STATE OF NEW YORK

DIVISION OF TAX APPEALS

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.

: DETERMINATION

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.

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.

Petitioner Capital District Better TV, Inc., 160 Inverness Drive West, Englewood, Colorado 80112, filed a petition 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 (File No. 802530).

Petitioners 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 petitions for revision of determinations 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 (File Nos. 802529, 802531, 802532 and 802533).

A consolidated hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on October 26, 1989 at 9:15 A.M., with all briefs to be submitted by February 5, 1990. 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).

ISSUES

I. Whether the Division of Taxation properly concluded that 40% of the payments to subcontractors for cable connection services to the subscribers were not sales for resale of an installation service and were therefore subject to sales tax.

II. 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

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. 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 in Finding of Fact "12", infra, 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 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 of Taxation 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.

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. The intention at all times is for the installation of the trunk system to become a permanent installation to real property.

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 two franchise agreements during the hearing. The first was executed in 1978 between the City of Ithaca and American Television and Communications Corporation. The term of this agreement was 10 years, with a renewal option at the end of the term. It did not contain a provision addressing the removal or retention of the trunk line and cable system. It is unclear from the record whether this was the actual agreement in place during the years in issue.

The second agreement was executed in December 1984, between the Town of Colonie and Capital District Better TV, Inc. Although it does not pertain to the period in issue, the language with respect to termination of the franchise was offered as an example of the language generally used in the franchise agreements that were in effect. The provision stated the following:

> "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."

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. Their testimony 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 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.

With respect to the charges to the "R" account representing the improvements to the special franchise cable system, the Division of Taxation 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 of Taxation.

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 of Taxation 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."

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.

CONCLUSIONS OF LAW

A. Section 1105(c)(3) of the Tax Law imposes a tax upon the receipts from every sale, except for resale, of the services of installing tangible personal property with exclusions inapplicable in the instant case. Applying section 1105(c)(3) to a case with a nearly indistinguishable set of facts the former State Tax Commission concluded that "payments to subcontractors for installation of the cable television system inside the subscribers' buildings, as well as the subscribers' apartments, were purchases for resale to the subscribers and therefore not subject to tax" (Matter of Manhattan Cable Television, Inc., State Tax Commission, March 6, 1986 [TSB-H-86(78)S], confirmed on other grounds 137 AD2d 925, lv denied 72 NY2d 808).

It is petitioners' contention that the decision in Manhattan Cable applies to the installation services that these petitioners also provide and results in a nontaxable transaction, since the entire installation service running from the pole to and throughout the building is a service for resale. The Division of Taxation, however, construes Manhattan Cable in a more narrow light. The Division claims that Manhattan Cable essentially stands for the proposition that payments to subcontractors for installation services inside the building only are the portion subject to the

resale exclusion. In this case, the Division determined on audit that 40% of the installation services represented the hook-up from the pole to the house. The Division claims that it could substantiate the portion by some records retained by petitioners showing such segregation. However, no such records or summary thereof were presented at the hearing. Petitioners did not present evidence to show that the entire payment to subcontractors performing hook-up services from the pole to the house and/or within the building or house structure was in fact passed along to the consumer. However, there is no provision in the resale exclusion requiring that the entire fee be passed on to the consumer for it to qualify as a "resale". Thus, both parties relied on the same case in an attempt to reach a different result.

A review of Manhattan Cable indicates that the Commission did not address the issue relating to the payments to subcontractors for services of installation where the work was performed from the pole to the building over the private way. The Manhattan Cable decision addressed whether petitioner was liable for sales or use taxes on payments to subcontractors for installation in the public way. It also addressed whether petitioner was liable for sales or use taxes on payments to subcontractors for installation services inside the subscribers' buildings. It does not appear as though the issue of payments to subcontractors for services performed in the private way but outside the subscribers' buildings was addressed. Thus, the real issue is not whether the Manhattan Cable decision can be applied and dispose of the issue herein, but whether in fact there should be a distinction between the services performed inside the building and outside the building when it is an integral part of the installation and is all performed on premises owned by the subscriber. There appears to be no practical distinction or purpose served by differentiating the portion of the installation service running from the pole to the building. In the case where a hook-up is requested by a subscriber in a new suburban home, the hook-up must originate from the pole or underground trunk line, run across the property in the private way owned by the subscriber and then be carried throughout the building. In the case where that particular building or home is resold at a later time, generally only the services pertaining to the wiring inside the premises needs to be "resold". In both cases, the services are

for hook-up at the request of a subscriber for cable television installation. Therefore, payments to subcontractors charged to the "X" account by petitioners should be deemed nontaxable in their entirety as purchases of services for resale.

B. Manhattan Cable Television, Inc. v. State Tax Commn. (137 AD2d 925, lv denied 72 NY2d 808) clearly dictates the result of the second issue. The court rejected petitioner's contention that the cable buried under the streets of New York City constituted a capital improvement under Tax Law § 1101(b)(9) and was thus excluded from sales tax under Tax Law § 1105(c)(5). In that case, the franchise agreement provided that, at its expiration after a 20-year period, petitioner was required to either let the municipality buy the system or remove it subject to the satisfaction of the municipality. The court relied on the decision of Matter of Merit Oil of New York v. New York State Tax Commission (124 AD2d 326, 508 NYS2d 107) which concluded that "[w]here petitioner reserves the right to remove the installed property a finding of permanency is unlikely" (id., at 328). The court in Manhattan Cable held that since petitioner had actually obligated itself to remove the improvement regardless of how likely or how frequently that was done, the evidence of intention was clear.

In the present case, two franchise agreements were offered into evidence. There was no testimony as to whether the Ithaca agreement was specifically the agreement in effect during the tax periods in issue herein. As well, the second franchise agreement offered into evidence was subsequent to the tax periods being questioned herein. Thus, significant reliance on either of these documents must be viewed with caution. Presuming, however, that the documents can be viewed as providing sample language used in the various franchise agreements for the periods in issue, a different conclusion than that in Manhattan Cable cannot be reached. The Ithaca franchise agreement does not address what shall take place at the expiration of the franchise other than the opportunity to renew. One 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. Whereas the second agreement introduced presents sample language as to a removal provision, the conclusion in Manhattan Cable that results in a finding

that capital improvement status has not been attained must be followed (see also, Glenville Cablesystems Corporation v. State Tax Commn., 142 AD2d 851).

C. The notices of determination and demands for payment of sales and use taxes due dated June 20, 1985 are hereby reduced according to Conclusion of Law "A". The Division of Taxation concedes that the notices of determination shall also be reduced pursuant to Findings of Fact "2" and "10". In all other respects, the petitions are denied.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE

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".