

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>PEOPLES TELEPHONE COMPANY, INC.</b>	:	<b>DECISION</b>
		<b>DTA NO. 816253</b>
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods March 1, 1993 through November 30, 1993	:	
and March 1, 1994 through November 30, 1994.	:	

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Petitioner People's Telephone Company, Inc., 10120 Windhorst Road, Tampa, Florida 33619 and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on July 22, 1999. Petitioner appeared by Roland, Fogel, Koblenz & Petroccione, LLP (Keith J. Roland, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (James Della Porta, Esq., of counsel).

Petitioner filed a brief in support of its exception and a brief in opposition to the Division of Taxation's exception. The Division of Taxation filed a brief in support of its exception and in opposition to petitioner's exception and a reply brief. Oral argument, at petitioner's request, was heard on July 13, 2000 in Troy, New York.

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

***ISSUE***

Whether the pedestal and enclosure components of pay telephones purchased by petitioner in bulk sale transactions are exempt from sales and/or use tax pursuant to the exemption in Tax Law § 1115(a)(12) as central office equipment or station apparatus used directly and predominantly in receiving at destination or initiating and switching telephone communication.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact “6,” “7,” “8,” “9,” “10,” “11,” “12” and “13” which have been modified. We have also made additional findings of fact. The Administrative Law Judge’s findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

Since December 1992, petitioner, Peoples Telephone Co., Inc., has owned and operated pay telephones (“pay phones”) in New York State. Most of petitioner’s pay phones located in New York were acquired through bulk purchases from four companies, which had previously owned and operated the pay phones in New York, as follows: (1) U.S. Telecommunications, Inc. in March 1993, (2) ASCOM Communications, Inc. in November 1993, (3) Telecorp Public Communications, Inc. in April 1994, and (4) Telecoin Communications, Ltd. in October 1994.

Peoples Telephone Co., Inc. enters into agreements with property owners, including retailers, to install pay phones. Petitioner owns the installed pay phones and is responsible for their maintenance and the collection of coins. By the end of the period at issue, it had taxable sales from its operation of pay phones in New York, when annualized, of approximately \$10,000,000.00.

The Division of Taxation (“Division”) by its auditor examined petitioner’s acquisition of its New York pay phones by reviewing petitioner’s bulk sales contracts with the four companies noted above. The auditor determined that petitioner had \$1,052,768.00 in purchases subject to use tax.<sup>1</sup> Petitioner agreed that its bulk sale purchases of office furniture were subject to tax, but disagreed with the imposition of tax on purchases of telephone pedestals and enclosures of approximately \$860,000.00, which the parties agreed was a reasonable estimate of the portion of the total cost under the bulk sales contracts allocable to pay phone pedestals and enclosures.

The auditor determined that sales and use tax of \$70,997.12 was due on petitioner’s acquisition of pay phone pedestals and enclosures totaling approximately \$860,000.00, which resulted in the Division’s issuing a Statement of Proposed Audit Adjustment dated August 13, 1996 against petitioner asserting tax due of \$70,997.12, plus interest, as follows:

Periods Ended	Tax Due	Interest Due	Total
May 31, 1993	\$ 7,995.41	\$ 2,372.63	\$10,368.04
November 30, 1993	56,173.59	14,157.56	70,331.15
May 31, 1994	6,500.18	1,359.12	7,859.30
November 30, 1994	327.94	52.26	380.20
Totals	\$70,997.12	\$17,941.57	\$88,938.69

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<sup>1</sup>The tax at issue has been referred to as use tax by the auditor although it is more precisely viewed as sales tax. The use tax, as noted by the Court of Appeals in *Bloomingtondale Bros. v. Chu* (70 NY2d 218, 519 NYS2d 347, 349):

“[W]hich complements the sales tax, taxes uses which have not been and will not be the subject of sales tax [citation omitted]. Because the goods at issue were used in New York, but not sold in this State, it would be the use tax, not the sales tax that would govern.”

In the matter at hand, the goods at issue were the subject of bulk sale purchases by petitioner in New York so that it is technically correct to refer to the tax at issue as sales tax, not use tax.

The Division then issued a Notice of Determination dated September 3, 1996, mirroring the Statement of Proposed Audit Adjustment dated August 13, 1996, which asserted sales and use tax due of \$70,997.12 plus interest against petitioner.

We modify finding of fact “6” of the Administrative Law Judge’s determination to read as follows:

The parties have agreed that at issue is whether sales and use tax is due on petitioner’s purchase of pedestals and enclosures totaling approximately \$860,000.00. However, the record is inexact concerning the specific pedestals and enclosures purchased by petitioner in the course of the bulk purchases at issue. By way of explanation, the narrative section of the auditor’s report noted as follows:

The value that was associated with the [pay] telephones [purchased by petitioner in the bulk sales] also included the cost of the booths,<sup>2</sup> wiring, poles, signs and other items. This amount was not broken down and there was not adequate information to determine this amount. However, in the interest of being fair and reasonable current values of phones and additional items were used to arrive at estimated percentages that were agreeable with both the taxpayer and the auditor. The agreed upon percentage that was allocated to the telephones<sup>3</sup> and parts was 91.5%. This left 8.5% that related to the booths, wiring, etc. The telephones are considered exempt station apparatus that is used directly and predominantly to initiate and/or receive telephone communication. The tax due on the booths, wiring, etc. is \$70,997.12.

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<sup>2</sup> It appears the auditor used the term “booths” to refer to enclosures and pedestals.

<sup>3</sup>By exempting the “telephone,” the auditor treated “the housing, the coin retriever, anything that was actually part of the physical phone [as exempt]” (tr., p. 35).

However, since the parties agreed on the amount of sales and tax due thereon, that issue is not before us.<sup>4</sup>

We modify finding of fact “7” of the Administrative Law Judge’s determination to read as follows:

The auditor received a schedule from petitioner which:

gave the description of the type of enclosures and pedestals that were used and the number of phones associated with that type of enclosures and pedestals, and the number of phones acquired during the acquisition to tie the type of enclosures and pedestals to the number of phones that were used when arriving at the percentage to use for the total amount of taxable items from the bulk sale.

This schedule, which was labeled “Cost of Peripheral Equipment Acquired- 1993 and 1994 Acquisitions,” shows a total “cost of peripheral equipment acquired” of only \$629,540.00 not \$860,000.00, the amount agreed to by the parties as noted above. Furthermore, the technical descriptions on the schedule of the 16 types of enclosures and pedestals apparently at issue were not all explained. The schedule shows \$478,303.00 as the greatest “cost of peripheral equipment acquired” for one particular type of enclosure and pedestal (out of 16 listed) which was associated with 5,295 phones at acquisition (out of a total number of phones at acquisition of 6,464). This most common “equipment type” was noted as “IEDX 33,” and the description of this particular enclosure and pedestal was as follows, “SALP + Enclosure only, 110V light, Solid/ Sardine.” Petitioner’s witness, Michael Ogrodnick, described this particular item as “an enclosure only, with a 110 volt light in a solid sardine that goes around a sardine enclosure. This is a standard pedestal and enclosure that goes on a pay phone” (tr., pp. 47-48). While later in the hearing, petitioner introduced into evidence technical specifications for five types of pay phone pedestals and enclosures from Independent Enclosures, a manufacturer of pay phone pedestals and enclosures, none of these specifications can be specifically related to this most

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<sup>4</sup>We modified finding of fact “6” of the Administrative Law Judge’s determination to more accurately reflect the record.

common type of pedestal and enclosure noted on the schedule or any of the others listed.<sup>5</sup>

***Petitioner's Evidence***

We modify finding of fact “8” of the Administrative Law Judge’s determination to read as follows:

Petitioner presented the testimony of Michael Ogrodnick, its district manager for the region that includes New York City, Long Island, and parts of Westchester and New Jersey. Prior to his employment by petitioner, Mr. Ogrodnick was employed in a similar capacity by ASCOM Communications, Inc., from which, as noted above, petitioner had acquired pay phones through a bulk sale. Mr. Ogrodnick’s duties as district manager included:

Running the office and supervising the service technicians that go out and service and clean and collect the coins from the pay phones. He also supervises installers of the pay phones, coin counters, a secretary in the office, a warehouse crew and parts and repair people.

Mr. Ogrodnick, who has been employed in the telecommunications industry for 11 years including 8 years in the pay phone industry, began as an installation repair technician employed by the New York Telephone Company. He was then employed as a pay phone installer and worked his way up to a position as service manager in charge of service technicians before then becoming a district manager. Based on this history, his knowledge of and experience with pay phones was demonstrated to be extensive.<sup>6</sup>

We modify finding of fact “9” of the Administrative Law Judge’s determination to read as follows:

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<sup>5</sup>We modified finding of fact “7” of the Administrative Law Judge’s determination to more accurately reflect the record.

<sup>6</sup>We modified finding of fact “8” of the Administrative Law Judge’s determination to more accurately reflect the record.

Based upon his knowledge and experience, Mr. Ogrodnick considers himself to be an expert in the manner in which pay phones are installed and in the operation of the different components of pay phones. However, he was not offered as an expert witness.

There are 21 essential or necessary and integral parts of a pay phone. The following chart sets forth the parts and the description of each:

1. Pedestal or wall mount	Houses the telephone company's demarcation device <sup>7</sup> and secures and protects the pay phone and wires, including the power cable, that come through the pay phone and also keeps the pay phone at the proper height for use by customers in compliance with the Americans with Disabilities Act
2. Enclosure	Secures and protects the pay phone and keeps out the weather and may provide a sound barrier and house lighting
3. Upper housing	Outside shell that holds the keypad, handset, the coin release linkage and secures the computer board
4. Lower housing	Outside shell that holds the inner components
5. Computer board	Determines the rate of the pay phone and whether the call is placed
6. Coin mechanism	Accepts money and divides and separates out quarters, nickels and dimes
7. Trigger switch	Registers what the coin was with the computer board, a quarter, nickel or dime
8. Hopper	Holds the money until the call is placed or the money is returned to the user
9. Relay	Releases the money from the hopper in whatever direction is necessary
10. Coin chute	Where the user retrieves money if the call is not placed

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<sup>7</sup>According to Mr. Ogrodnick, the pedestal is the "address" for purposes of the telephone company, i.e., Bell Atlantic, formerly NYNEX, to which "they go to ... install their wires and demarcation point" (tr., p. 94).

11. Anti-stuffing device (ASD)	Where money is collected from
12. Ribbon cable	Connects the computer board to the keypad in the upper housing unit
13. Power cord	Brings the power and dial tone from a Bell Atlantic (formerly NYNEX) wire to the computer board
14. Keypad	Number pad by which the call is placed
15. Handset	Black plastic cradle piece which holds the speaking and hearing (receiver) parts and wires
16. Coin release linkage	Linkage on the inside of the upper housing that catches and releases money to be returned to the user
17. Coin box	Holds money from completed calls
18. Vault door	Secures the coin box in the lower housing
19. Mast	Holds the wires coming into the pedestal
20. Coin release lever	Used by the customer to work the coin release linkage
21. Cradle	Holds the handset <sup>8</sup>

We modify finding of fact “10” of the Administrative Law Judge’s determination to read as follows:

The pedestals and enclosures provide protection and security. The lower housing is mounted on the pedestal which is affixed to the ground. The enclosure is mounted to the pedestal, protecting the upper housing and lower housing from vandalism and the elements.

The pedestal, enclosure, telephone and mast are a “single integral unit” (tr., p. 68). Without a pedestal and enclosure, petitioner would not be able to operate a pay phone outdoors due to weather conditions and vandalism. In particular, the enclosure

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<sup>8</sup>We modified finding of fact “9” of the Administrative Law Judge’s determination to more accurately reflect the record.



prevents the handset from being used by a vandal to break a glass window since it cannot be stretched around the enclosure.<sup>9</sup>

We modify findings of fact “11,” “12” and “13” of the Administrative Law Judge’s determination to read as follows:

Pedestals are attached to the ground with bolts which are welded to prevent removal of the pedestal. The enclosure is then bolted to the pedestal and the lower housing is locked in place. The result is one integrated unit. It was estimated that the standard pedestal, such as the Econoline, Number 23, had a value of approximately \$200.00 and the enclosure about \$150.00.

Since signage was not necessary to initiate or receive calls it was not one of the 21 essential parts enumerated above.<sup>10</sup>

Eight-five percent of petitioner’s installations of pay phones are outdoors, exposed to the elements.

We find the following additional findings of fact.

On audit, the Division never observed the physical makeup of the telephones purchased by petitioner. In determining the tax due on the bulk purchase of the pay phones, the Division exempted the phone, the housing, the coin retriever and anything that was actually part of the physical phone. However, the Division did not analyze the component parts of the telephone to determine if a part was used to initiate or receive telephone communication. The Division summarily decided that the whole phone component was used for the purpose of receiving and initiating calls and was, therefore, exempt.

Although source documentation afforded no breakdown of component parts by pricing, the Division and petitioner agreed that

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<sup>9</sup>We modified finding of fact “10” of the Administrative Law Judge’s determination to more accurately reflect the record.

<sup>10</sup>We modified findings of fact “11,” “12” and “13” of the Administrative Law Judge’s determination to delete certain language that was improperly included within the findings of fact and, thus, succinctly set forth the remaining portions of the enumerated findings of fact.

91.5% of the value was for the telephones and the remainder for the “booths” and wiring.

The protective function of the pedestals and enclosures is their chief function. The fact they also make calling more convenient, private or quiet is ancillary to their primary purpose. In addition, some enclosures have built-in coin return mechanisms, anti-stuffing devices and faceplates which enhance their protection capabilities.

### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge determined that the pedestals and enclosures qualified as station apparatus used directly and predominantly in receiving or initiating and switching telephone communication (Tax Law § 1115[a][12]) and, thus, were exempt from sales tax imposed by Tax Law § 1105(a). Cognizant of the strict construction given to exemptions, the Administrative Law Judge carefully mapped his reasons for so finding. Initially, the Administrative Law Judge found that the exemption for station apparatus was a “parallel exemption” to the manufacturing exemption and used this relationship to incorporate the rationale of several of our prior cases, particularly ***Matter of Deco Bldrs.*** (Tax Appeals Tribunal, May 9, 1991), wherein we interpreted the terms “directly and predominantly” more broadly than the Division and found that a part used to produce electricity was eligible for the exemption because the electricity, albeit not the ultimate object of production, was “an essential and active part of production at the mill”.

The Administrative Law Judge held that the pedestals had an active and causal relationship with the operation of the pay phones and without it, the computer board, a critical component, would only function for a short time. Likewise, the enclosure was also found to be within the scope of the exemption because it performed the same function as the pedestal, at least for

outdoor installations, where it provided protection from the weather and vandals. The Administrative Law Judge also found that the function of the pedestals and enclosures in outdoor installations was “predominantly” related to the receiving or initiating of telephone communication and served no other separate and distinct use.

In response to petitioner’s argument that it would be subject to a pyramiding of taxes, the Administrative Law Judge stated that this would not provide a basis for the exemption, but, in so granting the exemption for the reasons he cited, the Administrative Law Judge said that the exemption for station apparatus comports with the legislative intent to prevent pyramiding of taxes.

The Administrative Law Judge refused to provide the exemption for enclosures at indoor locations because he believed the computer board could function without the installation of an enclosure to protect it from the elements. The Administrative Law Judge then fashioned his own unique formula for the apportionment of the purchases to exclude the indoor enclosures from the exemption.

### ***ARGUMENTS ON EXCEPTION***

Petitioner’s exception is confined to the Administrative Law Judge’s conclusion that the enclosures used at indoor locations do not qualify for the exemption. Petitioner argues that the Administrative Law Judge focused on the weather protection provided by the enclosure and did not consider the protective function central to the enclosure’s purpose both in and out of doors. Petitioner notes that the evidence demonstrates that protection from vandalism and theft is the same for both indoor and outdoor installations, particularly because the coin return mechanism is built directly into the enclosure, providing the security essential to the operation of any pay

phone. The enclosure also provides protection from impact, noise reduction, compliance with the Americans with Disabilities Act, privacy and a structure to house an electric light fixture. Petitioner argues that each of these functions is essential to the operation, i.e., the initiation and reception of telephone communication, of a pay phone. Petitioner concedes that there is a difference in the degree of protection offered by the indoor and outdoor enclosures, but contends that neither could function properly without it.

Petitioner relies on *Matter of Niagara Mohawk Power Corp. v. Wanamaker* (286 App Div 446, 144 NYS2d 458, *affd* 2 NY2d 764, 157 NYS2d 972) which, in deciding whether an item qualified for the exemption, weighed certain factors like the necessity of the item to production, the proximity of the item to the finished product and the harmony of the item with the admittedly exempt equipment to make an integrated and synchronized system. Petitioner urges that its pedestals and enclosures meet this criteria and qualify for the exemption under Tax Law § 1115(a)(12).

The Division argues that the uncontroverted testimony of Mr. Ogronick does not need to be accepted by the Tribunal even if the witness is credible, based on our decisions in *Matter of Tropicana Prods. Sales* (Tax Appeals Tribunal, June 12, 2000) and *Matter of Sumitomo Trust & Banking Co.* (Tax Appeals Tribunal, September 9, 1999). It argues that Mr. Ogronick's testimony was not relevant in many respects and was conclusory in nature.

The Division maintains that there must be more than a causal link between the station apparatus and the requirement for the exemption for initiating and receiving telephone communication. In fact, the Division relies on *Matter of Niagara Mohawk Power Corp. v. Wanamaker* (*supra*) in support of this position. The Division does not believe that the pedestals

and enclosures are “directly” and “predominantly” used in the telephone process described in the exemption, as those terms are defined at 20 NYCRR 528.13(c). Further, the Division does not believe that the enclosures or pedestals meet the three criteria set out in *Niagara Mohawk*, i.e., they are not necessary to the exempt function (a call can be initiated without them), they are not close to the station apparatus that receives or initiates a telephone communication (the metal casing around the telephone protects it from inclement weather, therefore, the enclosure is redundant) and the items do not operate harmoniously with the exempt equipment to create an integrated and synchronized system.

The Division also takes exception to the Administrative Law Judge’s conclusion that the disputed items had an active causal relationship with the station apparatus. The Division argues that the Administrative Law Judge did not explain why the protective function of the enclosures and pedestals created an active causal relationship with the station apparatus that actually performs the initiating and receiving of telephone communication.

The Division also maintains that the pedestals and enclosures are not used predominantly in the exempted communication process, only for the convenience of the customers.

Finally, the Division contends that the Administrative Law Judge erred in focusing on the inquiry of whether the pay phones could be used without the pedestals and enclosures. The Division urges that the real inquiry should be whether the items are used in the specific technological function of receiving at destination or initiating and switching of telephone communication.

**OPINION**

We affirm in part and reverse in part the determination of the Administrative Law Judge for the reasons set forth below.

Tax Law § 1115(a)(12) provides an exemption from the tax imposed under Tax Law § 1105(a) for “telephone central office equipment or station apparatus . . . for use directly and predominantly in receiving at destination or initiating and switching telephone . . . communication . . . .” The exemption is repeated at 20 NYCRR 528.13(f)(1).

It is well established that statutes creating exemptions from tax are to be strictly construed (*see, Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715, *lv denied* 37 NY2d 708, 375 NYS2d 1027; *Matter of Blue Spruce Farms v. New York State Tax Commn.*, 99 AD2d 867, 472 NYS2d 744, *affd* 64 NY2d 682, 485 NYS2d 526. The taxpayer’s argument must satisfy the burden of demonstrating clear and unambiguous entitlement to the exemption claimed (*Matter of Marriott Family Rests. v. Tax Appeals Tribunal*, 174 AD2d 805, 570 NYS2d 741, *lv denied* 78 NY2d 863, 578 NYS2d 877; *Matter of W.T. Wang, Inc. v. State Tax Commn.*, 113 AD2d 189, 495 NYS2d 792).

The exemption in issue seeks to avoid the pyramiding of taxes, i.e., it eliminates the imposition of sales tax on production equipment, leaving the state to collect tax on the “finished product,” which in this case is telephone service. In 1974, the exemption in issue was broadened when the term *directly and exclusively* was changed to *directly and predominantly*. It was perceived as a “major liberalization of the exemption . . . [entailing] a significant loss of revenue for the State and many of its localities” (Letter from Commissioner of Taxation & Finance to the Governor, May 30, 1974, Bill Jacket A. 9899-B, L 1974, ch 851, p. 22). How the terms directly

and predominantly are applied to the enclosures and pedestals is crucial to the resolution of this matter.

The parties agreed that the enclosures and pedestals in issue are station apparatus as required by the statute, but the Division does not believe the enclosures and pedestals, what it termed *booths* in its audit report, were close enough to the process of receiving or initiating and switching telephone communications to qualify for the exemption. However, when the original decision was made to deny the exemption for the pedestals and enclosures, there was no articulated standard applied by the Division to determine if a component part of a pay phone was used directly and predominantly in receiving or initiating and switching telephone communications. The Division did not find it germane that many parts of the telephone having nothing to do with the actual receiving or initiating of telephone communication, like the coin box, were deemed exempt by it for the sole reason that they were contained in the “whole phone component.” Since the Division lacked a standard for determining the qualification of the component parts of a pay phone for the exemption in Tax Law § 1115(a)(12), we must review the applicable law and facts.

In *Matter of Deco Bldrs. (supra)*, we decided that a penstock used to turn a turbine to produce electricity which was then used in a production process, had an “active causal relationship” to the product. In so holding, we found that the penstock was used directly in the production process as required by the regulation at 20 NYCRR 528.13(c)(1)(ii). The Division had argued that the penstock’s relationship to production was secondary and insufficiently active because it did not actually operate on the materials used in production. We found this interpretation to be strained and determined that the penstock qualified for the exemption.

Likewise, we agree with petitioner that without the security and protection provided by the pedestal and enclosure as well as their use as conduits for wiring, provision of lighting, and a secure interface with telephone lines, there would be no meaningful reception or initiation of telephone communication at the pay phone locations, both outdoor and indoor. In fact, since some enclosures have added built-in features like coin return mechanisms, anti-stuffing devices and faceplates, we believe the indoor enclosures also are used directly and predominantly in the initiation and reception of telephone communication. Hence, it is our determination that the pedestal and enclosure have an active causal relationship in the production of telephone communication. Further, since the components perform their protective function at all times, it can be said that they are used predominantly in the initiation or reception of telephone communication, which the regulation states is more than 50% of the time (*see*, 20 NYCRR 528.13[c][4]).

In *Matter of Niagara Mohawk Power Corp. v. Wanamaker (supra)*, under the pre-1974 amendment to Tax Law § 1115(a)(12), the court recognized that there is no simple test of what constitutes “directly and exclusively”, but thought the basic questions to be answered are:

- 1) Is the disputed item necessary to production?
- 2) How close, physically and causally, is the item to the finished product?
- 3) Does the item operate harmoniously with the admittedly exempt machinery to make an integrated and synchronized system?

The facts of the instant matter indicate that the enclosures and pedestals are necessary to the initiation and reception of telephone communication. The items are physically and causally close to the service provided in that they protect, support and envelop the other components.



Most importantly, the enclosure and pedestal of a pay phone, when they are deemed of necessity by the exigencies of the location, are inextricable components of mechanical equipment which operate as a single, integrated and synchronized system with the “admittedly exempt machinery” to initiate and receive telephone communication. The words of the Appellate Division in *Niagara Mohawk* are particularly instructive:

A taxing statute should receive a practical construction. [citation omitted.] That is particularly true here, for the resolutions are designed to achieve a practical, economic result—avoidance of multiple taxation, at least to some extent. It is not practical to divide a generating plant into “distinct” stages. It was not built that way, and it does not operate that way. The words “directly and exclusively” should not be construed to require the division into theoretically distinct stages of what is in fact continuous and indivisible” (*Matter of Niagara Mohawk Power Corp. v. Wanamaker, supra*, 144 NYS2d, at 461-462).

Given the synergistic relationship between the component parts of the pay phone, acting together to initiate or receive the telephone communication, the pedestals and enclosures (indoor and outdoor) qualify for the exemption set forth in Tax Law § 1115(a)(12).

In coming to this conclusion, both the Administrative Law Judge and this Tribunal have relied on facts in the record, some of which were established through the testimony of Mr. Ogrodnick. The testimony was found credible by the Administrative Law Judge both by specific reference to credibility and the Administrative Law Judge’s adoption of facts testified to by Mr. Ogrodnick. Although Mr. Ogrodnick was not offered as an “expert” witness, only characterized as such, the Administrative Law Judge properly relied on his sworn testimony to establish several facts, which were found by the Administrative Law Judge to be credible, i.e., competent and truthful (*Matter of 1605 Bookcenter*, Tax Appeals Tribunal, July 25, 1991, *conf*

*Matter of 1605 Book Center v. Tax Appeals Tribunal*, 188 AD2d 694, 590 NYS2d 591, *affd* 83 NY2d 240, 609 NYS2d 144, *cert denied* 513 US 811, 130 L Ed 2d 19). Given Mr. Ogrodnick's extensive knowledge of and experience with pay phones, reliance on his credible testimony was prudent and proper. To the extent that any of Mr. Ogrodnick's testimony was conclusory in nature as suggested by the Division, such conclusory testimony was not considered in, or necessary to, arriving at this decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The exception of Peoples Telephone Company, Inc. is granted;
3. The determination of the Administrative Law Judge is affirmed in part and reversed in part consistent with this decision;
4. The petition of Peoples Telephone Company, Inc. is granted; and
5. The Notice of Determination, dated September 3, 1996, is canceled.

DATED: Troy, New York  
January 16, 2001

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.  
Commissioner