STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ECHOSTAR SATELLITE CORP.	:	DETERMINATION DTA NO. 821465
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 March 1, 2000 through February 29, 2004.	:	

Petitioner, EchoStar Satellite Corp., 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 March 1, 2000 through February 29, 2004.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 27, 2007 at 10:30 A.M., with all briefs to be submitted by May 2, 2008, which date began the six-month period for the issuance of this determination. Petitioner appeared by Ryan and Co. (Mark Weiss, Esq., and Charles Rice, Jr., Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Lori P. Antolick, Esq., of counsel).

ISSUE

Whether the resale exclusion of section 1101(b)(4)(i)(A) of the Tax Law applied to parts and equipment purchased by a satellite television provider, which were used by its customers in order to receive satellite television programming.

FINDINGS OF FACT

1. Petitioner, a provider of satellite television programming, conducts business under the name Dish Network. After a lengthy audit, with time charged to the case of 301.5 hours, the Division of Taxation (Division) calculated additional sales and use tax due from petitioner on its purchases of parts and equipment it used to provide satellite television programming. The Division increased the amount of "purchases subject to tax" from the $136,393.00 reported by petitioner to an after-audit amount of $23,565,926.82, resulting in additional sales and use tax due of $1,776,165.18.

2. The Division issued a Notice of Determination, dated February 28, 2005, asserting sales and use tax due of $1,776,165.18 plus interest for the period March 1, 2000 through February 29, 2004. Petitioner paid this amount in full by a check dated December 7, 2006. Consequently, the petition, filed on December 15, 2006, seeks a refund of such payment plus interest.

3. Petitioner supplies the following parts and equipment to its customers in order to provide satellite television programming: (i) a satellite dish, (ii) a low-noise block feedhorn (LNBF), (iii) a switch, (iv) a receiver (a/k/a set-top box) and (v) a remote control. These items cannot be utilized to receive service from any other provider of satellite television programming. Rather, they can be utilized *only* to receive petitioner's Dish Network satellite television programming. Further, petitioner repossesses and refurbishes the items listed above, except for the satellite dish, for reuse on subsequent programming contracts as detailed in Finding of Fact 8. Although all of the parts and equipment are designed and engineered by petitioner, their manufacture is outsourced to other companies, including Sanmina-SCI. At issue is sales tax imposed by the Division on petitioner's purchases of the parts and equipment from such manufacturers.

4. The receiver accepts data from the satellite dish, which is mounted on the roof of a house. The data is processed by the receiver into a format that can be projected onto a television. The LNBF is the component located at the end of the arm projecting from the satellite dish, and it receives the signals sent by the satellite and converts them to a lower frequency that can be accepted by a receiver. Petitioner has multiple satellites in various orbital positions, and a separate LNBF is needed to access each satellite position. The switch is the device that is used at a location where a customer has more than one receiver. The switch directs the satellite signal from the dish to the receivers and allows the customer to watch different programs at each receiver. For example, a twin-switch handles two receivers, while a quad-switch handles four receivers.

5. In May of 2000, petitioner adopted a new policy concerning the parts and equipment it supplies to its customers in order to provide satellite television programming. Rather than sell the parts and equipment to its customers, petitioner decided to recoup its cost for the parts and equipment as part of its monthly fee for programming. In this way, there would not be an excessive up-front expense to a customer since there would be no need to purchase outright the parts and equipment necessary to receive the satellite television programming. Petitioner, which apparently never sold satellite dishes to its customers, presumably built into the monthly charges for satellite television programming the cost of its own purchases of satellite dishes, which in turn it provided to its customers.

6. During the period at issue, petitioner collected and remitted New York State sales and use taxes in an amount slightly over $2,000,000.00 on its rental and sales of satellite television parts and equipment, which is greater than the amount asserted due of $1,776,165.18 on its purchases of such items.

