STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

AMERICAN COMMUNICATIONS TECHNOLOGY, INC. AND STEVEN MEYERS, DAVID MEYERS AND STUART MEYERS, AS OFFICERS : DETERMINATION

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, c/o Robert A. Scher, Esq., 111 Great Neck Road, Great Neck, New York 11021, filed a 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 (File No. 805430).

A hearing was commenced before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on May 2, 1990 at 10:00 A.M. and was continued to conclusion on July 25, 1990 at 1:15 P.M., with all briefs to be submitted by November 23, 1990. Petitioners appeared by Scher and Eliasberg, P.C. (Robert A. Scher, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Susan Hutchison, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

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.[1]

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 in Findings of Fact "1" and "2" were generated from an audit of the books and records of ACT, the result of which is summarized below:

Agreed or

[1]At the commencement of the hearing, the Division raised as an issue the timeliness of the petition on this assessment, and asserted that a protest letter from petitioner's representative dated February 19, 1987 regarding that assessment as well as the others in issue in this matter, was untimely and as a result the Division of Tax Appeals lacked jurisdiction to address the merits of that liability. 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.

	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 in Finding of Fact "2".

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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 $31,730.86 (see Finding of Fact "1"). 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.

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."

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

SUMMARY OF THE PARTIES' POSITIONS

Petitioners assert that Tax Law § 1115(a)(12) is clear and needs no interpretation. It provides for an exemption to a whole category of

equipment without qualification as to who sells or leases it. The interpretation of the statute is inconsistent and the statutory effect of the exemption should not be denied by regulation 20 NYCRR 528.13(f).

The Division claims that regulation 20 NYCRR 528.13(f) is a reasonable interpretation of the statutory exemption and must be read with Tax Law § 1115(a)(12). Petitioners stipulated that ACT was not a telephone company, nor were the customers of ACT telephone utilities. Applying the statute and regulation, given the stipulations, the Division asserts that petitioners have failed to establish their entitlement to the exemption. The Division points to Eastman Kodak Company v. Department of Taxation and Finance (Sup Ct, Monroe County, November 22, 1989, Siracuse, J.) in support of its conclusion.

CONCLUSIONS OF LAW

A. During the period in issue, Tax Law § 1115(a)(12) provided an exemption from the sales tax on receipts from the sale of the following:

> "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, mining 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. The corresponding regulation, 20 NYCRR 528.13(f), qualifies the equipment intended to be eligible for the exemption as follows:

"(f) 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.

(2) The purchase or lease of equipment by a person subscribing to a telephone or telegraph service, which is comparable to telephone or telegraph central office equipment or station apparatus is not eligible for exemption.

Example 1: A telephone company purchases switchboards and handsets for installation at a subscriber's premises. Such purchases are exempt.

Example 2: An airline company purchases consoles which initiate, receive and switch telephone calls which are sent over telephone company lines. The consoles are not exempt, as they were not purchased by a telephone company in connection with a telephone service for sale." (Emphasis added.)

C. This precise issue has recently been addressed in a decision from the New York State Supreme Court (Eastman Kodak Company v. Department of Taxation and Finance, Sup Ct, Monroe County, November 22, 1989, Siracuse, J.). The two parties in that case made the same basic arguments that were made in the instant matter, i.e., the Division contended that the exemption was intended to be available only to telephone companies, those which provide telephone service. The plaintiff argued that the rule is inconsistent with the statutory language and took the position that the plain language of section 1115(a)(12) should be followed and an exemption granted regardless of ownership of the telephone equipment. In relevant part, the Eastman Kodak case provided as follows:

"An agency may not create a rule out of harmony with a statute (citation omitted). However, the construction given the statute by the agency 'will be upheld if not irrational or irresponsible' (citation omitted). The burden is upon the plaintiff to show that its interpretation of the law was plausible and the only reasonable construction available (citation omitted). Furthermore, statutes creating tax

> exemptions are to be strictly and narrowly construed and the burden of proving entitlement to an exemption rests with the taxpayer (citation omitted). To determine whether a regulation is contrary to a statute, it is necessary to look at the statute's legislative history (citation omitted).
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> In broad terms, Section 1115(a)(12) was designed to eliminate the imposition of the sales tax on production equipment for tangible personal property and utilities. By eliminating this tax, the state satisfied itself with the collection of the sales tax on the distribution of the 'finished product,' whether that be an item of tangible personal property or a utility or service such as gas, electricity, refrigeration, steam or telephone and telegraph services. Under Tax Law § 1105(b), tax is collected upon the sale of telephone services. In the case of a 'private' telephone company, in which there is no sale of telephone services, there is no opportunity to ultimately collect the tax. Thus, there is a total avoidance of tax as opposed to a mere deferral of tax.
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> The placement of the telephone equipment exemption in the same section as the production equipment exemption is significant. Had the Legislature intended to completely exempt telephone equipment from tax liability, the exemption would have been more appropriately placed in another paragraph of section 1115 separate and apart from the production exemptions. By this placement, it appears that the intent was to create a parallel exemption for machinery and equipment used to produce tangible personal property, gas and electric services for sale and for machinery and equipment used to switch telephone and telegraph services for sale.
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> A look at the genesis of the term 'central office equipment' reveals why the words 'for sale' may not have been deemed necessary by the Legislature. At the time of passage of section 1115, central office equipment was a term of art used by the Public Service Commission and defined at 16 NYCRR § 221. By the very use of that term, the public services connotation is conveyed. Under the rule of statutory construction known as in pari materia (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."

D. In light of the likeness of these cases and the issues raised, the analysis employed in Eastman Kodak clearly dictates a determination that ACT and the officers have not established entitlement to the exemption set forth by Tax Law § 1115(a)(12).

E. The petition of American Communications Technology, Inc., Steven Meyers, David Meyers and Stuart Meyers, as officers, is denied and the notices of determination and demands for payment of sales and use taxes due dated September 20, 1986, as revised, and December 15,

1986 are hereby sustained in their entirety.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE