

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
PETRA CABLEVISION CORP.	:	DECISION
	:	
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 September 1,	:	
1971 through May 31, 1975.	:	

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Petitioner, Petra Cablevision Corp., 95 Brightside Avenue, Central Islip, New York 11722, 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 September 1, 1971 through May 31, 1975 (File No. 17154).

A formal hearing was held before Archibald F. Robertson, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 20, 1979 at 1:15 P.M. Petitioner appeared by Roberts & Holland, Esqs., (Lester Hochberg, Esq., and Arnold Panzer, Esq., of counsel). The Audit Division appeared by Peter J. Crotty, Esq., (Frank Levitt, Esq., of counsel).

ISSUES

I. Whether equipment and materials used in the installation of cable television and the furnishing of cable television service are exempt under section 1115(a)(12) of the Tax Law.

II. Whether "connect drop material" or "subscriber drop material" used in the installation of cable television is for resale pursuant to section 1101(b)(4)(i)(B) of the Tax Law.

III. Whether the projection of tax due based on a test period audit is proper and correct in accordance with section 1138(a)(1) of the Tax Law.

IV. Whether penalty and interest in excess of the statutory rate imposed by section 1145(a)(1) of the Tax Law should be waived.

FINDINGS OF FACT

1. Petitioner, Petra Cablevision Corp., is a wholly-owned subsidiary of Viacom International Incorporated, 345 Park Avenue, New York, New York 10022 and was, throughout the period herein involved, a corporation engaged in furnishing cable television service to subscribers in Suffolk County, New York.

2. On September 8, 1976, as the result of an audit, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$392,940.24 in tax, plus \$195,407.21 in penalty and interest, for the period September 1, 1971 through May 31, 1975. The notice was timely issued pursuant to signed consents that extended the period for assessment to October 20, 1976.

3. The audit involved an examination of the cash receipts journal, the cash disbursements journal, the general ledger, sales invoices, purchase invoices, bills of lading, sales tax returns and cancelled checks.

The auditor made a random check of sales invoices which revealed that petitioner properly collected sales tax on installation charges and did not collect tax on the basic cable television service. Based on his examination, the auditor accepted the sales that petitioner reported on the tax returns it filed.

The auditor then made tests on expense and fixed asset purchases. His test of May, 1974 purchases recorded in various expense accounts revealed an error ratio of .5807 percent. His test of January 1, 1974 through September 30,

1974 purchases recorded in the fixed asset inventory account revealed an error rate of 94.56 percent. Similar tests made by the auditor on purchases in the period January through March, 1973 and recorded in the fixed asset accounts: head end Brookhaven, head end Smithtown, head end Islip, equipment and tools, furniture and fixtures, cable casting equipment, microwave, and leasehold improvements revealed the respective error rates: 96.06 percent, 99.93 percent, 99.94 percent, 79.00 percent, 15.73 percent, 99.24 percent, 99.64 percent and 7.27 percent. Projection of these error rates over the audit period September 1, 1971 through May 31, 1975 resulted in additional taxable purchases of \$5,914,749.10 and \$392,940.24 in tax.

4. Petitioner's cable television system is composed of three elements: a head end where televisions signals from various sources, i.e. off air antennas, microwave receivers or satellite receivers, are assembled, standardized by processors and combined for application to a distribution cable; a distribution cable which carries the signals from the head end to the location of subscribers; a drop cable which is tapped into the distribution cable at one end and connected on the other to a set transformer at the subscriber's home to complete the circuit.

5. Petitioner analyzed the May, 1974 purchases that were charged to the inventory account and categorized them into these classifications: central office equipment, station apparatus, and "neither". Under central office equipment, petitioner included the elements of the head end, the processors, and the combiners. Petitioner included in station apparatus the dropline cable, both underground and overhead, the connectors on that cable and the set transformers. The category "neither" was for the distribution cable and tools and supplies that last less than a year. The analysis showed that 87.54

percent of the total expenditures was for either central office equipment or station apparatus.

6. Petitioner contends that based on its analysis of the inventory account, 87.54 percent of the expenditures recorded therein were exempt. Petitioner further contends that the purchases recorded in the three head end accounts, (Brookhaven, Smithtown and Islip) were exempt. The microwave equipment is transmitters and receivers that are necessary to deliver television signals to the head end equipment. Petitioner's contention is based on the fact that its equipment is substantially identical to equipment used by telephone and telegraph companies and thus constitutes telephone and telegraph equipment.

7. Petitioner failed to identify the "connect drop material" or "subscriber drop material" and to explain why said material was for resale.

8. The books and records that petitioner maintained were adequate for the Audit Division to determine petitioner's exact tax liability.

9. Petitioner acted in good faith at all times and there was no intent to evade the tax.

#### CONCLUSIONS OF LAW

A. That section 1115(a)(12) of the Tax Law exempts from sales and use tax:

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 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 (emphasis added).

B. That section 1105(b) of the Tax Law imposes sales tax upon:

[G]as, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature, and...telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service (emphasis added).

C. That cable television service is not a telephone or telegraph service within the purview of section 1105(b) of the Tax Law (New York State Cable Television Association v. State Tax Commission, 59 A.D. 2d 81, 397 N.Y.S. 2d 205 (1977) aff'g. 88 Misc. 2d 601 (Sup. Ct. Albany Co., 1976).

D. That inasmuch as cable television service is not a telephone or telegraph service for the purpose of section 1105(b) of the Tax Law, it must be similarly determined that the equipment used to provide cable television service is not used in the receipt, the initiation or the switching of "telegraph or telephone communication" for the purpose of section 1115(a)(12) of the Tax Law.

E. That in construing a taxing statute in order to determine the scope of a statutorily prescribed exemption, the rule is that the exemptions are to be strictly construed and that if any ambiguity or uncertainty exists it is to be resolved in favor of the sovereign and against exemption (Matter of Aldrich v. Murphy, 42 A.D.2d 385, 348 N.Y.S.2d 384).

F. That the exemption accorded under section 1115(a)(12) of the Tax Law is not applicable to the equipment used by petitioner in furnishing cable television service to its subscribers.

G. That 20 NYCRR 528.13(f)(2) promulgated June 1, 1977 states:

Example 3: A cable television company purchases equipment that is used for receiving incoming signals, duplicating them, and transmitting new signals to subscribers. Such equipment is exempt.

H. That 20 NYCRR 528.13(f) is prefaced with the statement that for any machinery or equipment to be entitled to exemption it must be used in furnishing a telephone or telegraph service for sale. At the time of the promulgation of

said regulation, cable television service was deemed a taxable telephone and telegraph service under 20 NYCRR 527.2(d)(2). Said regulation the court declared null and void in New York State Cable Television v. State Tax Commission, (supra). Therefore, 20 NYCRR 528.13(f) has no application herein.

I. That the burden of proof is on the taxpayer. Petitioner has failed to establish a basis for its claim that "connect drop material" or "subscriber drop material" is for resale and accordingly said is not eligible for the resale exclusion provided under section 1101(b)(4)(i)(B) of the Tax Law.

J. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41).

K. That in accordance with Finding of Fact "8" the books and records maintained by petitioner were adequate. Therefore, the tax due is reduced to the amounts found due for the periods reviewed.

L. That penalty and interest in excess of the minimum prescribed by section 1145(a) of the Tax Law is waived.

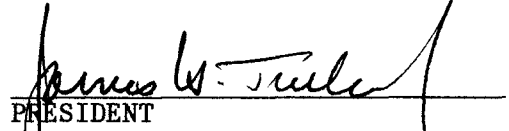
M. That the petition of Petra Cablevision Corp. is granted to the extent indicated in Conclusions of Law "K" and "L" above. The Audit Division is hereby directed to modify the Notice of Determination and Demand

for Payment of Sales and Use Taxes Due issued September 8, 1976. Except as so granted, the petition is in all other respects denied.

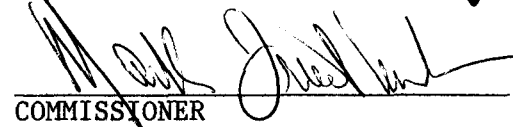
DATED: Albany, New York

JAN 29 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Petra Cablevision Corp.

:

: 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 9/1/71 - 5/31/75.

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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Petra Cablevision Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

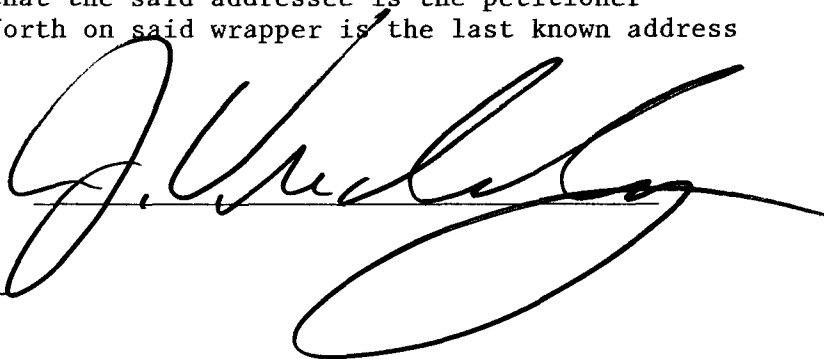
Petra Cablevision Corp.  
95 Brightside Ave.  
Central Islip, NY 11722

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  
29th day of January, 1982.

Conrad A. Haglund





STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Petra Cablevision Corp. : 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 9/1/71 - 5/31/75.

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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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Lester Hochberg the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

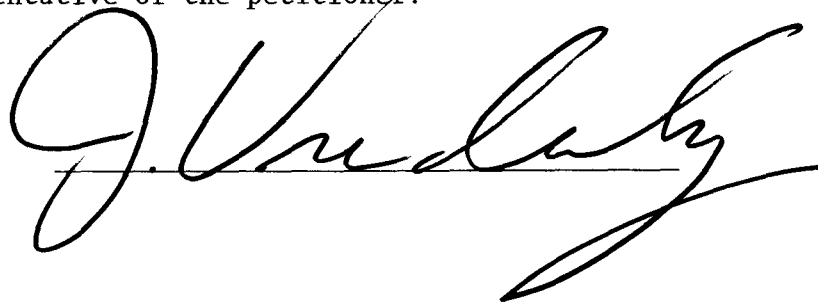
Lester Hochberg  
Roberts & Holland  
1301 Ave. of the Americas  
New York, NY 10019

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  
29th day of January, 1982.

  
Grand Juror

  
Jay Vredenburg

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

January 29, 1982

Petra Cablevision Corp.  
95 Brightside Ave.  
Central Islip, NY 11722

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 & 1243 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  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Lester Hochberg  
Roberts & Holland  
1301 Ave. of the Americas  
New York, NY 10019  
Taxing Bureau's Representative

**P 230 842 048**  
**RECEIPT FOR CERTIFIED MAIL**

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

SENT TO		Patra Cablevision Corp	
STREET AND NO.		95 Bright Side Ave	
P.O. STATE AND ZIP CODE		Central Islip N.Y. 11722	
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 230 842 049**  
**RECEIPT FOR CERTIFIED MAIL**

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

SENT TO		Lester Hochberg	
STREET AND NO.		1301 Ave of the Americas	
P.O. STATE AND ZIP CODE		New York N.Y. 10019	
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