

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

May 27, 1983

Harbor Vue Cable TV, Inc.  
59 Lake Shore Dr. W.  
Dunkirk, NY 14048

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 Law 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  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Clarence H. Snyder  
Towne, Rubenstein, Snyder & Polowy  
125 E. Fourth St.  
Dunkirk, NY 14048  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Harbor Vue Cable TV, Inc. :  
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 6/1/79 - 8/31/79. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Harbor Vue Cable TV, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harbor Vue Cable TV, Inc.  
59 Lake Shore Dr. W.  
Dunkirk, NY 14048

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  
27th day of May, 1983.

David Parchuck

David A. Hagelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Harbor Vue Cable TV, Inc. :  
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 6/1/79 - 8/31/79. :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Clarence H. Snyder the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Clarence H. Snyder  
Towne, Rubenstein, Snyder & Polowy  
125 E. Fourth St.  
Dunkirk, NY 14048

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  
27th day of May, 1983.

David Parchuck

James A. Hagelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
HARBOR VUE CABLE TV, INC.	:	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 June 1, 1979	:	
through August 31, 1979.	:	

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Petitioner, Harbor Vue Cable TV, Inc., 59 Lake Shore Drive West, Dunkirk, New York 14048, 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, 1979 through August 31, 1979 (File No. 35087).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on September 15, 1982 at 2:45 P.M. Petitioner appeared by Clarence H. Snyder, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner is liable for tax on tangible personal property transferred in a bulk sales transaction.

FINDINGS OF FACT

1. On June 20, 1979, petitioner, Harbor Vue Cable TV, Inc., notified the Tax Commission, by letter, that it was purchasing the cable television franchise of Dunkirk, New York from Erie Communications, Inc. Petitioner enclosed a copy of the contract and requested that it be advised if all sales taxes due had been paid to date and whether there would be any sales tax involved with the

transaction. The letter also indicated that a closing was expected on or about July 31, 1979.

2. Petitioner entered into an agreement dated March 30, 1979 with Erie Communications, Inc. whereby petitioner agreed to purchase all of the CATV System business and assets (other than cash and those specifically excluded) of the seller, including but not limited to the following assets:

- (a) All tangible assets of CATV System, including test equipment, automobiles and trucks.
- (b) All contracts and agreements relating to CATV System.
- (c) All franchises and permits for operation of the CATV System.

The purchase price for the foregoing assets was \$1,600,000.00. The closing took place on August 23, 1979.

3. On August 23, 1979, the agreement entered into on March 30, 1979 was amended to apportion the purchase price of the assets as follows:

(a) Cable and Equipment	\$ 420,000
(b) Customer List	500,000
(c) Franchise	480,000
(d) Covenant Not to Compete	200,000
	<u>\$1,600,000</u>

The Audit Division was not provided with this amendment.

4. On September 14, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner asserting taxes due of \$11,200.00. Said notice indicated that the tax was due on the transfer of tangible personal property in accordance with the provisions of sections 1138 and 1141(c) of the Tax Law.

On November 9, 1979, petitioner remitted the tax of \$11,200.00, plus interest of \$767.73, making a total payment of \$11,967.73.

5. On February 15, 1980, the Audit Division issued a release to petitioner which stated in part as follows: "The purchaser will not be held liable for any sales and use taxes subsequently found to be due from the seller as a result of this bulk sale."

6. On July 22, 1981, the Audit Division issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner in the amount of \$100,800.00, plus interest of \$16,292.00, for a total of \$117,092.00. This notice was issued when it was discovered that the tax of \$11,200.00 assessed on the notice referred to above contained a clerical error. The corrected tax due was found to be \$112,000.00 ( $\$1,600,000.00 \times 7\%$ ). Therefore, the above notice was issued for the balance determined due ( $\$112,000.00 - \$11,200.00 = \$100,800.00$ ).

7. Petitioner argued that it properly notified the Tax Commission of the proposed sale and requested the amount of any tax liability that may result from the sale; the taxes as so determined due were paid and a release was issued; and that, such release discharged any further obligations for sales or use taxes in connection with the bulk sale transaction of August 23, 1979.

The Audit Division took the position that petitioner's liability for the \$100,800.00 in additional tax was not predicated on it being a purchaser in a bulk sales transaction, personally liable for taxes owing by the seller under section 1141(c) of the Tax Law, but was the direct liability of a customer in a retail sale pursuant to section 1133(b) of the Tax Law.

#### CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides, in pertinent part, that the purchaser in a bulk sales transaction, for failure to comply with the

provisions of said section of the Tax Law, shall be personally liable for the payment of any taxes determined to be due to the state from the seller.

Petitioner, however, complied with the requirements of section 1141(c) of the Tax Law and was relieved of any such liability determined due from the seller as set forth in Finding of Fact "5". Said release did not constitute a release for a tax liability incurred by petitioner.

B. That the taxes asserted on the notice issued September 14, 1979 for \$11,200.00, as well as the additional tax of \$100,800.00 assessed on July 22, 1981, were not inherent liabilities from the seller under section 1141(c) of the Tax Law.

The tangible personal property transferred in the bulk sale of the business assets constituted a "purchase at retail" as defined in section 1101(b)(1) of the Tax Law and was subject to the tax imposed under section 1105(a) of the Tax Law and petitioner had a direct liability to pay the tax due on said transaction in accordance with the provisions of section 1133(b) of the Tax Law.

The sales tax is a "consumer tax", that is, the tax is imposed on the retail sale of tangible personal property and certain services and is collected from the person who purchases at retail -- the consumer. The consumer cannot shift the liability for payment of the tax to another person, nor otherwise relieve himself of such liability, although the vendor is personally liable for the tax he was responsible for collecting. [20 NYCRR 525.2(a)(4)].

C. That in accordance with Finding of Fact "3", the sales price of the tangible personal property transferred in the bulk sale was \$920,000.00. Accordingly, the taxes due are reduced to \$53,200.00 ( $\$920,000.00 \times 7\% = \$64,400.00$  less  $\$11,200.00 = \$53,200.00$ ).

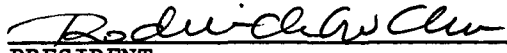
Petitioner failed to establish whether any portion of the cable and equipment constituted a capital improvement to real property.

D. That the petition of Harbor Vue Cable TV, Inc. is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 22, 1981; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 481 207 878

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Harbor Vue Cable TV, Inc.</i>	
Street and No. <i>59 Lake Shore Dr. W.</i>	
P.O., State and ZIP Code <i>Dunkirk, NY 14048</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 481 207 879

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Clarence H. Snyder</i>	
Street and No. <i>Towne Rubenstein, Snyder + Polak</i>	
P.O., State and ZIP Code <i>125 E. Fourth St. Dunkirk, NY 14048</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982