STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
INDEPENDENT WIRELESS ONE CORP., USU	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Years 2000 and 2001.	:	DETERMINATION DTA NO. 820313

Petitioner, Independent Wireless One Corp., USU,[1] P.O. Box 3104, Lake Charles, Louisiana 70602-3104,[2] 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 years 2000 and 2001.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 22, 2005 at 10:30 A.M., with all briefs to be submitted by February 10, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared by Ronald J. Rabkin, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (James Della Porta, Esq., of counsel).

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[1] According to petitioner's representative, "USU," as included in petitioner's corporate name, stands for U.S. Unwired.

[2] On its refund claim dated February 21, 2002 at issue in this matter, petitioner provided an address in Albany, New York, of 52 Corporate Circle. However, its petition dated December 20, 2004 uses the address in Louisiana. It is unknown whether the varying addresses reflect a change in corporate structure or headquarters or whether petitioner is perhaps a subsidiary of a parent organization headquartered in Louisiana since petitioner's market is limited to the northeastern United States as noted in Finding of Fact "1."

ISSUE

Whether petitioner's purchases of various items of tangible personal property used at its cell phone sites, particularly power equipment such as rectifiers which became part of the sites' electric distribution systems, were exempt from sales and use taxes pursuant to the telecommunications exemption under Tax Law § 1115(a)(12) for the period prior to September 1, 2000 or Tax Law § 1115(a)(12-a) for the period on or after September 1, 2000.

FINDINGS OF FACT

1. Petitioner, Independent Wireless One Corp., USU, provides wireless telecommunications service, commonly known as cell phone service, to the general public under the Sprint brand name in the northeastern United States market, consisting of upstate New York, New Hampshire (other than the Nashua market), Vermont and portions of Massachusetts and Pennsylvania.

2. During the period at issue, petitioner established approximately 300 cell sites in upstate New York, consisting of a tower and a switch, located outside of a central switching office, in order "to build out the [Sprint] network." In the process, petitioner purchased tangible personal property and installation services of approximately $40,000,000.00 on which it paid sales and use tax. For example, petitioner established and now maintains cell sites located at Rensselaer Polytechnic Institute in Troy, New York, off of Fuller Road in Albany, New York and underneath the concourse of the Empire State Plaza in Albany.

3. By a refund claim dated February 21, 2002, petitioner sought a refund of sales and use tax in the amount of $3,186,013.71 consisting of tax paid on purchases claimed to be "exempt telecommunications equipment and services" from the following four vendors and in the two categories of "switch costs" and "tools & test items":

Quarter Ending	Lucent	DAPA	Radio Frequency	Switch Costs	Tools & Test Items	Mid-State	Total
2/28/00	$ 88,327.90	$ 636.77	$ 28.24	-0-	-0-	-0-	$ 88,992.91
5/31/00	269,022.24	-0-	604.28	7,493.89	5,513.52	14,632.35	297,266.28
8/31/00	208,692.68	7,685.67	3,587.81	-0-	4,209.44	132.80	224,308.40
11/30/00	892,995.97	22,711.01	43,908.21	869.29	14,056.00	-0-	974,540.48
2/28/01	151,263.99	10,408.11	-0-	-0-	1,640.24	-0-	163,312.34
5/31/01	327,243.68	14,764.00	20,347.90	16,842.34	522.00	-0-	379,719.92
8/31/01	880,577.60	7,026.08	2,512.98	17,742.53	7,980.04	-0-	915,839.23
11/30/01	106,128.90	9,563.43	18,950.70	7,391.12	-0-	-0-	142,034.15
Totals	$2,924,252.96	$72,795.07	$89,940.12	$50,339.17	$33,921.24	$14,765.15	$3,186,013.71

The purchases listed under the above category of "tools and test items" were from various vendors: MapInfo Corp, Allen Telecom, Inc., Informix Software, Agilent Technologies, Jensen Tools, Inc., TTC (Acterna), Textronix, Anritsu Co., and Telecordia Technologies-TRA.

4. By a letter dated September 29, 2003, the Division of Taxation ("Division") approved a refund in the amount of $2,872,857.99 of the $3,186,013.71 amount claimed by petitioner. This approved refund of $2,872,857.99 consisted of two parts: (i) $961,886.30,[3] which the Division recommended for payment and forwarded to the Office of the State Comptroller; and (ii) $1,910,971.69, which the Division noted "was previously refunded to you under claim 2002110567." Of the remaining amount of $313,155.72, representing the difference between petitioner's refund claim of $3,186,013.71 and the approved refund of $2,872,857.99, the Division noted that $293,808.89 "had been denied." The amount left of $19,346.83 ($313,155.72 less $293,808.89 equals $19,346.83) was not "denied" but rather was allowed as a

[3] However, the Division also advised petitioner that before a refund "can be issued" in this amount, petitioner's "outstanding assessments must be satisfied" in the total amount of $3,016.05 consisting of assessment number L022267604 of $2,815.22 and assessment number L022787884 of $200.83.

refund but applied as follows: (i) $2,484.25[4] was "used to satisfy additional tax due on purchases where only the State tax amount was charged," and (ii) $16,862.58[5] was "used to satisfy use tax due on purchases where New York State sales or use tax was not imposed on items shipped into New York State." Because the Division applied a portion of petitioner's refund to this tax asserted due of $19,346.83, it denominated its letter dated September 29, 2003 a notice of determination and not merely a notice of partial disallowance of a refund claim.