7. In calculating the amount of tax asserted due, the Division performed a detailed review of petitioner's capitalized parts[1] reports, which were maintained by petitioner as electronic files. These files, consisting of over 350,000 line items, contained detailed information on all of petitioner's purchases of satellite television parts and equipment. The Division's position was that all the parts and equipment that petitioner had located in New York that it had not actually sold to its customers were furnished as part of its satellite television programming, a nontaxable service. Accordingly, the auditor calculated sales and use tax due on petitioner's purchases of its capitalized parts and equipment, which were not actually *sold* to customers.

8. Petitioner's senior accounting manager explained that satellite dishes were not capitalized (and therefore not included in the capitalized parts reports) because, "The dish is weathered. It's on the top of a roof." In contrast, petitioner expects to "recover and be able to refurbish and redeploy" the receivers, LNBFs, switches and remote controls, which were capitalized and listed on the capitalized parts reports.

9. The capitalized parts reports contain much detail and are difficult to decipher due to the variation in model type and the coded description of particular parts and equipment. Included in the record is a sample of these files which consists of 116 line items of parts purchased by petitioner and placed in service at customer locations in Albany County during the audit period. A careful review of these 116 line items of capitalized parts show 12 types of parts as follows:

[1] Although petitioner introduced the reports as capitalized "equipment" reports, the term "parts" and not "equipment" is used on the column headings of the reports, and the terminology of "parts" has been used in referencing the reports.

Part Description	Model Number	Part Number	Capitalized Cost[2]
(1) Unknown	2700	6-AA	$126.40
(2) Unknown	3822	9-AA	136.08
(3) RCVR IR [receiver]	2800	102456	126.00
(4) IR 3922	3922	103953	134.86
(5) IR 3922T	3922T	103954	134.70
(6) Accessory	TWIN	0-AA	42.50
(7) RCVR IR	301	103631	145.63
(8) Accessory	QUAD	105842	72.41
(9) IR 301T	301T	103475	135.04
(10) IR 301D	301D	103491	110.68
(11) UHF 4922	4922	102647	146.45
(12) UHF 501T	501T	103680	286.11

10. Petitioner's "DISH Network Residential Digital Home Plan Customer Lease Agreement" is a complex consumer contract, in fine print, which is not easily deciphered or understood. For example, the agreement lists 14 different equipment lease packages which include 4 upgrade options. There are six programing packages, with each particular programming package having varying monthly fees depending on the number of receivers. For example the America's Top 50 package costs $29.99/month for one receiver, $34.99/month for two receivers and $39.99/month for three receivers. This pricing structure is explained later in the agreement in a section labeled "Total Payments," where it is noted that "for each additional receiver add a total payment of $60.00" for the 12-month agreement, which equates to an extra

[2] These amounts vary to some degree for the same type of part, which may relate to the variation in the date when the particular item is placed in service. For example, an item with the part description of RCVR IR, which appears on a line later in the sample reviewed, shows a capitalized cost of $110.68 instead of $126.00 as shown in the table.

$5.00 per month for each added receiver. In the words of petitioner's senior accounting manager, this $5.00 charge for each receiver (and related parts and equipment) is "baked" into the monthly charge for a programming package. The agreement, in a section labeled "equipment return," requires the return of the parts and equipment at issue within 15 days if the agreement is terminated:

> If you elect to terminate this Agreement or not subscribe . . . , disconnect your Programming, or your service is otherwise disconnected for any reason at any time, you must return all Receivers, Smart Cards, remote controls, LNBFs and switches in good operating condition, normal wear and tear excepted, to DISH Network within 15 days of such event.

Earlier in the agreement in a section labeled Notice to the Consumer, a similar requirement concerning the return of equipment is noted:

> All receivers, smart cards, remote controls, LNBFs and switches must be returned to DISH Network within 15 days of downgrading below minimum programming, expiration or termination of this lease. If you fail to do so, you agree to pay the applicable equipment charges (minimum of $100 per receiver and $50 per LNBF).

A close review of the customer agreement *does not* disclose the use of the terminology "rent" or "rental" or "lease" with regard to the $5.00 monthly charge noted above. Further, a close review of the two invoices or billing statements introduced into evidence by petitioner discloses that the terminology "rent" or "lease" is not utilized. Rather, the invoice with a payment due date of December 22, 2001 references a "$10.00 equipment fee."

11. Petitioner submitted five proposed findings of fact. Proposed finding of fact 4 is accepted and incorporated into this determination. Proposed finding of fact 1 is accepted to the extent that it suggests that in May 2000, petitioner built into its monthly programming charge to customers $5 per month for each receiver and that this $5 per month also covered the LNBF, switch, and remote controls for the receivers. In addition, it is accepted to the extent that it states

that petitioner did not on its monthly bill to a customer itemize a separate charge for the actual satellite dish or specifically allocate its monthly programming fee to the satellite dish. However, it is rejected to the extent that it presumes that $5 per month was a *rental* or *leasing* fee, which is an ultimate finding of fact which is properly addressed in the Conclusions of Law. It is also rejected to the extent that it states that petitioner did not "charge" its customers for the actual satellite dish since the monthly fee for programming, based upon ordinary business practice and necessity, would have to take into consideration the cost to petitioner of providing a satellite dish to a customer. Proposed finding of fact 2 is accepted to the extent that it states how petitioner calculated the $5 per month charge for each receiver provided to a customer, but is rejected to the extent that it refers to the $5 per month as a *lease* charge, which is an ultimate finding of fact better addressed in the Conclusions of Law. Proposed finding of fact 3 is rejected because whether or not petitioner provided receivers and related parts and equipment as part of a "lease" charge is an ultimate finding of fact which is properly addressed in the Conclusions of Law. Proposed finding of fact 5 is accepted to the extent that it states that receipts from sales of equipment were recorded by petitioner in a separate revenue account, but is rejected to the extent that it presumes that the portion of the monthly programming fee allocable to its provision of receivers and related parts and equipment represented "lease" charges or "rental revenue," which is properly addressed in the Conclusions of Law as an ultimate finding of fact.

12. The parties entered into a stipulation of facts dated November 27, 2007, relevant portions of which have been incorporated into this determination.

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioner contends that it purchased the equipment at issue "in order to lease it to customers." Petitioner argues that its *billing methods* support its contention that it rented the

equipment to its customers. It rejects the Division's reliance on memorandums issued by the Taxpayer Services Bureau as well as an advisory opinion which concluded that "cable television equipment is incidental to providing cable television services even if a cable company separately charges its customers for equipment." According to petitioner, "If the equipment was *inconsequential*, Petitioner would not have bothered selling the equipment to customers or entering into lease agreements for the equipment." (Emphasis added.) Petitioner contends that "[t]he equipment was equal in importance to the services, and Petitioner sought to at least recover the cost of the equipment through its lease charges." Petitioner claims it "did not supply the equipment as part of the television programming services." Further, permitting the Division to impose tax on petitioner's purchases of equipment results in an "unjust enrichment," since petitioner had collected and paid over sales tax it collected from its own customers on the portion of the monthly fee which it treated as for the rental of the equipment.

14. The Division, citing ***Matter of Baker Protective Service, Inc.*** (Tax Appeals Tribunal, November 1, 2001), argues that petitioner is not renting equipment to its customers since it retains ownership and title of the equipment at all times, and the equipment is an "integral" or "component" part of the satellite television service provided to petitioner's customers. According to the Division, the equipment is of no use to customers if they do not receive satellite television programming services from petitioner since the equipment cannot be used to receive service from another provider. Further, tangible personal property must be purchased *exclusively* for the purpose of resale in order to qualify for the resale exclusion, which the Division maintains was not the case here. Rather, the parts and equipment were merely "incidental" to the provision of the satellite television service. In short, the Division maintains that petitioner was required to pay sales and use tax on the dishes, receivers, remotes and any other equipment and parts it

purchased, which it then used in order to provide the nontaxable service to its customers of satellite television programming.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) provides for the imposition of sales tax upon the "receipts from every *retail sale of tangible personal property*, except as otherwise provided in this article." (Emphasis added.) The parts and equipment purchased by petitioner from its manufacturers, as detailed in Finding of Fact 3, clearly constitute "tangible personal property," which is defined at Tax Law § 1101(b)(6) as "[c]orporeal personal property of any nature." However, before the sales of the parts and equipment to petitioner by the companies which manufactured the items, according to petitioner's own design and engineering, may be treated as subject to sales tax, it must also be determined that such sales constituted "retail sales."

B. A "retail sale" is defined by statute pursuant to Tax Law § 1101(b)(4)(i)(A) as a "sale of tangible personal property *to any person for any purpose*, other than (A) for resale as such or as a physical component part of tangible personal property . . . ." (Emphasis added.) Clearly, this statutory definition is much more *expansive* than the average layperson's understanding of "retail sales." Further, it is concluded that the parts and equipment purchased by petitioner are *not* used by it in a manner that they become "physical component parts of tangible personal property" (***see Matter of Automatique, Inc.***, Tax Appeals Tribunal, March 4, 1993). Rather, they are utilized by petitioner so it may provide the *service* of satellite television programming to its Dish Network customers. Consequently, the analysis turns to whether petitioner purchased the parts and equipment from its suppliers for the purpose of "resale as such."

C. Tax Law § 1101(b)(5) provides the following expansive statutory definition of "sale, selling or purchase," which encompasses the *rental* of tangible personal property:

> Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

This statutory definition is also applicable for purposes of defining the terminology of resale or reselling (***see Matter of Sodexho USA, Inc.***, Tax Appeals Tribunal, November 21, 2007***; see also Matter of Loper***, Tax Appeals Tribunal, September 7, 1990).

D. The Division has adopted regulations at 20 NYCRR 526.7(c) which characterizes a rental or a lease as follows:

> The terms *rental, lease and license to use* refer to all transactions in which there is a transfer for a consideration of possession of tangible personal property without a transfer of title to the property. Whether a transaction is a "sale" or a "rental, lease or license to use" shall be determined in accordance with the provisions of the agreement.

Based upon this regulatory definition of rental, the Division's argument that petitioner is not renting equipment "since it retains ownership and title of the equipment at all times" is rejected since only "transfer of possession" for a consideration is required to find a rental transaction. Here, petitioner clearly transferred the parts and equipment to its customers for a consideration. Although, as noted in Finding of Fact 10, petitioner's customer agreements and invoices do not explicitly use the terminology of "rent" or "rental" or "lease" with regard to the $5.00 per receiver charge, petitioner has established that the customer agreements do impose this charge of $5.00 per month for each receiver and related parts and equipment provided to a customer.

E. The analysis may not end here, however, since it is also required that the parts and equipment at issue be purchased by petitioner from its manufacturers for resale "as such." A careful review of the record leads to the conclusion that petitioner did not purchase the parts and

equipment at issue for the purpose of resale to its Dish Network customers "as such." Rather, petitioner furnishes such parts and equipment to its customers for the purpose of providing satellite television programming, and the provision of such items is merely *incidental* to the provision of satellite television programming (***see Matter of Baker Protective Services, Inc.***, Tax Appeals Tribunal, November 1, 2001 [alarm equipment furnished to customers, who were provided with burglar alarm monitoring services, was not being resold and therefore the taxpayer's own purchases of the equipment were subject to sales tax]). In ***Baker Protective Services***, the alarm equipment was not being sold "as such" to the alarm company's customers, but rather was furnished as part of a central station alarm monitoring service: "petitioner could not provide its . . . service unless it first installed alarm equipment." Similarly, EchoStar Satellite Corp. could not provide its satellite television programming unless it also furnished the equipment and parts at issue. Moreover, as noted in Finding of Fact 3, the parts and equipment at issue are of *no use* to petitioner's customers if they do not receive satellite television programming services from petitioner since the parts and equipment cannot be used to receive service from another provider. Further, petitioner repossesses and refurbishes the parts and equipment at issue for further use in subsequent programming contracts so that its purchases of the parts and equipment is not exclusively for resale (***cf. Matter of Micheli v. State Tax Commission,*** 109 AD2d 957, 486 NYS2d 448 [1985]; ***cf. Matter of Loper***).

F. Petitioner's attempt to distinguish ***Baker Protective Services*** on the basis that in ***Baker*** "invoices . . . did not indicate a separate charge for the alarm equipment provided" is rejected. Such fact provided only one factor for the Tribunal's decision in ***Baker***, which emphasized the more critical point that "petitioner could not provide its central station alarm monitoring service unless it first installed alarm equipment" and that, "[t]he alarm equipment . . . is incidental to

provision of that service." Here, similarly, petitioner could not provide its satellite television programming unless it furnished the items at issue. Notably, when the agreement to provide satellite television programming comes to an end, petitioner has the contractual right to recover the parts and equipment used to provide such service. The agreement does *not* provide that when the customer's *rental* of parts and equipment ends, petitioner has the contractual right to recover the parts and equipment. In short, the provision of the parts and equipment is simply incidental to petitioner's provision of satellite television programming. Although petitioner is correct that the parts and equipment are not *inconsequential*, they are, nonetheless, *incidental.*

G. Petitioner's argument is also reminiscent of the contention made by a hotel operator that its purchases of guest room furniture (e.g., beds, table, lamps, etc.), furnishings (e.g., towels, sheets, etc.) and items supplied for use or consumption by guests (e.g., soap, stationery) were exempt from sales tax because it was "reselling" such property to its guests by providing a license to use or possession of such items to its guests (***see Matter of Helmsley Enterprises, Inc.***, Tax Appeals Tribunal, June 20, 1991, ***confirmed*** 187 AD2d 64, 592 NYS2d 851 [1993], ***lv denied*** 81 NY2d 710, 600 NYS2d 197 [1993]). In confirming the Tribunal's decision, the Appellate Division emphasized the reasonableness of the Tribunal's conclusion that:

> [A] hotel such as petitioner's is not in the business of buying and then reselling the use of guest room furniture, furnishings and guest consumables. Rather, it is in the business of providing a service, the overnight accommodation of its patrons, 'and the items at issue were furnished to the hotel's guests as part of its services' (***Matter of Helmsley Ent. v. Tax Appeals Tribunal***, 187 AD2d 64, 851 NYS2d 851, 853 [1993], ***lv denied*** 81 NY2d 710, 600 NYS2d 197 [1993]).

Similarly, petitioner is in the business of providing satellite television programming, and the parts and equipment at issue were furnished as part and parcel of this service (***cf. Transervice Lease Corp. v. Tax Appeals Tribunal***, 214 AD2d 775, 777, 624 NYS2d 661, 663 [1995]

["where the substance of a transaction brings it within a tax statute it will be taxable notwithstanding its form"]).

H. As noted in Finding of Fact 6, the equities do favor petitioner's position since it collected and remitted sales tax in an amount slightly over $2,000,000.00 on its rental and sales of parts and equipment provided to its Dish Network customers, an amount greater than what has been asserted due of $1,776,165.18. Unfortunately, pursuant to Tax Law § 1139(a), "[n]o refund *or credit* shall be made to any person of tax which he collected from a customer until he shall first establish . . . that he has repaid such tax to the customer." (Emphasis added.) Further, administrative law judges lack equitable powers (***Matter of Eisenstein***, Tax Appeals Tribunal, March 27, 2003).

I. As a final note, the Division's emphasis on the point that petitioner's provision of satellite television programming was a *nontaxable* service, in order to justify the imposition of sales tax on petitioner's purchases of parts and equipment used to provide such *nontaxable* service, is irrelevant. Even if such service were taxable, "multiple taxation" is not "inherently improper" (***see Matter of XO New York Inc. v. Commissioner***, 51 AD3d 1154, 856 NYS2d 310 [2008]).

J. The petition of EchoStar Satellite Corp. is denied, and the Notice of Determination dated February 28, 2005 is sustained.

DATED: Troy, New York
August 28, 2008

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE