

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
GLENVILLE CABLESYSTEMS CORP.
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, 1978
through August 31, 1980.

DECISION

Petitioner, Glenville Cablesystems Corp., c/o American Cablesystems Corp., 30 Tozer Road, Beverly, Massachusetts 01915, 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, 1978 through August 31, 1980 (File No. 34270).

A formal hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Building #9, W. A. Harriman Campus, Albany, New York, on March 14, 1985 at 1:15 P.M., with all briefs to be filed by October 18, 1985. Petitioner appeared by Noonan, Troue, Gutermuth & O'Connor (Holden C. Gutermuth, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether certain assets purchased by petitioner from Glenville Cablevision, Inc., to wit, the "headend" and the "distribution system", are subject to tax as purchases of tangible personal property or exempt from tax as purchases of real property and/or capital improvements to real property.

FINDINGS OF FACT

1. On July 2, 1980, petitioner, Glenville Cablesystems Corp. ("Glenville"), a subsidiary of American Cablesystems Corp., purchased the cable television system serving the Towns of Glenville, Ballston and Charlton, New York from Glenville Cablevision, Inc. ("Cablevision") for \$1,800,000.00. A complete list of the assets purchased, as fully described in petitioner's Exhibit "7" entitled "Allocation of Purchase Price among Assets Purchased from Glenville Cablevision, Inc." is attached to this decision as Appendix "A".

2. In July, 1980, Glenville filed with the Audit Division a Notification of Sale, Transfer or Assignment in Bulk accompanied by a check in payment of bulk sales tax due in the amount of \$2,443.60. In October, 1980, an examiner for the Audit Division audited the books and records of Cablevision and determined, among other things, that additional bulk sales tax of \$39,970.00 was due based on the value of all tangible personal property transferred. The auditor did not physically inspect the assets purchased, but based his determination on the fact that the assets were located on leased property.

3. Consequently, on October 21, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner for taxes due of \$40,602.02, plus interest of \$341.18, for a total amount due of \$40,943.20 for the period June 1, 1978 through August 31, 1980. The assets claimed to be subject to tax by the Audit Division and which are at issue herein are in two primary categories: (1) headend and (2) distribution system. Within the category of headend assets are included (a) antennas (\$26,000.00), (b) supporting structures (\$21,200.00) and (c) signal processing equipment (\$32,000.00) amounting in all to the sum of \$79,200.00. The distribution system is composed of (a) a distribution plant (\$809,000.00) and (b)

subscriber connections (\$94,250.00) amounting in all to the sum of \$903,250.00. The total amount of assets in dispute is \$982,450.00, and at a tax rate of 4 percent, the tax in dispute is \$39,298.00. The assessment also includes tax of \$600.00 on converters (\$15,000.00) which are part of the distribution system and tax of \$632.02 on installation charges made by Cablevision; however, said amounts are not at issue. Also, the Audit Division stipulated that the supporting structures which were originally assessed based on a value of \$23,000.00 should be reduced by \$1,800.00 to \$21,200.00.

4. On January 16, 1981, the petitioner timely filed an application for a hearing to review the above notice. The petitioner's arguments are twofold: first, if the assets in question are real property, then they cannot be subject to the sales tax and, second, if the assets satisfied the definitional requirements of the term "capital improvement" at the time of installation, then they have necessarily become real property and remain such for purposes of applying the definition of "tangible personal property". The Audit Division maintains that the assets in question constitute tangible personal property pursuant to section 1101(b)(6) of the Tax Law, the sale of which is subject to tax.

5. Petitioner's expert witness gave a brief description of a cable television system. The television signal is picked up by the antennas mounted on the supporting structure and fed to the signal processing equipment. The signal is next fed to a trunk cable and trunk amplifiers which feed the signal throughout the towns served by the system. At specific locations called trunk stations, the signal is then fed off to distribution cables and distribution amplifiers (also known as line extenders). At pole locations, the cable is cut and taps are interconnected. Subscriber drops are connected to spigots on the

tap and the signal is fed to the converter and then on to the subscriber's television set.

6. At the time of purchase by petitioner, the headend and distribution system were already installed and operating. With certain exceptions, all of the assets at issue were out of doors and subjected to the forces of nature. The exposure of the assets to the elements over a substantial period of time, together with the manner in which such assets are installed, results in their partial or total destruction upon removal. Virtually all of the assets in question were designed specially for their particular location and were either precut, measured or installed for the particular location. The assets in question are subject to precise physical design and location requirements not only to insure that they function as operating devices, but so that they comply with various statutes, ordinances, contracts and manuals of construction design and maintenance.

7. The antennas, custom-made from aluminum, are attached to the supporting structure by clamps, brackets, nuts and bolts. They are mounted on the supporting structure at specific heights and angles in order to pick up the desired off-air or satellite signal. The antennas, if properly maintained, have a useful life of between 10 and 15 years and are expected to remain on the structure for this entire period. The antennas are subject to corrosion by exposure to the elements. They can be removed from their location by the use of hammers and penetrating oil, or with torches if the nuts and bolts are severely corroded. In the process of removal, the antenna may be bent, thereby irreparably damaging the element within. Petitioner considers it more economical to purchase new antennas than to attempt to remove and reuse old ones.

8. The supporting structure is a 100' self supporting tower designed to withstand 42 lbs. of windload. The tower is located on a high piece of ground so that it may be capable of receiving signals free of terrestrial interference. The structure is made of galvanized steel which comes in sections which are bolted together. The legs are mounted in a cement foundation. The tower has a useful life of between 15 and 20 years and is not expected to be removed before this period. The tower is located on leased land and rent is paid to the landlord. The lease agreement provides that at termination the petitioner has 60 days to remove its equipment and property. Any structures or equipment remaining at the expiration of the 60 day period will inure to the benefit of and becomes the property of the landlord. The tower is also subject to corrosion by the elements, and if it were to be dismantled or taken down, it could be done only with blow torches and cutters. After removal, the component parts of the tower would require refurbishing, but they are rarely reused because they are custom-made for a particular location. The foundation would be removed with a backhoe.

9. The signal processing equipment consists of specially made electronic processors and modulators located on racks in a building at the base of the supporting structure. The equipment stabilizes and/or improves the quality of the signals and processes them for distribution. The signal processing equipment has a useful life of approximately 15 years and is expected to remain in the building for this entire period. The building housing the signal processing equipment is on the same land as the tower and is therefore subject to the terms of the lease agreement mentioned in Finding of Fact "8". The signal processing equipment could be removed without material damage to it.

10. (a) The first step in the installation of the distribution plant is the make-ready work or the rearrangement of the electric power and telephone lines on the poles in order to make room for the plant. This work is normally done by the utility company employees and petitioner is billed for it.

(b) The next step is the installation of a strand or metal messenger wire to support the cable by a clamp and bolt by drilling a hole through the utility pole.

(c) The principal elements of the distribution plant, i.e. the trunk cable, trunk amplifier, distribution cable, distribution amplifier and taps, are connected to the strand by lashing with a thin wire.

(d) The distribution plant also includes guys and anchors which are attached to the poles when the loads to be imposed are greater than can safely be supported by the pole alone, or when the load would be unbalanced, i.e. at a corner or dead end.

(e) The distribution plant has a useful life of between 15 and 20 years and is expected to remain on the pole for this entire period. To remove the plant would require cutting the lashing wire and letting cable drop to the ground. The cable would generally be cut into 6' to 8' sections and sold for scrap. Due to weathering and corrosion, the taps and the amplifier housings would be discarded as useless. Provided the housing could be opened, the electronic modules inside could be removed and salvaged; however, because of technological advances, they would normally be useless after 4 or 5 years on the plant. Of the total purchase price, the modules have a value of approximately \$100,000.00. The utility poles are owned by the New York Telephone Company or the Niagara Mohawk Power Corporation or jointly by both of the aforementioned utilities. Petitioner pays rent to these utilities for the privilege of

placing its distribution plant on the poles. The agreement with New York Telephone Company is a one year renewable lease, and the agreement with Niagara Mohawk Power Corporation is a five year renewable lease. The agreements provide that upon termination, the plant will be removed from the poles.

11. The subscriber connection is a small black wire, in a custom length for every house, which runs from a spigot on the tap to the top of the subscriber's house where it is secured by a ram's horn clamp and screwed to the siding. The wire runs down the side of the house where it is secured by a variety of staples and/or clips. A hole is drilled through the block and a grommet is placed therein. The wire is led through the grommet to the converter or device interfacing the subscriber's television set. A sealant is placed around the grommet to protect it from the weather. The connection is grounded to the cold water pipe. The subscriber connections have a useful life of between 15 and 20 years and are never removed even if service is disconnected. Removal of the subscriber connections would result in material damage not only to the connections themselves, but also to the subscriber's house.

12. As required, the installation and specifications of the assets at issue conform to the National Electrical Safety Code (1984 Edition), the Bell System Manual of Construction Procedures (American Telephone and Telegraph Company, 1977) and American Cablesystems Corporation Construction Guidelines and Specifications (April, 1981). Additionally, petitioner's licenses with the various towns where it provides its service requires that petitioner construct its cable system using materials of good and durable quality and that all work involved with construction, installation, maintenance and repair of the cable system be performed in a safe, thorough and reliable manner. Petitioner's cable system must also be designed to meet the technical standards of both the

Federal Communications Commission and the New York State Commission on Cable Television.

CONCLUSIONS OF LAW

A. That the term "capital improvement" is defined by section 1101(b)(9) of the Tax Law as an addition or alteration to real property which (i) substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and (ii) becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and (iii) is intended to become a permanent installation. This provision, enacted by Chapter 471 of the Laws of 1981 (effective July 7, 1981), represents a legislative enactment of the substance of the Commission's previously promulgated regulation on the subject, located at 20 NYCRR 527.7(a)(3).

B. That the antennas and the supporting towers to which they are attached are not capital improvements because they fail to satisfy the second prong of the statutory test (section 1101[b][9][ii]). They do not become part of the real property nor are they permanently affixed to the real property so that their removal would cause material damage to the property or to the assets themselves. (See Matter of West Mountain Corp. v. Miner, a proceeding brought pursuant to Real Property Tax Law Article 7, in which the Supreme Court of Warren County held similar structures exempt from real property taxation as "movable" and "removable without material injury to any building, to the land or to the structures themselves." 381 N.Y.S.2d 606, 610 [1976].) These assets were therefore subject to tax at the time of purchase by petitioner.

C. That the distribution plants, installed on utility poles owned by the New York Telephone Company or Niagara Mohawk Power Corporation, are not capital

improvements because they fail to satisfy both the second and third prongs of the statutory test (section 1101[b][9][ii] and [iii]). By the terms of petitioner's lease agreements with the utilities, the plants must be removed upon termination of the respective leases. The parties' intentions are thus expressed in the leases: the distribution plants were not intended as permanent installations.

D. That the signal processing equipment and subscriber connections, at the time of purchase by petitioner, constituted tangible personal property and therefore were subject to tax. The signal processing equipment did not become part of the real property in that it could be removed without sustaining material damage. The petitioner failed to show that the subscriber connections substantially added to the value of the subscriber's property or appreciably prolonged the useful life of the subscriber's property.

E. That the petition of Glenville Cablesystems Corp. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 21, 1980 is modified as noted in Finding of Fact "3" but is otherwise sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 09 1986


PRESIDENT


COMMISSIONER

COMMISSIONER

I dissent from that portion of this decision which finds that the antennas, supporting towers and distribution plants are not capital improvements. The fact finder has concluded, in this instance, that the antennas are attached to their supporting structure by clamps, brackets, nuts and bolts. During their useful life of up to 15 years, they are subject to corrosion by exposure to the elements, and are frequently only removable by the use of hammers and blowtorches. The removal process so injures the antennas as to render them economically useless. Similarly, the supporting structure, following its useful life of up to 20 years, sustains significant corrosion by exposure to the elements, and can only be removed with blowtorches and cutters. The tower and foundation which make up the supporting structure would be totally destroyed in dismantling, and even their component parts, as admitted by the fact finder, would require refurbishing, which would be inherently uneconomical. Finally, the distribution plant would be similarly difficult to dismantle following its long useful life and it could not be considered economically feasible to contemplate reuse or salvaging of this equipment.

As a result of the above, it simply cannot be reasonably maintained that this equipment fails to satisfy the second prong of the statutory test (i.e., that the equipment does not become part of the real property and is not permanently affixed to the real property so that its removal would cause material damage to the property or to the assets themselves). It is hard to conceive that further proof of damage to the assets themselves could be adduced than that the assets must be blowtorched and rendered economically useless, in order to achieve their removal.

The majority cites West Mountain Corp. v. Miner, 381 N.Y.S.2d 606, 610 for the proposition that "similar structures" were held to be removable. That decision, however, is not dispositive here.

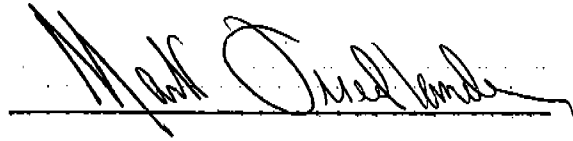
It refers to ski lifts, which, by their nature, sustain wear and tear of a different nature. Ski lifts are maintained in close proximity to their users, and the frequent interaction between the ski lift equipment and the people who use them may render it necessary to provide that the equipment is sheltered in some fashion from the elements, and thus corrosion resistant. Indeed, it is even possible that safety considerations absolutely mandate such an arrangement, considering the use to which ski lifts are put. There is no necessary parallel, therefore, between ski lift equipment and cable system equipment, which is often maintained far afield from any frequent human contact. If the precedent cited by the majority is not dispositive, the only reasonable alternative is to rely upon the uncontested evidence presented at the hearing as to the destructive nature of removal of this equipment and its consequent "permanent" status in place. I sense that the majority may fear that a tax avoidance scheme could emerge from the principle advocated in this dissent, whereby equipment would be deliberately installed in such a fashion as to insure its damage upon removal, with the consequent claim that any such equipment was a capital improvement. I do not share this fear, because I do not believe that actions which are inherently uneconomical and potentially destructive of a taxpayer's property would necessarily be engaged in to avoid this tax. If a pattern of such conduct were established (indeed, if any evidence of such deliberate scheme were to be presented in the future) a different conclusion might be supportable. But it is not to be presupposed ab initio, and without factual basis, that property used for a bona fide economic purpose will be deliberately imperiled, to the economic detriment of its owner, merely for the purpose of changing its tax status.

In any event, it is the statute, in its definitional scheme, which establishes that the destruction of the asset upon removal renders

it a capital improvement. In the face of the statutory language, it is not for this Commission to disassociate permanence from destructibility, based upon the imputed motives of the equipment owner.

For all of the above reasons, I would find that the assets indicated above, constituted capital improvements.

OCT 09 1986

A handwritten signature in dark ink, appearing to read "M. J. O'Connell", is written over a horizontal line.

APPENDIX A

GLENVILLE CABLESYSTEMS CORPORATION

ALLOCATION OF PURCHASE PRICE AMONG ASSETS PURCHASED FROM GLENVILLE CABLEVISION INC.

			<u>Total Value</u>
HEADEND			
Antennas -			
Installation Labor:			
WTEN - Albany	QCA - 7	\$ 125.00	
WAST - Albany	QCA - 7	125.00	
OMNI Directional	TFM - 2	125.00	
WRGB - Schenectady	QCA - 4	125.00	
UHF - Channel 17	QCA - UHF	125.00	
NBC - Utica	QCA - 2	125.00	
		<u>\$ 750.00</u>	
Microwave 4½" OD pipe mount + converter		450.00	
Total Installation Labor		<u>1,200.00</u>	
Materials:			
QCA - 7	186 degrees	4,133.00	
QCA - 7	109 degrees	4,133.00	
TFM - 2		4,133.00	
QCA - 4	185 degrees	4,133.00	
QCA - UHF	186 degrees	4,133.00	
QCA - 2	288 degrees	4,133.00	
Total Material		<u>24,800.00</u>	
Total Value Antennas			\$ 26,000.00
Supporting Structure -			
100' self supporting tower-type S3T. Designed to stand 42 lbs. of windload. Galvanized and erected by Fort Worth Tower Company, Inc.			
		21,200.00	
Tower preparation and footing		<u>1,800.00</u>	
Total Value Supporting Structure			\$ 23,000.00
Signal Processing Equipment -			
SA Model 6150	2-7 Processor	2,000.00	
" "	" 6-3 "	2,000.00	
" "	" 17-4 "	2,000.00	
" "	" 10-5 "	2,000.00	
" "	" 13-12 "	2,000.00	

Signal Processing Equipment (cont.)

Total

SA Model 6350	2 Modulator	\$ 2,000.00
" " "	6 "	2,000.00
" " "	8 "	2,000.00
" " "	9 "	2,000.00
" " "	10 "	2,000.00
" " "	11 "	2,000.00
" " "	13 "	2,000.00
		<u>24,000.00</u>

SA Model RA701924 Equipment Racks/Mounted	1,500.00
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Installation Labor	2,000.00
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Standby Signal Processor	
1 Tunable VHF & UHF input converter	1,000.00
1 Tunable VHF & UHF output converter	1,000.00

Search Antenna	1,500.00
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150' Control Wire	<u>1,000.00</u>
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Total Value Signal Processing Equipment	\$ 32,000.00
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Building - 8' x 16' x 8½' Mobilt fiberglass prefabricated equipment building. Insulated with foam, wiring, heater, A/C, exhaust fan, foundation.	<u>12,000.00</u>
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TOTAL HEADEND VALUE	\$ 93,000.00
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DISTRIBUTION SYSTEM

Distribution Plant - (85 miles) Labor, Design, Make-Ready:	<u>per ml.</u>	<u>Total</u>
Make-Ready	\$ 600.00	\$ 51,000.00
Strand Map	150.00	12,750.00
Design	100.00	8,500.00
Strand and Hardware	930.00	79,050.00
Cable Trunk & Feeder	1,241.00	106,135.00
Splicing	388.00	32,980.00
Down Guys	246.00	20,910.00
Anchors	180.00	15,300.00
Bonds, Tree Guards	150.00	12,750.00
Taps	<u>150.00</u>	<u>12,750.00</u>
Total Labor, Design, Make-Ready	\$ 4,135.00	\$ 352,125.00

<u>Material:</u>	<u>per ml.</u>	<u>Total</u>
Electronics	\$ 2,000.00	\$ 170,000.00
Cable 750	750.00	63,750.00
500	900.00	76,500.00
412	250.00	21,250.00
Strand	500.00	42,500.00
Hardware	<u>600.00</u>	<u>51,000.00</u>
Total Material	\$ 5,000.00	\$ 425,000.00
Waste	350.00	29,750.00
Power Supplies	<u>25.00</u>	<u>2,125.00</u>
Total Value Distribution Plant	\$ 9,510.00	\$ 809,000.00
Subscriber Connections		
150' drop cable	10.00	
Labor	21.00	
Hardware	<u>5.25</u>	
	36.25	
2600 subs x \$36.25		\$ 94,250.00
Converters		
\$75.00 x 200 subs.		<u>15,000.00</u>
TOTAL VALUE DISTRIBUTION SYSTEM		\$ 918,250.00
SUBSCRIBER RECORDS		
2600 subs x \$13.28		
Work Order Processing (1 Hr.)	\$ 4.50	
Posting (Twice/yr.) (1½ Hr.)	6.75	
Benefits (18%)	<u>2.03</u>	
	\$ 13.28	
TOTAL VALUE SUBSCRIBER RECORDS		\$ 34,532.00
TEST EQUIPMENT AND TOOLS		
1 Field Strength Meter	\$ 6,000.00	
1 Set of Splicing Tools	2,000.00	
1 Set of Lineman's Gear	700.00	
Safety Equipment	250.00	
2 Ladders	500.00	
Sweep Equipment	5,000.00	
2 Television Monitors	1,200.00	
Construction Equipment	2,000.00	
Testing Equipment	1,000.00	
Other	<u>640.00</u>	

		<u>Total</u>
VEHICLES		
1978 Fairmont Station Wagon	\$ 4,000.00	
1978 Sky Dart Ford Van	9,500.00	
1978 Ford Courier	<u>3,000.00</u>	
TOTAL VALUE VEHICLES		\$ 16,500.00
COMMUNICATIONS EQUIPMENT		
Base Station, 4 mobile 2 way radios, 2 pagers with rechargers antennas, and other accessories.		
TOTAL COMMUNICATIONS EQUIPMENT VALUE		\$ 9,000.00
OFFICE FURNITURE AND FIXTURE		
4 Desks	\$ 2,000.00	
2 IBM Selectric Typewriters	2,000.00	
Shelving	500.00	
1 Metal File Cabinet	500.00	
4 Desk Calculators	500.00	
5 Chairs	500.00	
Vacuum Cleaner, tables, other	<u>1,300.00</u>	
TOTAL VALUE FURNITURE AND FIXTURE		\$ 7,800.00
INVENTORY		
Installation Hardware	\$ 5,000.00	
Drop Cable (RG59)	5,000.00	
Construction Cable (750, 500,412)	5,000.00	
Construction Hardware	<u>10,000.00</u>	
		\$ 25,000.00
NONCOMPETITION AGREEMENT		\$ 200,000.00
FRANCHISES		<u>\$ 476,628.00</u>
TOTAL PURCHASE PRICE		<u>\$1,800,000.00</u>