5. The Division included with its letter dated September 29, 2003, a schedule which detailed for each of the four vendors and the two categories of "switch costs" and "tools & test items," as noted in Finding of Fact "3", the specific amounts of sales tax which it refused to refund to petitioner as follows:

Vendor/Category & Quarter Ending	Refund claimed	Denied	Previously refunded	Refund payable
Lucent				
2/28/00	$88,327.90	-0-	-0-	$88,327.90
5/31/00	269,022.24	16,450.14	-0-	252,572.10
8/31/00	208,692.68	23,004.80	-0-	185,687.88
11/30/00	892,995.97	78,048.33	728,105.67	86,841.97
2/28/01	151,263.99	5,482.98	83,358.03	62,422.98
5/31/01	327,243.68	30,155.82	189,209.54	107,878.32

[4] Petitioner had paid State sales tax totaling $2,484.25 at the rate of 4% on some of its purchases from Radio Frequency Systems, but did not pay the local sales tax component, computed at the same rate of 4%, on such purchases. Local sales tax asserted due by the Division of $2,484.25 consisted of $2,284.34 due on purchases made prior to September 1, 2000, and $199.91 on purchases made on or after September 1, 2000.

[5] The total amount of use tax asserted due by the Division of $16,862.58 consists of $14,324.54 on out-of-state purchases totaling $179,056.75 from Radio Frequency Systems later shipped into New York State and $2,538.04 on out-of-state purchases totaling $31,725.52 from DAPA Communications later shipped into New York State. All of these purchases were prior to September 1, 2000 except for three invoices of Radio Frequency Systems dated after September 1, 2000 totaling $967.65, with use tax due on such purchases of $77.41. The Division of Taxation *now concedes* that no additional use tax in the amount of $2,538.04 is due on petitioner's purchases of antennas from DAPA.

8/31/01	880,577.60	80,131.00	643,990.46	156,456.14
11/30/01	106,128.90	15,573.60	74,139.58	16,415.72
Total of sales tax paid on *Lucent* purchases which Division denied refund		$248,846.67		
DAPA Communications				
2/28/00	636.77	636.77	-0-	-0-
8/31/00	7,685.67	7,685.67	-0-	-2,538.04
11/30/00	22,711.01	-0-	22,711.01	-0-
2/28/01	10,408.11	-0-	10,408.11	-0-
5/31/01	14,764.00	-0-	14,764.00	-0-
8/31/01	7,026.08	-0-	7,026.08	-0-
11/30/01	9,563.43	-0-	9,563.43	-0-
Total of sales tax paid on *DAPA* purchases which Division denied refund		$8,322.44		
Mid-State				
5/31/00	14,765.15	2,782.00	-0-	11,983.15
Tools & Test Equipment				
5/31/00	5,513.52	5,416.24	-0-	97.28
8/31/00	4,209.44	2,580.72	-0-	1,628.72
11/30/00	14,056.00	14,056.00	-0-	-0-
2/28/01	1,640.24	372.24	-0-	1,268.00
5/31/01	522.00	66.00	-0-	456.00
8/31/01	7,980.04	2,233.44	-0-	5,746.60
Total of sales tax paid on *Tools & Test Equipment* purchases which Division denied refund		$24,724.64		
Switch Costs				

5/31/00	7,493.89	-0-	-0-	7,493.89
11/30/00	869.29	-0-	-0-	869.29
5/31/01	16,842.34	-0-	16,842.34	-0-
8/31/01	17,742.53	-0-	17,742.53	-0-
11/30/01	7,391.12	-0-	7,391.12	-0-
Radio Frequency Systems				
2/28/00	28.24	28.24	-0-	-0-
5/31/00	604.28	604.28	-0-	-1,214.73[6]
8/31/00	3,587.81	3,587.81	1,684.30	-15,316.75[7]
11/30/00	43,908.21	2,883.44	43,908.21	-3,129.24[8]
5/31/01	20,347.90	894.64	20,347.90	-916.70[9]
8/31/01	2,512.98	157.97	2,512.98	-157.97[10]
11/30/01	18,950.70	976.76	18,950.70	-986.21[11]

[6] This amount consists of $600.04, the local sales tax component for purchases from Radio Frequency Systems on which petitioner paid only the State sales tax component (as detailed in Footnote "4"), plus $614.69, the use tax due according to the Division on out-of-state purchases from Radio Frequency Systems later shipped into New York (as detailed in Footnote "5").

[7] This amount consists of $1,684.30, the local sales tax component for purchases from Radio Frequency Systems on which petitioner paid only the State sales tax component, plus $13,632.45, the use tax due according to the Division on out-of-state purchases from this vendor later shipped into New York.

[8] This amount consists of $2,883.44 of sales tax which the Division asserts should not have been previously refunded, plus $168.40, the local sales tax component for purchases from Radio Frequency Systems on which petitioner paid only the State sales tax component, plus $77.40, the use tax due according to the Division on out-of state purchases from this vendor later shipped into New York.

[9] This amount consists of $894.64 of sales tax which the Division asserts should not have been previously refunded, plus $22.06, the local sales tax component for purchases from Radio Frequency Systems on which petitioner paid only the State sales tax component.

[10] This amount represents the $157.97 of sales tax which the Division asserts should not have been previously refunded.

[11] This amount consists of $976.76 of sales tax which the Division asserts should not have been previously refunded, plus $9.45, the local sales tax component for purchases from Radio Frequency Systems on which petitioner paid only the state sales tax component.

Total of sales tax paid on *Radio Frequency Systems* purchases which Division denied refund		$9,133.14		

Petitioner is disputing the denial of its refund claim relating to sales tax paid on tangible personal property purchased (i) from Lucent in the amount of $248,846.67, as detailed above; (ii) from Radio Frequency of $9,133.14, as detailed above, plus the use tax of $14,324.54 on out-of-state purchases totaling $179,056.75 from Radio Frequency Systems later shipped into New York State, as detailed in Footnote "5", and the local sales tax component of $2,484.25 which had not been paid on some of its purchases from Radio Frequency Systems, as detailed in Footnote "4"; as well as sales tax paid on its purchases of tools and equipment from various vendors in the amount of $24,724.64. As detailed above, the Division allowed a refund in the amount of $11,983.15 on purchases from Mid-State, but denied the amount of $2,782.00, which petitioner concedes was tax paid on services subject to sales and use tax. Further, as detailed above, the Division has refunded sales tax paid on petitioner's purchases categorized as "switch costs" which also are not in dispute. Finally, the Division concedes that sales tax should be refunded in the amount of $8,322.44 on petitioner's purchases of antennas from DAPA Communications, as detailed above, which it had denied, as well as conceding that use tax of $2,538.04 on out-of state purchases of antennas totaling $31,725.52 from DAPA Communications later shipped into New York State, as detailed in Footnote "5", is *not* due from petitioner.

6. Petitioner sought a refund of sales tax in the total amount of $2,924,252.96 paid on its purchases from Lucent during the period at issue, and as noted in Finding of Fact "5", the Division, allowed more than 91% of this portion of the refund claim. However, it denied a refund of sales tax in the amount of $248,846.67 on petitioner's purchases from Lucent.

Further, the Division now asserts that the amount of its denial was incorrect as the result of "computation errors made by the Department in auditing Petitioner's refund claim." Pursuant to a revised schedule designated "Exhibit C-1" attached to the stipulation dated September 22, 2005, the Division contends that it is entitled to an additional $33,637.08 "as an offset against the refund conceded by the Department due on Petitioner's purchase of antennas" as well as "an offset" against any additional refund determined by the Division of Tax Appeals since petitioner owed sales tax in the amount of $282,483.75[12] (not $248,846.67) on its purchases from Lucent.

7. The revised schedule designated "Exhibit C-1"[13] provides the following details concerning the 26 types of items petitioner purchased from Lucent which the Division maintains were not exempt from sales tax:

Invoice description of item at issue	Explanation	Amount of sales tax at issue
(1) Enhanced primary compact antenna cable cover	None noted	$ 6,202.56
(2) Enhanced primary outdoor weather proof kit	None noted	7,336.00
(3) Rectifier	Converts electrical current from AC to DC to power telecommunications equipment and charge batteries	31,200.00
(4) Primary power cabinet w/enhanced cooling system	A metal cabinet which contains a cooling unit and rectifiers	92,328.80

[12] This amount of $282,483.75 less $248,846.67 equals $33,637.08, the amount the Division now seeks as an offset.

[13] In addition, an attachment to a memo dated July 24, 2002 of petitioner's representative transmitted to Terry Marra of the Audit Division in the course of the audit, provided an explanation for the items numbered 4, 6, 15 and 20 above.

(5) Power distribution cabinet	Circuit breakers/distribution busters	5,991.00
(6) Cabinet, wired w/interlock, primary distribution, multiple (power distribution cabinet)	24 volt power supply unit for cell site BTS	19,008.00
(7) Light kit, convenience lights option	For night time work at site	617.76
(8) Grounding kit-multiple sector microcells/PDC	None noted	5,175.63
(9) Circuit breaker, LMLK1 type, 100 AMP	To power site	224.64
(10) Cabinet, power, wired, powerhouse 24, Otdr	None noted	27,345.76
(11) Circuit breaker panel assm	To power site	734.24
(12) Power battery (back-up) cabinet (cabinet sealed, PAD/Roof mount, wired for PBC)-Cabinet	None noted	20,880.00
(13) Enhanced primary CDMA radio tool unit	Antenna testing	36,680.00
(14) Solar shield	Outside plastic to protect metal on microcell	2,839.26
(15) PCS CDMA microcell (hardware, outdoor hatch plates	cell site Code Domain Multiple Access (“CDMA”) equipment to aid the function of a CDMA processor for the wireless network	15,837.12
(16) Hardware, conduit interface, pwr to Prim cabl, otdr	Pre 9/1/00	-0-
(17) Cable kit, copper w. Hardw, otdr 24	Pre 9/1/00	101.72
(18) Antenna jumper cable	Pre 9/1/00	1,159.20
(19) 1/2" anchoring	Pre 9/1/00	194.10

(20) 400 AMP rectifiers, w. circuit breakers, batteries and cabling	Pre 9/1/00-Provides the additional power to operate the enhanced and upgraded 5 E switch and to charge the batteries, with the circuit breakers cutting off power in the event of a short circuit	6,744.74
(21) Low gain GPS antenna & mounting kit	Pre 9/1/00	787.20
(22) Cable assembly (copper wires for PDC heater)	None provided	715.62
(23) Unit power	Rectifier/rectliner-converts power	312.00
(24) Cable coxial GPS	Pre 9/1/00	12.00
(25) Antenna jumper cable (jump kit) compact cover	Pre 9/1/00	16.80
(26) Mounting kit, pole	Pre 9/1/00	39.60
Total		$282,483.75

8. Petitioner also sought a refund of sales tax in the total amount of $89,940.12 paid on its purchases from Radio Frequency Systems during the period at issue, and the Division allowed approximately 90% of this portion of petitioner's refund claim. However, it denied a refund of sales tax in the amount of $9,133.14[14] on the purchases from Radio Frequency Systems. Further, as noted in Finding of Fact "5", the Division had previously refunded much of the $9,133.14[15] it now contends was due. In addition, the Division contends that the following amounts are also due on petitioner's purchases from Radio Frequency Systems: (i) as noted in Footnote "4", the local sales tax component of $2,484.25,[16] and (ii) as noted in Footnote "5", use tax of

[14] This sales tax of $9,133.14 was paid on invoices all dated *prior* to 9/1/00.

[15] Only $2,536.03 of the $9,133.13 was not previously refunded.

[16] As noted in Footnote "4", $199.91 was on purchases made on or after September 1, 2000.

$14,324.54[17] on out-of-state purchases from Radio Frequency Systems later shipped into New York. The items petitioner purchased from Radio Frequency Services which the Division maintains were not exempt from sales tax consisted of cables, connectors, weather proofing kits and grounding kits.

9. Petitioner also sought a refund of sales tax in the total amount of $33,921.24 paid on its purchases of testing equipment and other tangible personal property from seven separate vendors during the period at issue. As noted in Finding of Fact "5", the Division allowed a refund of sales tax of only $9,196.60 while denying a refund of the remaining sales tax paid of $24,724.64. However, the amount of its denial was incorrect due to computational errors made by the Division in auditing petitioner's refund claim. Pursuant to a revised schedule designated "Exhibit G-1," attached to the stipulation dated September 22, 2005, the Division now contends that it is entitled to an additional $480.65 "as an offset" against any additional refund determined due by the Division of Tax Appeals since petitioner owed sales tax in the sum of $25,205.29[18] (not $24,724.64) on its purchases of this category of items.

10. The revised schedule designated "Exhibit G-1" provides *verbatim* the following details concerning the "tools" and other tangible personal property purchased from seven separate vendors:

Vendor	Item description	Explanation	Sales tax amount at issue
(1) MapInfo Corp			
	Decibel planner	Software	$2,735.32

[17] As noted in Footnote "5", use tax of only $77.41 is contended due on purchases *after* September 1, 2000.

[18] This amount of $25,205.29 less $24,724.64 equals $480.65, the amount the Division now seeks as an offset.

	MapInfo Professional Win	Software	326.80
	Professional upgrade Win	Software	142.80
(2) Allen Telecom, Inc.			
	Bundle, Fleet illuminator	Drive testing equipment	1,680.00
	WMI, Navtracker GPS	Drive testing equipment	510.00
	WMI Illuminator continuous	Drive testing equipment	306.00
	WMI, HS Mainframe	Drive testing equipment	374.00
	WMI Receiver	Drive testing equipment	306.00
	WMI Decoder	Drive testing equipment	102.00
	WMI Accessory, PCS antenna	Drive testing equipment	20.40
	WMI Accessory, PCS antenna	Drive testing equipment	10.20
	WMI, Accessory, rechargeable	Drive testing equipment	23.80
	WMI, Accessory, cigarett Li	Drive testing equipment	3.40
	WMI, Accessory, carry cases	Drive testing equipment	10.20
	WMI, Accessory, RAM card	Drive testing equipment	51.00
	WMI, software, spectrumtrack	Drive testing equipment to see if adjustments are needed to cell sites	136.00

	WMI, accessory, handheld con	Drive test equipment	68.00
	Extended warranty on WWMI	None noted	84.08
(3) Agilen Technologies			
	High power sensor	Test equipment used by field	450.00
	Single channel EPM series power meter	Test equipment used by field	698.40
(4) TTC (Acterna)			
	Spring PCS package #1: T-carrier analyzer, advanced stress patterns OPT, Fractional T1 Option, Cable	Test equipment used to measure digital radio systems	4,839.12
(5) Tektronix			
	Analyzer, Spctrm	Field equipment to detect interference	5,412.00
	Program loader	Field equipment to detect interference	147.60
	CDMA option	Field equipment to detect interference	687.82
	CDMA source control	Field equipment to detect interference	383.76
	CDMA test source unit, adv.	Field equipment to detect interference	2,150.04
(6) Agilent Technologies			
	CDMA receiver & phone based SW Licens	Drive test equipment	1,857.13

	CDMA multiple phone capability SW Lic	Drive test equipment	374.92
	PCS band receiver & internal GPS	Drive test equipment	1,019.20
	Socket I/O dial serial port PCMCIA card	Drive test equipment	22.20
	Briefcase for phone/receiver & phone	Drive test equipment	29.85
	Powered Qualcomm cable	Drive test equipment	22.01
	Powered Qualcomm cable	Drive test equipment	22.06
	Powered Qualcomm cable	Drive test equipment	66.18
(7) Telecordia Technologies			
	Traffic routing adminis-Networking engineering software, local exchange routing guide	Show codes throughout the country	64.00
Various vendors listed above	Freight	freight charges on denied items	69.00
Total			$25,205.29

The software purchased from MapInfo shown above is used to design the placement of cell sites. Other purchases shown above noting a function of "drive testing equipment" ensure the proper working of the cell site by testing signal strengths particularly "in different locations away from the cell site." Purchases shown as "field equipment to detect interference" are used to "check power at the radio equipment to see if it's putting out the correct output" in the words of Steven

Hughes, an operations manager for petitioner, whose testimony at the hearing is described further in Finding of Fact "11".

11. As noted in Finding of Fact "5", most of petitioner's refund claim relates to its purchases from Lucent. In addition to Exhibit C-1 attached to the parties' stipulation which set forth details concerning the 26 types of items petitioner purchased from Lucent which the Division maintains were not exempt from sales tax, as delineated in Finding of Fact "7", petitioner also offered the testimony of Steven Hughes. Mr. Hughes has worked in the telecommunications industry for ten years, and as petitioner's operations manager is responsible for the daily maintenance of petitioner's cell sites. He elaborated further on the function of the items in dispute purchased from Lucent as follows:

Item at issue	Further explanation & description by operations manager Hughes
Enhanced primary compact antenna cable cover	Similar to a telephone cover, it protects from the elements the connection of the wires that go into the radio box and physically sits on top of the radio box
Enhanced primary outdoor weatherproof kit	A kit that protects the connection of the wires that go into the radio box when a cover cannot be used and physically located right next to the radio box
Rectifier	Located in the power house and converts AC voltage to DC voltage in order to power the radio unit, in close physical proximity to the power house, i.e., one foot away
Power battery (back-up) cabinet	Holds batteries that supply backup power to the radio equipment if power lost as well as fans to keep the batteries at proper temperature
Light kit convenience light option	Provides light, at night, to see operation of cards
Grounding kits	Protects radio equipment from lightning and located on antenna running off cable power line

Circuit breakers	Spike in electricity will flip breakers to stop voltage and protect radio equipment from damage or if radio equipment gets too hot, circuit tripped to protect radio equipment
Connector pipes	Connects the radio equipment to the power house keeping connecting wiring water tight
Solar shield	Protective function by reflecting the sun off the equipment
Jumper cable	Connects radio equipment to the power line and to antenna hardline
Mounting hardware	To mount the radio and battery house to the ground
Global position system	Gets timing from satellites to ensure all cell sites are on the exact timing
Microcell (hardware, outdoor hatch plates)	Like an antenna cover, protects equipment from weather

12. As noted in Finding of Fact "8", the Division maintains that petitioner's purchases of cables, connectors, weather proofing kits and grounding kits from Radio Frequency Services were not exempt from sales and use tax. Mr. Hughes also provided some explanation of the function of these items. Smaller cables known as jumper cables connect the antenna to the hardline, which comes in different sizes and is not flexible like jumpers, which are used to make the connection. The jumpers are weather packed and sealed utilizing the weather proofing kits. In sum, these items "basically connect the antenna to the radio box."

13. Relevant portions of the parties' stipulation dated September 22, 2005 have been incorporated into these findings of fact.

SUMMARY OF THE PARTIES' POSITIONS

14. The Division in its answer to the petition contended that "rectifiers and batteries, antennas[19] and power equipment enclosures" may be categorized as "power equipment" which "is part of the electric distribution system and does not qualify for the telecommunications exemption." The Division contends that the items in dispute are not "used directly" in the exempt activities "of, in essence, switching or transmitting." They simply "do not switch, they do not transmit telephone calls," but rather "are used before the transmission or switching process begins." Furthermore, according to the Division, "They are not physically integrated as a single unit with the admittedly exempt equipment." Relying on a decision of the State Tax Commission in ***Matter of Cole Sand and Gravel Corp.*** (January 10, 1983), the Division argues that being "essential to production is not itself determinative of whether such equipment qualifies for the exemption." Here, according to the Division, "At best, the property assists the processes of switching or transmitting," with most of the property at issue having only a "tenuous causal linkage" to switching or transmitting, given the "passive nature" of such property. The Division would limit the decision of the Tax Appeals Tribunal in ***Matter of Peoples Telephone Company*** (January 16, 2001) essentially to the facts of that case arguing that the enclosure and pedestal of a pay phone, at issue in that matter, were "inextricable components of actual switching or transmitting equipment" (Division's brief, p. 23). In addition, the exemption for "tools" does not extend to computer *software*, and prior to September 1, 2000, "tools" were expressly subject to sales tax since Tax Law former § 1115(a)(12) excluded from the exemption "tools and supplies used in connection with machinery, equipment or apparatus."

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[19] As noted in Finding of Fact "5", the Division has conceded that sales and use tax is not due on petitioner's purchases of antennas thereby amending its position set forth in its answer.

Further, prior to September 1, 2000, the telecommunications exemption applied to "equipment" only. Wiring and cable, circuit breakers, grounding kits, weather proofing kits and jumpers, albeit tangible personal property, are not "equipment." Purchases of such items prior to September 1, 2000 do not qualify for the telecommunications exemption then in effect which applied to purchases of "equipment" and not the expanded exemption of "tangible personal property." Relying on ***Matter of Slattery Associates, Inc. v. Tully*** (79 AD2d 761, 434 NYS2d 788), the Division maintains: "The assembly of tangible personal property purchased into equipment . . . will not qualify the tangible personal property for the exemption as equipment." The Division also maintains that it was unfair for the Tax Appeals Tribunal in ***Matter of Peoples Telephone Company (supra)*** to state that the Division "lacked a standard" for deciding what was taxable and nontaxable under the telecommunications exemption since its audit guidelines dated November 5, 1992 (STB-92-15) provide a reasonable basis for its audit decisions in matters involving this exemption. Such guidelines specifically treat rectifiers as taxable since they are taxable as a "power plant for the cell site," and the changes in the statutory language of the telecommunications exemption did not have "any impact on the taxability of rectifiers."

15. Petitioner counters that "the rectifiers were physically connected with the radio box and the other admittedly exempt equipment," and it rejects the Division's position that they themselves have to "actually transmit or switch or receive the telephone transmissions" (Petitioner's brief, p. 8). Rather they qualify for the exemption since they are "integral, inextricably intertwined and necessary for the proper functioning of the cell site equipment, which generates the telecommunications service" (Petitioner's brief, p. 8). Further, according to petitioner, pursuant to the Division's Publication 852 which provides sales tax information for manufacturers, any electronic part that is attached to exempt production machinery by a wire,

itself constitutes exempt production machinery. Relying on the Tax Appeals Tribunal's decision in ***Matter of Peoples Telephone Company (supra)***, petitioner also argues that like the enclosures and pedestals found exempt in that matter, "hatch covers and solar shields and cabinets that protect our equipment" should be exempt too. In addition, meters and testers used to test the signals and to adjust the antennas to get the proper signal should be exempt as "tools" and such term should not be limited to only "manually operated implements." Further, petitioner asserts that "the New York State Legislature expanded the telecommunications equipment exemption" in 1998 and 2001. In particular, it notes that Tax Law § 1105-B was expanded, in the words of relevant legislative history, "to exclude from sales and compensating use taxes parts and tools used or consumed directly and predominantly in connection with the newly expanded production exemption for telephone and telegraph central office equipment" (Petitioner's reply brief, p. 4). Relying on the decision of the Tax Appeals Tribunal in ***Matter of Deco Builders*** (May 9, 1991), petitioner contends that the wiring and cable, circuit breakers, grounding kits, weather proofing kits and jumpers should be viewed as "equipment" since they were uniquely designed "components of the cell site" and had "an identifiable character as equipment at the time of purchase at retail" (Petitioner's reply brief, pp. 6-7). Petitioner rejects the proposition "that simply because the Division issues audit guidelines or a TSB, it can independently and irrefutably determine whether an exemption applies" (Petitioner's reply brief, p. 19).

CONCLUSIONS OF LAW

A. Under Tax Law § 1105(a), sales tax is imposed upon "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article." All sales of tangible personal property are presumptively subject to tax pursuant to Tax Law § 1132(c) "until the contrary is established."

B. Tax Law § 1115(a) enumerates a lengthy list of various items of tangible personal property which are exempt from the imposition of sales tax on the receipts from the sale of such items. Included in this listing is the so-called "telecommunications exemption." The statutory language setting forth this exemption has three relevant versions for purposes of this determination. First, the Tax Appeals Tribunal in ***Matter of Peoples Telephone Company, Inc.*** (January 16, 2001) analyzed the statutory language at Tax Law former § 1115(a)(12), as in effect for the period prior to September 1, 1998, which provided for the exemption of the following:

> Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, *or telephone central office equipment or station apparatus or comparable telegraph equipment for use directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication,* but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment or apparatus. This exemption shall include all pipe, pipeline, drilling rigs, service rigs, vehicles and associated equipment used in the drilling, production and operation of oil, gas and solution mining activities to the point of sale to the first commercial purchaser. (Emphasis added.)

Second, for the two year period running from September 1, 1998 to September 1, 2000, the statutory language at Tax Law former § 1115(a)(12) provided as follows:

> Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, *or telephone central office equipment or station apparatus or comparable telegraph equipment for use directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication or in receiving, amplifying, processing, transmitting and retransmitting telephone or telegraph signals,* but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment or apparatus. This exemption shall include all pipe, pipeline, drilling rigs, service rigs, vehicles and associated equipment used in the drilling, production and operation of oil, gas, and solution mining activities to the point of sale to the first commercial purchaser. (Emphasis added.)

Finally for the period on or after September 1, 2000, the statutory language at Tax Law § 1115(a)(12-a) provides as follows:

> Tangible personal property for use or consumption directly and predominantly in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale or internet access services for sale or any combination thereof. Such tangible personal property exempt under this subdivision shall include, but not be limited to, tangible personal property used or consumed to upgrade systems to allow for the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale or internet access services for sale or any combination thereof. As used in this paragraph, the term "telecommunications services" shall have the same meaning as defined in paragraph (g) of subdivision one of section one hundred eighty-six-e of this chapter.[20]

C. The Division is correct that exemptions from tax are strictly construed. "An exemption from taxation 'must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption'"(***Matter of Grace v. State Tax Commn,***, 37 NY2d 193, 196, 371 NYS2d 715, 718, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027, quoting ***People ex rel. Savings Bank of New London v. Coleman***, 135 NY 231, 234). However, in addition, the statutory language providing the exemption must be construed in a practical fashion with deference to the legislative intent behind the exemption (***see, Matter of Qualex, Inc.***, Tax Appeals Tribunal, February 23, 1995). Furthermore, petitioner's assertion, as noted in paragraph "15", that the telecommunications exemption has been expanded over the years is absolutely correct, and the reach of this exemption has been broadened not only by the changing statutory

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[20] Tax Law § 186-e (g) defines "telecommunication services" as "telephony or telegraphy, or telephone or telegraph service, including, but not limited to, any transmission of voice, image, data, information and paging, through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar media or any combination thereof and shall include services that are ancillary to the provision of telephone service (such as, but not limited to, dial tone, basic service, directory information, call forwarding, caller-identification, call-waiting and the like) and also include any equipment and services provided therewith. Provided, the definition of telecommunication services shall not apply to separately stated charges for any service which alters the substantive content of the message received by the recipient from that sent."

language noted above, but also by the decision of the Tax Appeals Tribunal in ***Matter of Peoples Telephone Company (supra)***, which interpreted the terminology, of use or consumption *directly* in receiving or initiating and switching telephone communications, in a generous fashion. In some respects, the Division in this matter has sought to relitigate the issues addressed in ***Peoples Telephone***. Consequently, a close and careful review of that earlier case is appropriate.

D. The taxpayer in ***Peoples Telephone*** owned and operated pay telephones. At issue was whether the Division properly imposed sales and use tax on the taxpayer's purchases of pay phone pedestals and enclosures or whether the telecommunications exemption applied because they were used directly and predominantly to receive or initiate and switch telephone communications. The pedestals were described as follows:

> Houses the telephone company's demarcation device [i.e., the "address" for purposes of the telephone company to which 'they go to . . . install their wires and demarcation point'] 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

The enclosures were described as follows:

> Secures and protects the pay phone and keeps out the weather and may provide a sound barrier and house lighting

E. The Division argued in ***Peoples Telephone*** that the pedestals and enclosures were not used to receive, switch or initiate telecommunications signals but rather were used "in *conjunction* with telephone communication" (emphasis added). Although they were used to support the phone and protect it from vandalism and exposure to weather, the Division contended that "they are not used 'directly' or 'predominantly' to receive, switch or initiate telecommunication." Consequently, according to the Division in that earlier matter, the taxpayer had "merely shown that pedestals and enclosures support the operation of a pay phone

business, which is insufficient for purposes of demonstrating entitlement to a sales tax exemption." In contrast, the taxpayer maintained that "the relationship between pedestals and enclosures, and the receiving or initiation of communication is close, integral, dependent and necessary" and therefore "directly related to the capability of the pay phone to receive or initiate communication so that they are used predominantly in receiving and initiating telephone communications." Serving as the administrative law judge in that earlier matter, I determined in ***Matter of Peoples Telephone Company*** (Division of Tax Appeals, July 22, 1999) that the purchase of (i) 100% of the pedestals and (ii) the enclosures which were used in *outdoor* installations were exempt from the imposition of sales tax on the basis that they were for use "directly and predominantly" in receiving or initiating and switching telephone communications because:

> Without the pedestals, the computer board would function, if at all, for only a minimum period. Unsupported, unsecured, and unprotected, it is reasonable to conclude that it would fail or be damaged almost immediately without the support, security and protection provided by a pedestal. With regard to the enclosures, petitioner has met its burden that with reference to *outdoor* installations, the enclosures play a similar function to the pedestals: securing and protecting the computer board from damaging weather. However, with reference to *indoor* installations, the computer board could function without the installation of an enclosure to protect it from the elements. (Emphasis added.)

F. Both the taxpayer and the Division took exception to the decision of the administrative law judge in ***Matter of Peoples Telephone Company (supra)***. The taxpayer contested the conclusion that the enclosures used at indoor locations did not qualify for the exemption. While conceding that "there is a difference in the degree of protection offered by the indoor and outdoor enclosures," the taxpayer argued on exception to the Tax Appeals Tribunal that the enclosures also provided protection "from vandalism and theft . . . for both indoor and outdoor installations, particularly because the coin return mechanism is built directly into the enclosure."

In addition, the taxpayer argued that the enclosures also provided "protection from impact, noise reduction, compliance with the Americans with Disabilities Act, privacy and a structure to house an electric light fixture" so that the enclosures were "essential to the operation, i.e., the initiation and reception of telephone communication of a pay phone." In contrast, the Division continued to maintain that 100% of the purchases of the enclosures and pedestals were subject to sales tax and argued on its exception to the Tax Appeals Tribunal that "there must be more than a causal link between the [enclosures and pedestals and] . . . initiating and receiving telephone communication." The Division argued that:

(1) The enclosures and pedestals were not "directly" and "predominantly" used in the telephone process;

(2) The enclosures and pedestals were 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 so that the test in ***Matter of Niagara Mohawk Power Corp. v. Wanamaker*** (286 AD446, 144 NYS2d 458, ***affd*** 2 NY2d 764, 157 NYS2d 972) was unmet;

(3) The protective function of the enclosures and pedestals did not have "an active causal relationship with the station apparatus that actually performs the initiating and receiving of telephone communication";

(4) The enclosures and pedestals were "only for the convenience of the customers" and "not used predominantly in the exempted communication process"; and

(5) The enclosures and pedestals were not "used in the specific technological function of receiving at destination or initiating and switching of telephone communication" and an inquiry "whether the pay phones could be used without the pedestals and enclosures" was an erroneous focus.

G. In its decision in ***Matter of Peoples Telephone Company*** (January 16, 2001), the Tax Appeals Tribunal rejected the Division of Taxation's arguments on exception, granted petitioner's exception, and modified the determination of the administrative law judge by allowing an exemption from the imposition of sales tax for 100% of the taxpayer's purchases of enclosures, including enclosures installed *indoors* as well as those installed *outdoors*, the limitation set by the administrative law judge. In deciding that even the purchases of the enclosures used indoors were exempt, the Tribunal noted 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*"* (emphasis added). The Tribunal added further: "it is our determination that the pedestal and enclosure have *an active causal relationship* in the production of telephone communication" despite the Division's objection that they did not actually perform the initiating and receiving of telephone communication (emphasis added). The Tribunal approved the reasoning set forth in the 1955 Court of Appeals decision in ***Matter of Niagara Mohawk Power Corp. v. Wanamaker (supra)*** in deciding what constitutes "directly and exclusively." The Tribunal, noting that although "there is no simple test of what constitutes 'directly and exclusively'," the following three questions should be asked: (1) Is the disputed item necessary to production; (2) How close, physically and causally, is the disputed item to the finished

product; and (3) Does the item operate harmoniously to make an integrated and synchronized system with machinery that is clearly exempt. Emphasizing that "a practical construction" of the statutory language should be utilized, the Tribunal concluded:

> 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 . . . .

The Tribunal, citing language from the Court of Appeals decision in ***Matter of Niagara Mohawk Power Corp. v. Wanamaker*** (***supra***, 144 NYS2d, at 462), stressed that "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."

H. The Division's arguments in this matter, as summarized in paragraph "14," are very similar to the arguments it made to the Tax Appeals Tribunal in ***Peoples Telephone***, as noted in Conclusion of Law "F," which were rejected. Moreover, the Division's contention that the property at issue has only a "tenuous causal linkage" to switching or transmitting is factually incorrect. The Division seems unwilling to apply the Tribunal's broader standard established in the earlier matter that focused upon whether there would be, in the Tribunal's words, "meaningful reception or initiation of telephone communication" without the causal linkage between the items at issue and the actual receiving and initiating of telephone communications. Petitioner's purchases of the items from Lucent, as detailed in Finding of Fact "7," were required for it to construct an electrical distribution system necessary to power the equipment used to receive or initiate cell phone communication. Without such items, there would in fact be no "meaningful reception or initiation of [cellphone] communication." Further the causal linkage between such items and the receiving and initiating of communications is not a tenuous causal linkage but rather such items are part of an integrated and synchronized system with equipment

that is clearly exempt. The Division's attempt to divide into distinct stages what is continuous and indivisible is based upon a much too narrow construction of the statutory terminology of "directly and predominantly." The Tax Appeals Tribunal rejected this narrow interpretation in ***Matter of Peoples Telephone Company (supra)***, and it is rejected here.

I. As noted in Conclusion of Law "B," Tax Law former § 1115(a)(12) limited the telecommunications exemption to purchases of "equipment" or "station apparatus" and *not* simply any item of "tangible personal property" as specified in the broader exemption effective for the period on or after September 1, 2000. Consequently, the Division may properly treat petitioner's purchases of cables, connectors, weatherproofing kits and grounding kits as subject to sales and use tax in the period *prior to September 1, 2000*,[21] as detailed in Finding of Fact "7." These items are not like the custom-made wooden staves, at issue in ***Matter of Deco Builders, Inc.*** (Tax Appeals Tribunal May 9, 1991), which were assembled into a penstock "designed to create a water flow with a sufficient force to power the turbine unit to which it was connected." (The penstock created from the staves was held, in turn, to be used directly in production.) The cables, connectors, weatherproofing kits and grounding kits at issue were not similarly "unique" and "capable of being used solely for that purpose" in the words of the Tribunal so as to qualify as "machinery and equipment." The cables, connectors, weatherproofing kits and grounding kits simply were not transformed, like the custom-made wooden staves which became a penstock, into "machinery and equipment" when used at petitioner's cell sites. Consequently, petitioner's analogy to the staves used to construct the penstock delineated in ***Matter of Deco Builders, Inc (supra)***, is rejected. Rather, these items are more like the "various construction materials" at

[21] With reference to purchases from Radio Frequency Systems, some small amount of sales tax was paid on some of these items, as noted in Footnotes "16" and "17," purchased on or after September 1, 2000.

issue in ***Matter of Slattery Associates v. Tully*** (79 AD2d 761, 434 NYS2d 788 [wherein the Court found that such materials were not "machinery or equipment" covered by the manufacturing exemption, which has been viewed as a "parallel exemption" to the telecommunications exemption at issue here]; ***see, Matter of Cortelco***, Tax Appeals Tribunal, October 31, 1991; ***see also, Matter of Stoddard Communications, Inc.***, Tax Appeals Tribunal, August 30, 1990). Similarly, only the items which petitioner purchased from Lucent, in the period prior to September 1, 2000, treatable as "machinery or equipment" would qualify for the exemption, i.e., "Machines in general or as a functioning unit" (Webster's Ninth New Collegiate Dictionary 714 [1983]) or "the set of articles or physical resources serving to equip a person or thing: as (1): the *implements* used in an operation or activity: *apparatus*" (Webster's Ninth New Collegiate Dictionary 421 [1983] [emphasis added]; ***see, Cortland-Clinton v. Dept of Health***, 59 AD2d 228, 399 NYS2d 492 [where there is no statutory definition of a word, it is reasonable to resort to the dictionary to define the term as it is commonly understood]). Not all the items on the list, detailed at Finding of Fact "11," qualify as such. The items not so treatable are the (1) antenna cable cover, (2) outdoor weatherproof kit, (3) grounding kits, (4) circuit breakers, (5) connector pipes, (6) jumper cable, and (7) mounting hardware. Therefore, if any of these items were purchased prior to September 1, 2000, such purchases are properly subject to sales and use tax. Included in the record is a document consisting of 120 pages which provides the invoice dates for such purchases. The Division is directed to review this lengthy document to determine the relevant invoice dates to determine whether items not deemed to be "machinery or equipment" are nonetheless exempt from sales and use tax based upon an invoice date on or after September 1, 2000.

J. With reference to the "tools and other tangible personal property" detailed in Finding of Fact "10", the Division is correct that prior to September 1, 2000, "tools" were expressly subject to sales tax since Tax Law former § 1115(a)(12) *excluded* from the exemption "tools and supplies used in connection with machinery, equipment or apparatus." Petitioner points to Tax Law § 1105-B as providing an alternative basis to exempt from the imposition of sales tax its purchases of tools, including during the period prior to September 1, 2000. Tax Law § 1105-B, effective March 1, 2000, provides:

> Receipts from every sale of the *services* of installing, repairing, maintaining or servicing the tangible personal property described in [Tax Law § 1115(a)(12)], including the parts with a useful life of one year of less, tools and supplies [for use directly and predominantly in or on telephone central office equipment or station apparatus or comparable telegraph equipment where such equipment or apparatus is used directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication, or in receiving, amplifying, processing, transmitting and retransmitting telephone or telegraph signals]. (Emphasis added.)

However, this exemption applies only to tools which are purchased as a *component* of the *services* which produce the receipts which this statutory language treats as exempt from sales and use tax. Reviewing the list of tools at issue here, as detailed in Finding of Fact "10", petitioner purchased the "tools" for which it seeks exemption from tax, not *services* which this statutory provision exempts from tax, including the tools which are part of the services purchased. Further, it is noted that this interpretation of the statutory language harmonizes this provision with section 1115(a)(12), which explicitly excludes tools from the exemption. Petitioner's interpretation would render other statutory language meaningless (***see, Matter of Morton Bldgs., Inc. v. Chu***, 126 AD2d 828, 510 NYS2d 320, ***affd*** 70 NY2d 725, 519 NYS2d 643). Moreover, even if the items at issue were purchased on or after September 1, 2000, so that the current statutory language at Tax Law § 1115(a)(12-a) was applicable, the items claimed to

be tools are simply not tools, i.e. "An instrument (as a hammer) used or worked by hand: implement" (Webster's Ninth New Collegiate Dictionary 1243 [1983]). Finally, even if the items claimed to be tools were in fact tools, nearly all of these items were described as "drive testing equipment" or "test equipment *used by field*" (emphasis added). This suggests that they were used in the field, away from the cell sites to test signal strength, for example, and thereby not "part of an integrated and synchronized system with equipment that is clearly exempt," with the necessary physical and causal closeness as discussed above.

K. The petition of Independent Wireless One Corp., USU is granted to the extent indicated in Conclusions of Law "H" and "I"; the Division's letter dated September 29, 2003, which is, in effect, a notice of partial refund allowance and notice of determination, is to be modified to so conform, and except as so granted, the petition is in all other respects, denied.

DATED: Troy, New York
June 29, 2006

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE