

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

December 14, 1982

Peoples Cable Co.
800 Linden Avenue
Rochester, NY 14625

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Robert A. Feldman
Levy, Feldman & Licata, P.C.
1025 Times Square Bldg.
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
PEOPLE'S CABLE COMPANY
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, 1975
through May 31, 1978.

DECISION

Petitioner, People's Cable Company, 800 Linden Avenue, P.O. Box 9210, Rochester, New York 14625, 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, 1975 through May 31, 1978 (File No. 24655).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York on July 22, 1981 at 1:15 P.M. Petitioner appeared by Robert A. Feldman, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq., (Thomas Sacca, Esq., of counsel).

ISSUE

Whether petitioner is liable for sales and use tax on the installation of a trunk cable system and purchases of program guides.

FINDINGS OF FACT

1. On September 20, 1978, based upon an audit of records, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, People's Cable Company, for the period of June 1, 1975 through August 31, 1975 in the amount of \$47,712.04 plus interest of \$12,166.57 for a total of \$59,878.61.

2. On December 20, 1978, based upon audit of records, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, People's Cable Company, for the period of June 1, 1975 through May 31, 1978 in the amount of \$146,460.05 plus interest of \$32,721.18 for a total of \$179,181.23.

3. On November 17, 1978, petitioner filed a Consent to Fixing of Tax Not Previously Determined and Assessed for the periods June 1, 1975 through May 31, 1978. Petitioner paid \$8,169.20 plus interest of \$1,365.27 for a total of \$9,534.47. This was a partial payment upon the total sought by the Audit Division upon expense purchases and certain capital items upon which there is no issue.

4. Petitioner transmits television signals through above ground cable systems attached to utility poles and underground conduits to subscribers for a monthly charge.

5. An audit was performed upon petitioner. Records available were sales tax returns, sales invoices, purchase invoices, contracts, general ledger and federal income tax returns.

6. Petitioner's contract with local utility firms required that cable and supporting equipment had to be removed from poles of the utility companies within thirty days upon termination of the agreement. Capital expenditures, comprising the installation of the cable system above and below ground, totalled \$3,690,378.24. Petitioner's vice-president of engineering testified that 36 percent of the installation was built on public rights of way and that 64 percent was built on private property on poles owned by the utilities.

7. Petitioner's testimony indicated that all of the hardware, amplification equipment, power suppliers, and steel strands were removable and reusable. The

only part of the installation which was not reusable was the coaxial cable which carried the signal. No evidence was produced indicating the monetary value of the coaxial cable in relation to the rest of the installation components.

8. In 1974 petitioner secured franchises from various towns. It hired Jerrold Electronics Corp., a construction company, which built the system and turned it over to petitioner. Sales tax was paid on materials used but not on the labor. From the records petitioner computed that nine percent (9%) of cable laid by Jerrold Electronics Corp. was underground conduit which did not require removal upon contract termination with the municipalities.

9. Between December 1975 and February 1976, petitioner contracted with Jackson Communications Corp. for cable rearrangement on the poles in order to accommodate the various utility and cable television lines. Invoices for this work totalled \$16,691.02.

10. In 1977, petitioner paid \$85,119.49 to Jerrold Electronics Corp. for taxes. These taxes were billed separately and were not connected with any particular charge. The auditor "netted" this tax from the total due from petitioner.

11. Petitioner claimed that in view of the fact that some of the cable did not have to be removed, those on public land and those underground were exempt from the imposition of sales tax on installation because they were "permanent capital improvements to real property". It was also claimed that the rearrangement of cable was not subject to tax pursuant to Sales Tax Information Letter No. 46 dated September 30, 1976 which exempted such rearrangements when they were part of the rental charged by the utility.

12. Petitioner purchased program guides from Home Box Office which it provided to its subscribers. The program guides were not listed on the billing

but petitioner claimed that the service charge included receipt of the guides and therefore purchases of the guides were exempt sales for resale.

CONCLUSIONS OF LAW

A. That section 1105(c)(3) of the Tax Law imposes sales tax upon the installation, maintenance, servicing or repairing of tangible personal property, except where the installed property constitutes an addition or capital improvement to real property as that term is defined in the real property tax law. Under 20 NYCRR 527.7(a)(2)(iv), the phrase real property includes telephone and telegraph lines, wires, poles and appurtenances.

B. That pursuant to 20 NYCRR 527.7(a)(3), a capital improvement is an addition or alteration to real property (i) which substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property, and (ii) which 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.

C. That petitioner failed to show by any evidence that the cable installation substantially added to the value of the telephone poles or appreciably prolonged their useful life as required by 20 NYCRR 527.7(a)(3)(i). Furthermore, petitioner failed to prove that the underground cable installations added to the value of the real property or prolonged its useful life.

D. That "unless a contrary intention is expressed, the Law will presume that where installations are made for the purposes of conducting the business for which premises are leased, such installations are not permanent annexations to the freehold, but are made for the sole use and enjoyment of the tenant during the term of his lease, and not for the purpose of enhancing the value of

the landlord's estate" (100 Park Ave. v. Boyland, 144 N.Y.S.2d 88, aff'd. 309 N.Y. 685. See also Central Office Alarm Co. v. State Tax Commission, 58 A.D.2d 162).

E. That as to the above-ground installations, the leases with the utility companies specifically state that the equipment must be removed from the poles at the termination of the agreement. Said lease provision applies whether the poles are on public or private property. As to the underground installations, petitioner failed to prove that said installations were not for the sole use and benefit of the petitioner or were "for the purpose of enhancing the value of the landlord's property" (100 Park Ave., supra). There was, therefore, no intention that the installed equipment become a permanent installation.

F. That, inasmuch as petitioner's installations did not meet all three requirements of 20 NYCRR 527.7(a)(3), the cable system does not qualify as a capital improvement within the meaning and intent of section 1105(c)(3) of the Tax Law.

G. That Sales Tax Information Letter No. 46 does not apply to petitioner's case because the cable rearranging service furnished by Jackson Communications Corp. was not part of the rental charge for pole rental from the utility company. The cable rearrangement was a separate service provided by a third party as part of the servicing of real property and thus was properly taxable under section 1105(c)(5) of the Tax Law.

H. That petitioner did not produce sufficient evidence to prove its contention that the Home Box Office program guides were resold as personal property when they were distributed to its customers and that a portion of the monthly service charge could be allocated to the program guides. The purchase of the program guides was a purchase for use by petitioner for promotional

purposes and not for resale and thus the purchases are taxable under section 1101(b)(4) of the Tax Law (See 20 NYCRR 526.6(c)(4)(i); cf. Waxlife, U.S.A., Inc. v. State Tax Commission, 67 A.D.2d 1040).

I. That the petition of People's Cable Company is denied and the notices of determination and demand for payment of sales and use taxes due issued September 20, 1978 and December 20, 1978 are sustained.

DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Peoples Cable Co.

:
:
: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax
under Article 28 & 29 of the Tax Law for the Period:
8/31/75 - 5/31/78.

State of New York
County of Albany

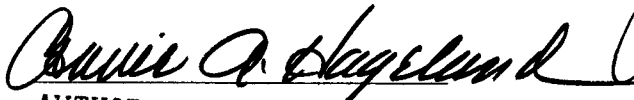
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Peoples Cable Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peoples Cable Co.
800 Linden Avenue
Rochester, NY 14625


and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
14th day of December, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Peoples Cable Co.

:
:
: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 8/31/75 - 5/31/78.

State of New York
County of Albany


Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Robert A. Feldman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

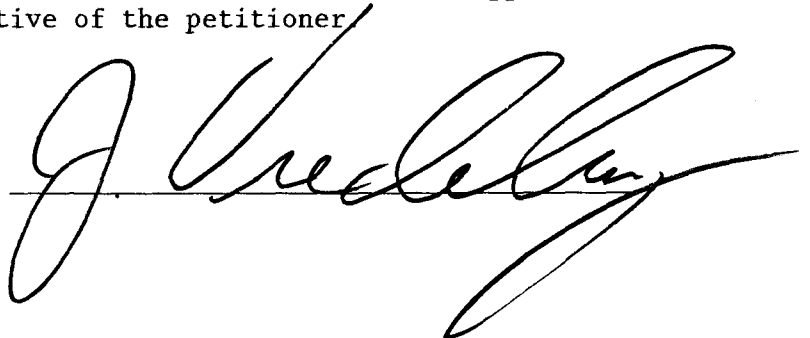
Robert A. Feldman
Levy, Feldman & Licata, P.C.
1025 Times Square Bldg.
Rochester, NY 14614

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner

Sworn to before me this
14th day of December, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



P 230 844 402
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO		<i>Charles L. Co.</i>	
STREET AND NO.		<i>500 Linden Ave.</i>	
P.O. STATE AND ZIP CODE		<i>Rochester, NY 14623</i>	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

P 230 844 403
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO		<i>Samuel A. Feldman</i>	
STREET AND NO.		<i>1625 Dimes Square Bldg.</i>	
P.O. STATE AND ZIP CODE		<i>Rochester, NY 14614</i>	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976