lieu of brief in response, p. 2).

Indeed, as noted in the findings of fact, petitioners' representative indicated at the hearing below that, "in some of the franchise agreements petitioners operate under, the municipalities have the theoretical right to come to us at the end of the franchise period and ask us to remove the cable, but no one has ever asked us to do that" (Hearing Tr., p. 16). In addition, Dr. Anthony Esposito, a "leading expert on the cable systems in New York State" (Determination

on Remand, p. 8) and President of all five petitioner corporations, stated that several of the Capital Cablevision franchise agreements contained removal provisions (Hearing Tr., p. 36).

In view of the fact that petitioners chose to submit only the two franchise agreements in evidence when clearly others existed for each of the companies in question, and petitioners admitted that others of these contracts contained termination/removal provisions, we find the evidence insufficient to sustain petitioners' burden of proof here.

We note that even if we were to accept petitioners' testimony that the Ithaca agreement was typical of other contracts between the various petitioner corporations and other municipalities (see, Hearing Tr., pp. 26-27), this testimony does not provide a basis to identify which installations were governed by franchise agreements without a removal provision. For purposes of reducing petitioners' assessments, it would be impossible to determine the amount of reduction without such an identification. Therefore, only the assessment charged to petitioner American Television & Communications Corporation may properly be reduced.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Capital District Better TV, Inc., American Television & Communications Corporation, American Television Communications Corporation d/b/a American Cablevision of Webster, Greater Rochester Cablevision, Inc. f/k/a American Cablevision of Rochester and Capital Cablevision Systems, Inc. is granted only to the extent that the assessment for petitioner American Television & Communications Corporation is reduced to account for the amount of tax charged this petitioner on the installation of the Ithaca cable system, but is otherwise denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above, but is otherwise sustained;

3. The petitions of Capital District Better TV, Inc., American Television & Communications Corporation, American Television Communications Corporation d/b/a American Cablevision of Webster, Greater Rochester Cablevision, Inc. f/k/a American Cablevision of Rochester and Capital Cablevision Systems, Inc. are granted to the extent indicated in conclusion of law "C" of

the Administrative Law Judge's determination dated December 27, 1991, and as indicated in paragraph "1" above, but are otherwise denied; and

4. The Division of Taxation is directed to modify the notices of determination issued to petitioners Capital District Better TV, Inc., American Television & Communications Corporation, American Television Communications Corporation d/b/a American Cablevision of Webster, Greater Rochester Cablevision, Inc. f/k/a American Cablevision of Rochester and Capital Cablevision Systems, Inc. in accordance with paragraphs "1" and "3" above, but the notices are otherwise sustained.

DATED: Troy, New York
July 30, 1992

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

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner

Appendix A

Additional Tax Due per field audit reports:	Rochester	Webster	Capital Cablevision	ATC Ithaca	Better TV	Total
1. "R" account	$215,918.60	$ 67,522.69	$ 44,175.96	$13,990.94	$5,001.29	$346,609.48
2. "X" account	28,421.05	4,284.58	7,496.33	293.86	--	40,495.82**
3. Other	165,586.32	56,667.81	80,467.13	17,933.35	2,508.40	323.163.01
4. Additional recurring purchases	34,126.17	5,033.43	17,107.40	8,122.24	-0-	64,389.24
	$444,052.14	$133,508.51	$149,246.82	$40,340.39	$7,509.69	$774,657.55
Reduced at conference, but not reflected in notices of determination and demand	(21,929.52)	(9,464.34)	(13,607.91)	(2,937.06)	(194.09)	(48,132.92)*
	$422,122.62	$124,044.17	$135,638.91	$37,403.33	$7,315.60	$726,524.63

*Reduction referred to in the transcript as $48,133.00.
**See Finding of Fact "3".

Findings of Fact "1" through "13" are the facts as determined by the Administrative Law Judge, except facts "2" and "7" which were modified by the Tax Appeals Tribunal ("Tribunal") in its decision issued on September 5, 1991.
This restatement of fact has been revised to coincide with revised Finding of Fact "7".