STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AMERICAN COMMUNICATIONS TECHNOLOGY, INC. AND STEVEN MEYERS, DAVID MEYERS AND STUART MEYERS, AS OFFICERS	:	DECISION DTA No. 805430
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1983 through February 28, 1986.	:	

Petitioners American Communications Technology, Inc., Steven Meyers, David Meyers and Stuart Meyers, as Officers, 27 West 20th Street, New York, New York 10011 filed an exception to the determination of the Administrative Law Judge issued on April 25, 1991 with respect to their petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1983 through February 28, 1986. Petitioner American Communications Technology, Inc. appeared by Scher and Eliasberg, P.C. (Robert A. Scher, Esq., of counsel). Petitioners Steven Meyers, David Meyers and Stuart Meyers appeared pro se.[1] The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Both parties filed briefs on exception.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether sales of telephone equipment or station apparatus by petitioners were exempt from sales and use taxes pursuant to Tax Law § 1115(a)(12).

[1]It appears from the record (Tr., pp. 18-19) that petitioners Steven Meyers, David Meyers and Stuart Meyers are being represented by Scher and Eliasberg, P. C. (Robert A. Scher, Esq., of counsel). However, Mr. Scher, by letter dated June 13, 1991, refused to submit written powers of attorney with respect to his representation of these individual petitioners (see, 20 NYCRR 3000.2[a][1] and [2]; 20 NYCRR 600.1[a]).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except that we have deleted the footnote to finding of fact "1" for the reasons stated in our opinion. These facts are set forth below.

The Division of Taxation ("Division") issued to petitioner American Communications Technology, Inc. ("ACT") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated September 20, 1986 (Notice No. S860920670M) asserting tax due for the period March 1, 1983 to August 31, 1983 in the amount of $54,694.32 plus interest of $18,818.84 for a total amount due of $73,513.16. A Notice of Assessment Review was subsequently issued bearing a date stamp of May 7, 1987 which corresponds to assessment number S860920670M adjusting the tax and interest to $31,730.86 and $13,123.34, respectively, for a total amount due of $44,854.20.

In connection with the above-referenced assessment, ACT, by its corporate officer, David Meyers, executed a consent to extend the statute of limitations for the tax period March 1, 1983 through May 31, 1983 for determination any time on or before September 20, 1986.

The Division issued to petitioners, ACT and Stephen Meyers, David Meyers and Stuart Meyers ("the officers"), notices of determination and demands for payment of sales and use taxes due dated December 15, 1986 asserting tax due for the period September 1, 1983 through February 28, 1986 in the amount of $126,096.74 plus penalty and interest of $31,524.19 and $35,680.68, respectively, for a total amount due of $193,301.61. The notices issued to the officers indicated their liability as officers pursuant to Tax Law §§ 1131(1) and 1133.

The notices described above were generated from an audit of the books and records of ACT, the result of which is summarized below:

	Agreed or Consented	Disagreed
Tax due on unsubstantiated nontaxable sales (test period used)	$ 2,397.57	

Tax due on unreported sales for 3/1/83 to 2/28/85		$132,956.10
Tax due on purchases of equipment used in capital improvement projects (test period used)	18,957.31	
Tax due on purchases		22,727.60
Tax not remitted due to bookkeeping error	428.01	
Totals	$21,782.89	$155,683.70

Petitioners' accountant, Christopher Chalavoutis, who represented them during the audit, executed a Consent to Fixing Tax Not Previously Determined and Assessed dated July 1, 1986,[2] agreeing to pay tax due in the amount of $21,782.89.[3] The auditor testified that Mr. Chalavoutis had promised to provide her with proper returns and proof of payments for the disagreed portion. The auditor was never given such information. Thus the remainder of the disagreed portion of the tax was reflected by the issuance of the notices described above.

ACT was primarily in the business of selling telephone station apparatus used for receiving at destination, initiating and switching telephone communications. None of ACT's customers are public utilities or telephone companies.

The parties do not dispute that the equipment is the type covered by the statute and the use is directly and predominantly for that intended by the statute. The sole issue is whether the qualification by the corresponding regulation successfully carves out an exception to the exemption inasmuch as the "apparatus must be purchased or leased by the vendor of such service for sale."

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[2]During the hearing, the issue of whether Mr. Chalavoutis was acting with proper authority was raised, since he signed the consent fixing tax under a power of attorney. The notice of appearance section of the power was unsigned by petitioners' representative. Although the power was incomplete to this extent, the authorization is not invalid as indicated at the hearing. Furthermore, petitioners acknowledged the involvement of this representative during the audit.

[3]As a result of the signed consent, after which no tax payment was submitted, on December 15, 1986 the Division issued to ACT and the officers four notices and demands for payment of sales and use taxes due in the amount of $19,638.99 plus interest for the period September 1, 1983 through February 28, 1986. The auditor testified that the agreed portion of the tax for the period March 1, 1983 through August 31, 1983 in the amount of $2,144.00 was assessed under Notice No. S860920670M, and included in the revised amount of tax due of $31,730.83. The total of $19,638.99 and $2,144.90 ($21,783.89) though bearing a one dollar discrepancy, was intended to reflect the amount of tax agreed by the parties as due pursuant to the consent.

There is no dispute as to the responsibility of the petitioner officers.

OPINION

In the determination below, the Administrative Law Judge held that petitioners did not establish that ACT was entitled to claim the telephone equipment exemption set forth in Tax Law § 1115(a)(12). Relying on a Supreme Court memorandum decision (Eastman Kodak Co. v. Department of Taxation & Fin., Sup Ct, Monroe County, Nov. 22, 1989, Siracuse, J.), the Administrative Law Judge concluded that the exemption was only available to an entity which purchases and uses equipment for switching telephone and telegraph services for sale. She determined that since petitioner corporation did not purchase and use the equipment in issue to provide telephone services for sale, it could not qualify for the exemption.

On exception, petitioners argue that the only issue in this case is the applicability of section 1115(a)(12) of the Tax Law, and that the Division's claim "concerning taxation as a capital improvement or tax due for repair services . . . have never been elevated beyond the level of innuendo and speculation" (Petitioners' brief on exception, p. 8). With respect to section 1115(a)(12) of the Tax Law, petitioners contend that the regulations in 20 NYCRR 528.13(f) went beyond the specific language of the statute. They argue that because it is undisputed that the equipment in question is telephone station apparatus, it fits squarely within the language of the exemption. It is petitioners' position that the statute is clear on its face and that there is no reason to add anything to it in the Division's regulations. They maintain that by adding the "for sale" requirement to its regulations, the Division improperly denied the statutory effect of the telephone equipment exemption. With respect to the tax stated on the notice and demands issued to petitioners, petitioners argue that they would not be foreclosed, assuming their success here or on an Article 78 proceeding, from paying all or a portion of that tax and filing for a refund.

In response, the Division asserts that with respect to the notice and demands in the amount of $19,638.99 issued separately to petitioner corporation and its three officers on December 15, 1986, petitioners may not obtain a review of their tax liability until the amount is paid and an application for refund is made because petitioners have already consented to its payment. The Division argues that since petitioners have not paid the tax owing, this Tribunal

lacks jurisdiction to consider any matters relative to the above notices and demands and the petition relating to these notices should be dismissed. With respect to its interpretation of section 1115(a)(12) of the Tax Law, the Division maintains that the regulation in issue is a reasonable interpretation of the statute. The Division relies on the Supreme Court's opinion in Eastman Kodak and the specific "purchased or leased by the vendor" and "for sale" requirements of the regulation. It contends that because petitioner corporation was not a telephone company and that none of its customers were such, petitioners failed to establish their right to the telephone equipment exemption. Finally, the Division notes that section 1105(c)(3) of the Tax Law imposes tax on the services of installing, servicing or repairing tangible personal property. The Division asserts that petitioners did not substantiate any basis for nontaxability of the sales disallowed by the auditor.

We affirm the determination of the Administrative Law Judge.

Preliminarily, we will clarify the issue of timeliness of the petition addressed by the Administrative Law Judge in footnote "1" of the findings of fact in her determination. The Administrative Law Judge wrote, in pertinent part, as follows:

> "The Division did not submit any evidence with respect to the mailing of notice number S860920670M. During the hearing (Transcript p. 92) the parties stipulated that the merits of the legal issue should be addressed without considering the timeliness of the February 19, 1987 protest with respect to that notice. The Division waived the timeliness issue regarding notice S860920670M, and thus it will not be addressed herein" (Administrative Law Judge's determination, p.2).

We think that a more accurate statement of the law in the instant case is that where the Division has failed to prove when it mailed the notices, but has been able to prove, by the taxpayer's receipt of the notices, that they were in fact mailed, the proper remedy is to deem the petition timely filed (Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). In this case, the Division did not offer any proof of mailing with respect to notice S860920670M. However, the record indicates that petitioners received that notice. Hence, we deem petitioners' petition concerning notice S860920670M timely filed.

Next, we address the issue of whether petitioners, who signed the consent to fixing of tax and were issued notices and demands for payment (Exhibits H, I, J and K), must pay the amount stated on these notices before they can obtain review of their assessments. Tax Law § 1138(c) provides that a person liable for collection or payment of tax shall be entitled to have a tax due finally and irrevocably fixed by filing a signed consent to fixing of such tax with the Commissioner of Taxation and Finance. Tax Law § 1139(c) states, in part:

> "[A] person filing with the commissioner of taxation and finance a signed statement in writing, as provided in subdivision (c) of section eleven hundred thirty-eight, before a determination assessing tax pursuant to subdivision (a) of section eleven hundred thirty-eight is issued, shall, nevertheless, be entitled to apply for a refund or credit pursuant to subdivisions (a) and (b) of this section, as long as such application is made within the time limitation set forth in such subdivision (a) or within two years of the date of payment of the amount assessed in accordance with the consent filed, whichever is later, but such application shall be limited to the amount of such payment" (Tax Law § 1139[c] emphasis added).

These provisions clearly show that the only means by which petitioners could obtain a review of their tax liability after signing the consent was to pay in full the assessed amount in accordance with the consent and then apply for a refund (Tax Law §§ 1138[c] and 1139[c]; Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989). Since petitioners have not yet paid the amount stated on these notices and demands, the Division of Tax Appeals has no jurisdiction to provide a hearing with respect to these notices and demands.

We now decide the issue of whether petitioner corporation's sales of telephone equipment or station apparatus were exempt from sales tax pursuant to Tax Law § 1115(a)(12). Section 1115(a)(12) of the Tax Law provides an exemption from sales and use taxes on receipts from the sale of the following:

> "[m]achinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, . . . 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" (Tax Law § 1115[a][12]).

The corresponding regulation in 20 NYCRR 528.13(f) states, in part, as follows:

> "Telephone and telegraph equipment. (1) Telephone and telegraph central office equipment and station apparatus, used directly and predominantly in receiving at destination, initiating or switching telephone and telegraph communication is exempt, when such equipment and apparatus is purchased or leased by the vendor of such service for sale" (20 NYCRR 528.13[f]).

It is well settled that statutes creating exemptions from tax are to be strictly and narrowly construed (see, Matter of Grace v. New York State Tax Commn., 37 NY2d 193, 371 NYS2d 715, lv denied 37 NY2d 708, 375 NYS2d 1027; Matter of Blue Spruce Farms v. New York State Tax Commn., 99 AD2d 867, 472 NYS2d 744, affd 64 NY2d 682, 485 NYS2d 526; Modern Refractories Serv. Corp. v. Tax Appeals Tribunal, 164 AD2d 69, 563 NYS2d 200). The taxpayer's argument must satisfy the burden of demonstrating clear and unambiguous entitlement to the exemption claimed (Matter of W.T. Wang, Inc. v. State Tax Commn., 113 AD2d 189, 495 NYS2d 792; Matter of Marriott Family Rests. v. Tax Appeals Tribunal, ___ AD2d ___, 570 NYS2d 741).

In determining whether petitioner corporation was entitled to the telephone equipment exemption, we find Judge Siracuse's analysis in a Supreme Court decision very instructive. In Eastman Kodak Co. v. Department of Taxation & Fin. (Sup Ct, Monroe County, Nov. 22, 1989), Judge Siracuse dismissed Kodak's challenge, which was based on a ground identical to the one raised by petitioners herein. The court there declared that section 1115(a)(12) was designed to eliminate pyramiding of the sales tax by exempting equipment used by a telephone company and taxing only the distribution of the "finished product," be it an item of tangible personal property or a utility or service such as gas, electricity or telephone service. Moreover, it was stated that since a "private" telephone company never sells telephone services to others, an exemption for its equipment would mean that sales tax would be avoided rather than merely deferred. We believe that the court's observation in Eastman Kodak with respect to the underlying intent of this exemption is fully consistent with its legislative history and case law (see, Budget Report on Senate Bill 9899-B, Bill Jacket, L 1974, ch 851; Matter of Burger King v. State Tax Commn., 70 AD2d 447, 421 NYS2d 668, mod on other grounds 51 NY2d 614, 435

NYS2d 689; Matter of Imperial Mfg. Co. v. State Tax Commn., 99 AD2d 874, 472 NYS2d 753, lv denied 63 NY2d 604, 480 NYS2d 1026).

In reaching his conclusion, Judge Siracuse focused on: (1) the placement of the telephone equipment exemption and (2) the origin of the "central office equipment" language in the statute. He reasoned that because the telephone equipment exemption was placed in the same section as the production equipment exemption, the Legislature intended to create a parallel exemption for machinery and equipment used to produce tangible personal property, gas and electric services for sale and equipment used to switch telephone services for sale. Judge Siracuse also declared that at the time the exemption was enacted, "central office equipment" was a term of art used by the Public Service Commission. He stated that this term conveyed a specific public services connotation and that under the rule of in pari materia (McKinney's Statutes § 222), the Legislature is presumed to have acted with knowledge of this meaning of the term in so choosing this particular language for inclusion in the statute. We agree with the Supreme Court's reasoning and conclusion in Eastman Kodak and we think the same could be said in response to petitioners' argument for claiming the exemption. We think it is clear that the Legislature did not intend to exempt telephone equipment from tax liability in the case of a "private" telephone company, in which there are no sales of telephone services.

Petitioners argue that the equipment sold was unmistakably the "station apparatus" provided in the statute and that no further inquiry based on the Division's regulation was necessary before permitting the corporation to claim the exemption. We reject this argument. In matters of statutory construction generally, legislative intent is "the great and controlling principle" (Matter of Sutka v. Conners, 73 NY2d 395, 541 NYS2d 191, 194, quoting People v. Ryan, 274 NY 149, 152). While legislative intent may be discerned from the specific wording of the statute, a facial lack of ambiguity is rarely, if ever, conclusive (Matter of Sutka v. Conners, supra; New York State Bankers Assn. v. Albright, 38 NY2d 430, 381 NYS2d 17). In interpreting statutes, it is preferable to inquire into the spirit and purpose of the legislation (Matter of Long v. Adirondack Park Agency, 76 NY2d 416, 559 NYS2d 941; Hudson City

Saving Inst. v. Drazen, 153 AD2d 91, 550 NYS2d 163), which "requires examination of the statutory context of the provision as well as its legislative history" (Matter of Sutka v. Conners, 73 NY2d 395, 541 NYS2d 191, 194; see, Ferres v. City of New Rochelle, 68 NY2d 446, 510 NYS2d 57; Matter of Albano v. Kirby, 36 NY2d 526, 369 NYS2d 655). In accordance with these principles, Judge Siracuse's analysis in Eastman Kodak of the placement of the telephone equipment exemption, the inclusion of the "central office equipment" term and the underlying intent of section 1115(a)(12) properly gave effect to the legislative purpose behind the statute. To allow petitioners to claim the exemption for their equipment, in the absence of showing that it was being sold to vendors who provide telecommunication services for sale, would mean that the transaction could escape tax altogether. This result would clearly frustrate the purpose of the production and telephone equipment exemption. We perceive no difficulty in reconciling the "by the vendor of such service for sale" language of the regulation with that of the statute. We think that it is consistent with the intent, meaning and scope of the exemption set forth in section 1115(a)(12) of the Tax Law. Therefore, we conclude that petitioners' sales of telephone station apparatus were not exempt from sales tax pursuant to Tax Law § 1115(a)(12).

Given our conclusion above, petitioners' attack on the examples given in the regulation is also without avail. The examples correctly illustrate the operation of the statutory exemption, which is intended to defer tax on the sale of telephone equipment until it is transferred as a "finished product" to the ultimate consumer.

Accordingly, is it ORDERED, ADJUDGED and DECREED that:

1. The exception of American Communications Technology, Inc. and Steven Meyers, David Meyers and Stuart Meyers, as Officers is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of American Communications Technology, Inc. and Steven Meyers, David Meyers and Stuart Meyers, as Officers is dismissed to the extent it protested four notices and demands dated December 15, 1986 but is otherwise denied; and

4. The notices of determination dated September 20, 1986, as revised, are sustained.

DATED: Troy, New York
November 14, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner