

# Pace Law Review

---

Volume 7  
Issue 1 *Fall 1986*  
*Cable Television and Communications Issue*

---

Article 2

September 1986

## Taxation of Cable Television Systems in New York - A Survey of Tax Liability of Operating Cable Television Systems under State and Municipal Law in New York

Joshua Noah Koenig

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>

---

### Recommended Citation

Joshua Noah Koenig, *Taxation of Cable Television Systems in New York - A Survey of Tax Liability of Operating Cable Television Systems under State and Municipal Law in New York*, 7 Pace L. Rev. 27 (1986)

DOI: <https://doi.org/10.58948/2331-3528.1506>

Available at: <https://digitalcommons.pace.edu/plr/vol7/iss1/2>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

# **Taxation of Cable Television Systems in New York State**

## **A Survey of Tax Liability of Operating Cable Television Systems Under State and Municipal Law in New York State**

**Joshua Noah Koenig†**

### **TABLE OF CONTENTS**

I. Introduction .....	28
II. Background: The Nature of Cable Television ...	29
III. Sales and Use Taxes .....	33
A. Cable Television Service is not Taxable ....	34
B. Cable Television is not Telephony .....	36
C. Cable Television Equipment Sales are Taxable .....	40
D. Installation of Cable Television Equipment is Taxable .....	43
E. The Sale of a Cable Television System is Taxable .....	47
IV. Corporate Earnings Taxes .....	49
A. Articles 9 and 9-A of the Tax Law .....	49
B. Cable Television is not Taxed as a Utility ..	51
C. Is Cable Television Transportation or Transmission? .....	53
D. Cable Television is Subject to the M.T.A. Assessment .....	59
V. Real Property Taxes .....	60

---

† Joshua Noah Koenig is Vice President and Counsel of the New York Cable Television Association in Albany, New York. He is a graduate of Cornell University and Albany Law School of Union University, and a member of the bar of the courts of New York since 1973. Formerly, he served on the staffs of the New York Senate (Excise Committee), the Federal Communications Commission in Washington, D.C., and the Commission on Cable Television of the State of New York, in Albany.

Copyright © Joshua Noah Koenig All Rights Reserved

A. Cable Television Lines are not Real Property	61
B. Special Franchise Tax	70
VI. Regulatory and Franchise Fees	75
VII. Constitutional Limits on the Taxation of Cable Television	78

## I. Introduction

The operation of a cable television system and the business of providing cable television service to subscribing customers in the general public are complex and confusing challenges in any jurisdiction, but even more so in the State of New York. An astounding variety of governmental regulations — sometimes conflicting — makes the simplest business decisions unusually complicated. In New York, these challenges exceed those presented in *most*, and perhaps *all*, other states because of the uniquely thorough involvement of both state and municipal government entities in the authorization and oversight of cable television operations.

Similarly, the state and local tax liability issues faced by cable television operators in New York are probably more complex than those faced by cable television operators in other states, or even those faced by most other business enterprises in this state. This Article attempts to provide a summary of these tax issues and their treatment.

This summary will not attempt to review in any detail the regulatory issues affecting cable television operators in New York, except as these issues have direct impact on tax liability; nor will it delve into the complexities of the general tax laws as they apply to all business entities without special or particular impact on cable television. The application of federal tax laws to cable television will also be substantially ignored here.

This Article will be directed toward those tax (and tax-like) liabilities which arise from state and local governments in New York, particularly those which affect cable television operations. The focus will be on the business of cable television service delivery to the public, and will avoid analysis of the equally complex tax issues affecting video production and distribution companies which serve the cable television industry. The following tax issues will be addressed:

Sales and Use Taxes;

Corporate Earnings Taxes;  
Real Property Taxes;  
Regulatory and Franchise Fees; and

Constitutional Limits on the Taxation of Cable Television.

A review of cable-related tax issues should make clear that many of these taxes impact each other; issues which arise within each tax category are by no means limited in effect to that particular subject or form of potential liability.

## II. Background: The Nature of Cable Television

A brief review of the nature of cable television service and the conduct of the cable television business is warranted to appreciate the application of tax treatment as discussed herein.

In its most traditional form, cable television was described as "community antenna television" or "CATV."<sup>1</sup> In fact, the business consisted essentially of providing what was in effect a long antenna line for the reception of the signals of more or less local broadcast television stations. This service was provided predominantly in rural and somewhat remote areas. Understandably, it was thought of as rather akin to a "utility" service, and substantially closer to "telephone" service than any other available analog or precedent.<sup>2</sup> Although the lines for such transmissions were of a new and distinct form in that they used "coaxial" structure with broad frequency capability, and were separate from any preexisting telephone transmission lines, the operators of cable systems<sup>3</sup> nonetheless needed to obtain street usage permits from local governments. These permits were and are still generally described as "franchises" rather than "licenses." Moreover, in almost every case the cable television operators needed to negotiate voluntary pole attachment agreements with the preexisting telephone and electric utilities. Fee payments were negotiated with both the local governments and with the pole-owning utilities.<sup>4</sup>

---

1. This was the case from approximately 1950 until the late 1960's.

2. 1952 OP. N.Y. ATT'Y GEN. 166; *Harper v. City of Kingston*, 17 Misc. 2d 627, 188 N.Y.S.2d 577 (Sup. Ct. Albany County 1959); *Staminski v. Romeo*, 62 Misc. 2d 1051, 310 N.Y.S.2d 169 (Sup. Ct. Suffolk County 1970).

3. Cable operators included independent commercial entrepreneurs or in some cases local customer cooperatives.

4. The fee negotiations for street usage rights were often in the range of a few per-

By the late 1960's, the nature of cable television services and the cable television business began to change substantially. Larger and more established commercial companies became involved in the ownership and operation of cable television systems. Cable television systems were built in less rural communities, including much more populated suburban and even urban municipalities where television signal reception was not as significant a factor in service appeal. The services provided to customers expanded beyond mere antenna reception to include an increasing variety of other video products. The business became more lucrative and more pervasive. Local governments became more interested in exploiting their street usage permits for more substantial remuneration.<sup>5</sup> Local utilities became increasingly aggressive in seeking higher payments for use of their pole plant. Television broadcasters and video program originators and distributors who market their products to and through the national structure of local and networked television stations became increasingly concerned with the growth of this new phenomenon of redistribution. By 1966, the Federal Communications Commission had decided to assert federal jurisdiction over this new outgrowth of "interstate commerce."<sup>6</sup> This jurisdiction led to a much fuller program of regulation in 1973.<sup>7</sup> By that time, several states, including New York, had decided to impose state-level regulatory control over cable television systems.<sup>8</sup>

Among the areas subject to express limitation by both federal and state law were the fees charged by local municipalities for street usage by cable television systems<sup>9</sup> and the fees charged

---

centage points of the resulting subscriber revenues. On the other hand, the fee negotiations with the pole-owning utilities usually were in the neighborhood of about one dollar per pole per year because all of the pole attachment expenses were also borne by the cable television company. This pole rental fee essentially represented a welcome windfall to the utility.

5. Such remuneration included a variety of forms of payment and in-kind commitments as well as service content commitments.

6. CATV, 2 F.C.C.2d 725, 728-34 (1966).

7. Cable Television Report and Order, 36 F.C.C.2d 143, *recon.* 36 F.C.C.2d 326 (1972). These regulations were challenged and upheld in *ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975).

8. N.Y. EXEC. LAW art. 28 (McKinney 1982 & Supp. 1986); *See also* MASS. GEN. LAWS ANN. ch. 166A (West 1976 & Supp. 1985).

9. The FCC deleted its rules concerning franchise fee limits, which had been embodied in 47 C.F.R. § 76.31, in deference to a 1984 statutory codification of a similar fee

by utilities for use of their poles.<sup>10</sup> Although the prices charged to cable television subscribers for their service were also subjected to state and local oversight,<sup>11</sup> this form of regulation has been substantially attenuated over the years and will effectively disappear by the end of 1986.<sup>12</sup> In 1984, the United States Congress confirmed the preemptive federal oversight of cable television operations as well as a continuing local "franchising" role.<sup>13</sup> Both the federal and state limitations on municipal franchise fees and utility pole rental charges continue to this day.<sup>14</sup>

Over the last decade, the nature of cable television services has continued to expand to include a broad national network of programming delivered by use of space satellites and a new variety of local transmission functions. Cable systems now distribute specialized local transmissions for particular customers — often under local franchise requirements — which may include "public interest" programs by community groups or local government agencies, or could include somewhat more limited deliveries for commercial program or content distributors.<sup>15</sup> In some parts of the country, cable television systems have been used to provide home fire and intrusion alarm services. Manhattan Cable Television Company, Inc., operating in New York City, has for some years provided essentially private transmissions for commercial

---

limit at 47 U.S.C. § 542. See Report and Order, Implementation of the Cable Communications Policy Act of 1984, 104 F.C.C.2d 386, 388 (1986). See also N.Y. EXEC. LAW art. 28, § 818 (McKinney 1982).

10. Communications Act of 1934, 47 U.S.C. § 224 (1982 & Supp. III 1985); N.Y. PUB. SERV. LAW § 119-a (McKinney 1955 & Supp. 1986).

11. N.Y. EXEC. LAW art. 28, § 825 (McKinney 1982 & Supp. 1986).

12. Cable Communications Policy Act of 1984 § 623, 47 U.S.C. § 543 (Supp. III 1985).

13. *Id.*

14. See 47 U.S.C. § 542 (Supp. III 1985); N.Y. EXEC. LAW art. 28, § 818 (McKinney 1982) (limiting local franchise fees); 47 U.S.C. § 224 (1982 & Supp. III 1985); N.Y. PUB. SERV. LAW § 119-a (McKinney Supp. 1986) (regulating utility pole attachment rates for cable TV lines).

15. 47 U.S.C. § 532 (Supp. III 1985) requires that cable television systems with substantial channel capacity (over 36 activated channels) rent some of this channel space to unrelated programmers for commercial use. This is often referred to as "leased access" program distribution. In addition, some cable television systems distribute one or more informational program services focused on a narrow subject of interest, such as stock market reports, which are produced by unrelated commercial "publishers," but may be made available to all current cable television system subscribers on a special option basis.

users on an experimental basis.<sup>16</sup> Other cable television systems have been asked to consider similar functions. The regulatory disputes arising from these less-traditional functions,<sup>17</sup> prompted by new competitive concerns on the part of telecommunications utilities, have added much confusion to the recent analysis of state and local treatment of cable television.<sup>18</sup> Naturally, this has significant implications for tax policy.

Despite the changing nature of cable television services, the basic elements of cable television system operations have remained essentially stable. In addition to a widely located and costly distribution plant, consisting of wires and electronic amplification and distribution hardware, all cable television systems maintain a costly signal origination center called a "headend."<sup>19</sup> The distribution plant is located to a substantial extent, but not exclusively, on public streets and roads, but often much of it can be found placed on private premises. The "headend" facilities are almost always located on private property, either owned or rented by the cable television company. In addition to the "trunk"<sup>20</sup> and "feeder"<sup>21</sup> lines erected throughout the distribution plant, the homes of individual subscribers are served by smaller "drop"<sup>22</sup> cables which eventually enter the

---

16. Manhattan Cable argued before the State Public Service Commission that this service was provided on a temporary basis to explore the functional capabilities of its facilities. It limited such service offerings to only a few selected customers. However, it recently received a certificate of public convenience and necessity from the State Public Service Commission which will authorize these operations on a "common carrier" basis under filed tariff terms.

17. See Proceeding on Motion of the Commission as to Private Line Service provided by Manhattan Cable TV, and the Petition of Manhattan Cable Television, Inc. for a certificate of public convenience and necessity to provide point-to-point data transmission services, Case 27091, and the Order Issuing Certificate of Public Convenience and Necessity and Approving Related Waivers, August 29, 1986 (also in Case 27091).

18. Note, the two-year Inquiry conducted by the State's Public Service Commission into "Bypass" services (Case 28710).

19. This generally includes one or more antenna towers, attached radio-frequency or microwave antennas, special antenna dishes for space satellite reception, and indoor racks of electronic receivers, amplifiers and channel distribution hardware.

20. "Trunk" lines are the transmission main lines designed to bring the signals out to local distribution areas. These are not used for direct connections to homes of subscribers.

21. "Feeder" lines are the local branch lines which take the signal from the "trunk" lines to the vicinity of subscriber homes.

22. "Drop" lines are generally smaller than "trunk" or "feeder" lines, and carry the signals from "feeder" lines to the subscriber's home or television set.

subscriber's residence and connect to regular television sets. In earlier years, when many cable television systems offered no more than twelve channels of service, these "drop" lines could be connected directly to the antenna leads on the back of a subscriber's television set. More recently, however, with the provision of much broader service packages<sup>23</sup> and the need to scramble or otherwise secure the distributed video products, cable television systems now generally must install some additional electronic hardware in the subscriber's home to "convert" and "decode" the delivered channels. These new boxes have also provided interesting challenges for the application of the tax laws.

### III. Sales and Use Taxes

Sales taxes and taxes on "compensating use"<sup>24</sup> are governed by Article 28 of the Tax Law.<sup>25</sup> These taxes are intended to be imposed on a one-time only basis, unlike the recurring taxation of real property value. For this reason alone, cable television operators may prefer to have certain property subject to this form of liability rather than allowing the same property to become subject to the recurring real property tax assessments.

In New York, the sales tax is imposed and enforced by the state government in substantial part, and much of its revenue is directed to the state's general funds. The state imposes a general tax rate of four percent on the sale or use of taxable property and services.<sup>26</sup> An additional tax rate of one quarter of one percent is imposed in the Metropolitan Commuter Transportation District.<sup>27</sup> However, local municipalities and other taxing authorities, such as school districts in some circumstances, are authorized to impose their own localized taxes upon the same

---

23. For technical reasons these cannot be transmitted on the UHF band.

24. A compensating use tax is imposed upon goods and services ordinarily taxable under the sales tax but which escape such taxation due to reasons such as movement in interstate commerce or removal from inventory for self-use. The compensating use tax is imposed at the same rate as the sales tax.

25. N.Y. Tax Law §§ 1101-48 (McKinney 1975 & Supp. 1986).

26. *Id.* at §§ 1105, 1110.

27. *Id.* at § 1109. The Metropolitan Commuter Transportation District consists of the City of New York and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester. N.Y. PUB. AUTH. LAW § 1262 (McKinney 1982).

property subject to the state's sales tax.<sup>28</sup> These local sales taxes are optional with local governments and vary; they amount to an additional one to four and one-quarter percent in many of the counties throughout the state.

As a general premise, all sales and rentals of tangible personal property are subject to the sales tax, unless they are expressly exempted. By contrast, the sales of services are not taxable, unless they have been expressly made subject to the tax.<sup>29</sup> The equipment, facilities and services of cable television systems have not been expressly addressed in these statutory provisions. As a result, the sale or rental of cable television equipment, if describable as "tangible personal property," is considered subject to the sales tax, but the sale of cable television service to the public is not. These conclusions were not as easy to reach as they might seem and, naturally, they do not resolve all of the disputes which can arise within their given premises.

#### A. *Cable Television Service is not Taxable.*

The most significant case to address this subject was a decision by the Appellate Division in the Third Department in 1977 in *New York State Cable Television Association v. State Tax Commission*.<sup>30</sup> This case arose from an erroneous policy change by the Sales Tax Bureau of the State's Department of Taxation and Finance. For many years cable television operators assumed — rightly as it turned out — that the provision of cable television service to subscribing customers was not subject to the sales tax. The current sales tax provisions were enacted in 1965.<sup>31</sup> That year the New York State Cable Television Association sought a clarification of the applicability of the sales tax to cable television service sales. The Department of Taxation and Finance issued a letter ruling that the tax on services imposed by section 1105(b),<sup>32</sup> and related municipal sales taxes, were not applicable to cable television service.<sup>33</sup> Notwithstanding this es-

---

28. N.Y. TAX LAW §§ 1201-63 (McKinney 1975 & Supp. 1986).

29. *Id.* at § 1105.

30. 59 A.D.2d 81, 397 N.Y.S.2d 205 (3d Dep't 1977).

31. Ch. 93 [1965] N.Y. Laws 649.

32. N.Y. TAX LAW § 1105(b) (McKinney 1975).

33. Note also the Opinion of Counsel of the Dep't of Taxation and Finance, March 29, 1973, unreported.

tablished policy, in 1976 the Department's Deputy Commissioner and Counsel determined that cable television systems were "engaged in the activities of telephony and telegraphy."<sup>34</sup> Under section 1105(b) receipts from the sale of "telephony and telegraphy and telephone and telegraph service" are subject to tax.

Although the Department of Taxation and Finance did not make a claim for sales taxes due prior to 1976, it did insist that cable television companies be responsible for the collection of such taxes from their subscribers starting in July of that year. The Cable Television Association challenged with an Article 78<sup>35</sup> proceeding in state supreme court.<sup>36</sup> After a rather careful analysis of the nature of cable television operations, Justice John T. Casey, sitting in Special Term, Albany County, ruled that the recent policy reversal of the Department was in error and unsupported by legislative direction.<sup>37</sup>

The Tax Commission appealed to the Appellate Division, Third Department, which affirmed Justice Casey's ruling.<sup>38</sup> The appellate division took note that

this is not an ordinary case of determining whether or not the construction given statutes by the agency responsible for its administration should be upheld if rational, since here we are faced with a situation where the administrative agency has completely reversed its position after almost 11 years of unchallenged interpretation.<sup>39</sup>

The appellate division in *New York State Cable* confirmed that "the failure to tax such transactions for such a lengthy period of time 'should create a presumption in favor of the taxpayer which

---

34. Op. of Counsel of the Dep't of Taxation & Fin. [1971-1979 N.Y. New Matters Transfer Binder] St. Tax Rep. (CCH) ¶ 99-9872 (April 6, 1976), subsequently confirmed by formal action of the Commission.

35. N.Y. Civ. PRAC. L. & R., §§ 7801-06 (McKinney 1986).

36. A companion challenge was brought on behalf of affected cable TV subscribers, *Miller v. Tully*, 88 Misc. 2d 601, 605, 388 N.Y.S.2d 560, 562 (Sup. Ct. Albany County 1976), merged with the Cable Association's suit but dismissed as procedurally inappropriate.

37. *New York State Cable Television Ass'n v. State Tax Comm'n*, 88 Misc. 2d 601, 388 N.Y.S.2d 560 (Sup. Ct. Albany County 1976).

38. *New York State Cable Television Ass'n v. State Tax Comm'n*, 59 A.D.2d 81, 397 N.Y.S.2d 205 (3d Dep't 1977).

39. *Id.* at 83, 397 N.Y.S.2d at 206.

can only be rebutted by clear manifestation of legislative intent to the contrary.’”<sup>40</sup> On that issue, the appellate division expressed agreement with the lower court that no legislative intention to tax cable service was evident. Both courts cited and relied on *Holmes Electric Protective Co. v. McGoldrick*,<sup>41</sup> “[a] tax law should be interpreted as the ordinary person reading it would interpret it.”<sup>42</sup>

Following this decision the Cable Television Association negotiated with the Tax Department to develop a program for the rebate of tax revenues already collected from many thousands of cable television subscribers during the intervening year. Although a claims mechanism was established, undoubtedly much of this revenue was not returned.

### B. *Cable Television is not Telephony*

The underlying conclusion of the *New York State Cable Television Association* decision is that cable television is not telephone or telegraph service.<sup>43</sup> This premise has dominated much of the debate regarding tax policy toward cable television services and equipment in essentially every area of state tax analysis, including corporate franchise tax and real property tax considerations. Nonetheless, the question of whether cable television is a form of “telephone” service presented itself very legitimately, and even now continues to generate real debate.

As early as 1952, the State’s Attorney General had issued an Opinion<sup>44</sup> which directed the Department of State to incorporate cable television companies under Article 3 (“Telegraph and Telephone Corporations”) of the Transportation Corporations Law,<sup>45</sup> a successor in effect to the former Telegraph Act.<sup>46</sup> In 1959, this treatment was considered determinative in a dispute over whether the normal procedures for awarding street use

---

40. *Id.* (quoting *Consolidated Edison Co. v. State Tax Comm’n*, 24 N.Y.2d 114, 119, 247 N.E.2d 120, 123, 299 N.Y.S.2d 142, 146-47 (1969)).

41. 262 A.D. 514, 30 N.Y.S.2d 589 (1st Dep’t 1941), *aff’d without opinion*, 288 N.Y. 635, 42 N.E.2d 737 (1942).

42. *Id.* at 518, 30 N.Y.S.2d at 594.

43. 59 A.D.2d at 84, 397 N.Y.S.2d at 207.

44. 1952 OP. N.Y. ATT’Y GEN. 166.

45. N.Y. TRANSP. CORP. LAW art. 3 (McKinney 1943).

46. Ch. 265 [1848] N.Y. Laws 392.

franchises were necessary.<sup>47</sup> In 1970, in *Staminski v. Romeo*,<sup>48</sup> the state's supreme court found that CATV systems could be classified as "public utilities," at least in the broad sense of that term.<sup>49</sup> In *Staminski*, a local cable television company succeeded in convincing the court that it was entitled to claim the benefits of special treatment accorded to the structures of a "public utility" under local zoning ordinances. A detailed analysis of the then current law available relating to CATV or cable television led the court to conclude that "the law in this area is still in a state of development,"<sup>50</sup> but that the totality of factors, including an incorporation under the Transportation Corporations Law, led the court to afford the cable television company the benefit of "public utility" status.<sup>51</sup>

To this day cable television companies are still incorporated under the Transportation Corporations Law and claim the benefits of section 27 of that statute, which include authorizations to erect facilities and string lines and to exercise powers of condemnation as needed.<sup>52</sup>

Three major decisions considered by the appellate division in *New York State Cable Television Association* provide useful analogies. In *Holmes Electric Protective Co. v. McGoldrick*,<sup>53</sup> the City of New York attempted to impose sales tax liability

---

47. *Harper v. City of Kingston*, 17 Misc. 2d 627, 188 N.Y.S.2d 577 (Sup. Ct. Albany County 1959).

48. 62 Misc. 2d 1051, 310 N.Y.S.2d 169 (Sup. Ct. Suffolk County 1970).

49. *Id.* See also, N.Y. COMP. CODES R. & REGS. tit. 20, §§ 500.1-500.2 (1962).

50. 62 Misc. 2d at 1053, 310 N.Y.S.2d at 172.

51. See also *Petra Cablevision Corp. v. County of Suffolk*, 75 Misc. 2d 549, 348 N.Y.S.2d 679 (Sup. Ct. Suffolk County 1973) (The cable television company sought "utility" status to contest a local highway fee which had been imposed in an amount higher than that applicable to traditional utilities. The court held the fee improperly discriminatory without ruling on whether the cable television company was a "utility."); *Crawley v. New York Tel. Co.*, 80 Misc. 2d 570, 363 N.Y.S.2d 292 (Dist. Ct. Nassau County 1975) (cable television held to be a "public utility" in order to benefit from homeowner's easement to telephone company for shared use of utility poles); *Faulkner v. Kingston Cablevision, Inc.*, 53 A.D.2d 948, 386 N.Y.S.2d 358 (3d Dep't 1976); *Hoffman v. Capitol Cablevision Sys., Inc.*, 52 A.D.2d 313, 383 N.Y.S.2d 674 (3d Dep't 1976) (confirming that utility company easements are to be shared with cable television companies to the furthest extent possible when a cable television company has rented pole attachments from the utility).

52. No cases were found of any cable television company ever attempting to use such eminent domain rights.

53. 262 A.D. 514, 30 N.Y.S.2d 589 (1st Dep't 1941).

under the "telephone or telegraph" clause of section 1105(b) of the Tax Law upon a burglar alarm service which used electric signal lines that were at times leased from the local telephone company. The First Department determined that the key service involved was not telephony or telegraphy, or even communications.

The electric signals transmitted over petitioner's wires are only incidental to the ultimate contracted purpose between petitioner and its customers, namely, protection of the customer's premises from unauthorized entry. What the customer buys and pays for is not a telegraph service. That consists essentially in the mere transmission of communications, the service of the telegraph company being completed when the message has been transmitted. Petitioner's customers were purchasing and petitioner was selling what began when the electric signals were transmitted, namely, some form of protection of the customer's premises. . . . Petitioner's system cannot be used for the purpose of communications between the subscriber and the general public or persons other than the petitioner, or even between the subscriber and petitioner, except to the limited extent of the prearranged communication[s]. . . .<sup>54</sup>

The court in *McGoldrick* rejected arguments that an earlier case involving the same petitioner, *Holmes Electric Protective Co. v. Williams*,<sup>55</sup> was controlling. In the *Williams* case, it was held that Holmes Electric was entitled to enjoy some of the benefits of companies incorporated under the Telegraph Act<sup>56</sup> because it had itself been incorporated under that statute. But the court in the *McGoldrick* case found that such incorporation was not determinative. "The issue before us is whether petitioner sold telegraphic service within the contemplation of the tax laws involved. . . . The true tests for the purpose of the taxing statute are the actual transactions engaged in and taxed during the taxing period."<sup>57</sup> The Third Department in *New York State Cable Television Association* found this analysis clearly applicable to distinguishing cable television from "telephony or telegraphy."<sup>58</sup>

---

54. *Id.* at 517, 30 N.Y.S.2d at 592-93.

55. 228 N.Y. 407, 127 N.E. 315 (1920).

56. Ch. 265 [1848] N.Y. Laws 392.

57. 262 A.D. at 518, 30 N.Y.S.2d at 593-94.

58. 59 A.D.2d at 84, 397 N.Y.S.2d at 207.

In *New York Quotation Co. v. Bragalini*,<sup>59</sup> the petitioner provided its customers with a stock market transaction reporting service, also by means of electric signals over wire. The tax in dispute arose under section 186-a of the Tax Law, a special additional corporate franchise tax on certain utilities,<sup>60</sup> rather than under the sales tax provisions, but the issue of "utility" or "telephone or telegraph" status was very similar. Here, the Third Department upheld the taxing authority's determination that the service was "telephone or telegraph," distinguishing *McGoldrick*. *New York Quotation* was found to be in the telegraph business in a way not demonstrated in *McGoldrick*, and the fact that *New York Quotation* was incorporated under the Telegraph Act was held to be relevant to its tax determination.

In *Quotron Systems, Inc. v. Gallman*,<sup>61</sup> the state's highest court reached a different conclusion when reviewing a similar dispute involving tax liability under section 186-a for a stock market reporting service. Here, however, the court found facts to distinguish the case from *New York Quotation* and to allow a closer application of the policy expressed in *McGoldrick*. The opinion of Judge Jasen noted that Quotron not only stored and transmitted stock market data, but also made available information concerning past performance of each security as well as other relevant information culled from financial publications. The court ruled that Quotron was not a "telephone or telegraph" service and not a "utility" for purposes of tax treatment under section 186-a. Although attempting to distinguish its ruling from *New York Quotation*, the Court of Appeals noted that if a conflict of policies was evident, then the analysis of *Quotron* should be controlling.

In its decision in *New York State Cable Television Association*, the Third Department noted this direction and found that *Quotron* applied to the dispute before it, even though the tax at issue arose under section 1105(b) and even though the disputed service was cable television. "In our view, this holding mandates the conclusion that in the present case it cannot be said that cable television companies are engaged in the sale of telephone

---

59. 7 A.D.2d 586, 184 N.Y.S.2d 924 (3d Dep't 1959).

60. See *infra* Part IV B of this Article.

61. 39 N.Y.2d 428, 348 N.E.2d 604, 384 N.Y.S.2d 147 (1976).

or telegraph services.”<sup>62</sup>

The same conclusion was reached by the Court of Appeals in a dispute arising out of real property tax assessments in New York City.<sup>63</sup> There the court found that the definition of “real property” contained in the Real Property Tax Law<sup>64</sup> and, in particular, the reference to “telephone and telegraph lines” contained at subdivision (12)(d) of section 102<sup>65</sup> as a component of “real property” for taxing purposes, were not applicable to cable television facilities. Citing the decision in *New York State Cable Television Association*, the high court concluded, “[t]hese differences, as a matter of law, preclude taxation of petitioner’s equipment upon the theory that it is ‘telephone or telegraph’ equipment within the meaning of the statute.”<sup>66</sup> This decision is discussed further below.

### C. Cable Television Equipment Sales are Taxable

The dispute regarding the taxability of cable television service resulted in a series of changes to the regulations of the State Tax Commission and the Department of Taxation and Finance. Section 527.2 discussed the taxability of the sales of “utility and similar services,”<sup>67</sup> and at subdivision (d)(2) thereof clarified what could be included under “telephony and telegraphy.”<sup>68</sup> In 1976, this language was changed to reflect the position of the agency at that time that cable television services were taxable.<sup>69</sup> The court’s ruling in the *New York State Cable Television Association* case resulted in the invalidation of that reference. Eventually this regulation was modified again to reflect current policy, which it now contains:

(3) The term *telephony and telegraphy*, as used in this Subchapter, does not include: (i) cable television service, which is the service of receiving and amplifying programs broadcast by televi-

---

62. 59 A.D.2d at 84, 397 N.Y.S.2d at 207.

63. *Manhattan Cable TV Serv. v. Freyberg*, 49 N.Y.2d 868, 405 N.E.2d 178, 427 N.Y.S.2d 933 (1980).

64. N.Y. REAL PROP. TAX LAW § 102(12) (McKinney 1984).

65. *Id.* at (12)(d).

66. 49 N.Y.2d at 869, 405 N.E.2d at 179, 427 N.Y.S.2d at 934.

67. N.Y. COMP. CODES R. & REGS. tit. 20, § 527.2 (1976).

68. *Id.* at § 527.2(d)(2) (1979). This regulation was revised in 1980.

69. *Id.* See example 6 of regulation.

sion or radio stations or any other programs originated by a cable television company or by any other party, and distributing such programs by wire, cable, microwave or other similar means, whether such means are owned or leased, to persons who subscribe to such service.<sup>70</sup>

The change in taxation of cable television service had a significant effect on a related issue, the taxation of sales of tangible personal property used for such service. Under section 1105(a)<sup>71</sup> these sales are generally taxable, but section 1115<sup>72</sup> provides exemptions from this liability for certain property. Subdivision (a)(12) of section 1115 provides such an exemption for, among other things, equipment used in the provision of "telephone" or "telegraph" service.<sup>73</sup> Thus, a company engaged in "telephone" service need not pay such sales tax when it buys such equipment in order to provide that service.<sup>74</sup> This exemption makes sense intuitively for a number of reasons: the services provided ultimately are themselves taxed<sup>75</sup> and the same hardware is treated as real property for annual assessment.<sup>76</sup>

Prior to 1976, the Tax Commission presumably did not consider the telephone equipment exemption to be applicable to cable television. But, when the 1976 policy change attempted to tax cable television service as "telephone" service, the cable companies were given the related benefit of exemption from tax on the purchases of equipment.<sup>77</sup> Naturally, after the 1977 decision confirming that such cable television service was not taxable, the exemption from taxation on related equipment sales was

---

70. Section 527.2(d)(3)(i). This somewhat unwieldy definition of cable television seems to have been taken fairly directly from Executive Law section 812 which established the jurisdiction of the State's Commission on Cable Television. N.Y. EXEC. LAW art. 28, § 812 (McKinney 1982).

71. N.Y. TAX LAW § 1105(a) (McKinney 1975 & Supp. 1986).

72. *Id.* at § 1115.

73. Such equipment includes "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." *Id.* at § 1115(a)(12).

74. The regulations governing such exemptions are found at N.Y. COMP. CODES R. & REGS. tit. 20, § 528.13(f) (1985).

75. N.Y. TAX LAW § 1105(b) (McKinney 1975).

76. N.Y. REAL PROP. TAX LAW § 102(12)(d) (McKinney Supp. 1986).

77. The regulations at § 528.13(f) were amended to reflect this.

reexamined and removed.<sup>78</sup> Audit guidelines were prepared by the Audit Division's Technical Directives Section.<sup>79</sup>

An *Advisory Opinion* was issued in 1980 on the petition of Seneca Cable Television, Inc.,<sup>80</sup> which clarified that sales tax was applicable under section 1105(a) to sales of:

materials intended to be assembled or constructed, either by Petitioner's employees or by sub-contractors, so as to become part or the whole of buildings, head end, trunk distribution system, and test equipment used in a cable TV operation, and . . . tools, equipment, automotive equipment, furniture and fixtures used in a cable TV operation.<sup>81</sup>

This opinion also noted that none of the exemptions contained at sections 1115 or 1116<sup>82</sup> of the Tax Law could be applied to avoid such taxation.<sup>83</sup>

In October of 1980, the Technical Services Bureau<sup>84</sup> issued a comprehensive explanatory memorandum describing the purchases made by cable television "and other transmission service companies" which are subject to state and local sales and use tax.<sup>85</sup> This memorandum also identified some purchases not subject to taxation, including the cable television service itself, music services, and telephone or telegraph service "used by a cable television company in the collection or dissemination of news."<sup>86</sup> Among the purchases which are identified as subject to tax are most office and regular business equipment, television studio and related electronic equipment, almost all headend

---

78. The regulations at N.Y. COMP. CODES R. & REGS. tit. 20, § 528.13(f)(5) (1985) now make this clear.

79. The guidelines were prepared on May 23, 1979.

80. *Advisory Op.*, TSB-H-80(112)S (State Tax Comm'n, July 1, 1980).

81. *Id.*

82. Section 1115 of the Tax Law covers exemptions from sales and use taxes. N.Y. TAX LAW § 1115 (McKinney 1975 & Supp. 1986). Section 1116 covers exempt organizations. These exempt organizations include: state and federal agencies; international organizations (such as the U.N.); charitable corporations; veterans' organizations; and Indian Tribes. *Id.* at 1116.

83. TSB-H-80(112)S.

84. The Technical Services Bureau is a special subunit of the Division of Taxpayers Services of the state's Department of Taxation and Finance. This bureau is responsible for issuing the instructions and interpretations of the Department's laws and regulations.

85. TSB-M-80(6)S (State Tax Comm'n, Oct. 10, 1980).

86. *Id.* The exemption only applies if the charge for such services is a toll or mileage charge.

equipment, including the antenna tower and antennas,<sup>87</sup> and components of the distribution plant.

Even property such as headend structure,<sup>88</sup> headend internal wiring,<sup>89</sup> and headend lighting fixtures<sup>90</sup> which may be considered in the nature of real property, and which, in fact, may be assessed as such each year, was included. In this regard, one should keep in mind that the antenna tower and antennas themselves are often considered real property for local tax purposes, and this issue has recently taken on new importance with the proliferation of individually owned space satellite antenna dishes.<sup>91</sup>

#### *D. Installation of Cable Television Equipment is Taxable*

A number of labor costs are also identified by the 1980 memorandum as subject to taxation, including "[l]abor to install transmission cables on poles belonging to [a] utility company under a contract which requires the cable company to remove the material at termination of contract,"<sup>92</sup> and "[l]abor charges for installation, alteration, renovation or repair of all machinery or equipment."<sup>93</sup> This position is apparently supported by section 1105(c)(3) of the Tax Law, which makes taxable the receipts from every sale, except for resale, of the services of installing tangible personal property.<sup>94</sup> The one-time installation charge imposed on most cable television subscribers is subject to sales tax, which should be itemized on that first subscriber bill.

The 1980 memorandum also makes clear that customer deposits are not taxable unless unreturned to the customer, and that certain other customer charges are taxable. These items include the "installation charge for initial hook-up to cable televi-

---

87. *Id.* "Microwave, VHF, UHF, FM and AM Radio, pre-amplifiers, power supplies, antennas and supports (but not foundations) are also subject to tax." *Id.* at 2, item 30.

88. *Id.* at 2, item 21.

89. *Id.* at 2, item 19.

90. *Id.* at 2, item 20.

91. These space satellite antenna dishes are subject to sales tax when purchased. Advisory Op., TSB-A-86(12) S (State Tax Comm'n, Apr. 30, 1986).

92. TSB-M-80(6)S at 2, item 23.

93. *Id.* at 2, item 24.

94. There are, however, certain specific exceptions. N.Y. Tax Law § 1105(c)(3) (McKinney Supp. 1986).

sion and other transmission systems,"<sup>95</sup> "charges for repairing or replacing damaged cable,"<sup>96</sup> and "sales and rentals of films."<sup>97</sup>

Following the issuance of the 1980 memorandum, the Tax Commission ruled on a number of individual disputes which arose in this area. In *Amherst Cablevision, Inc.*,<sup>98</sup> the Commission held that "drop line" equipment used to install service to a customer's home is taxable when purchased by the cable television company because it was not purchased for resale to the customer<sup>99</sup> and was never actually transferred to the customer's ownership. In *Plastoid Corp.*,<sup>100</sup> the Commission held that the sales of cable television wire and other equipment from an out-of-state manufacturer to a New York cable television company were subject to sales tax despite the interstate nature of the transaction<sup>101</sup> and that the sale to such cable television companies was not for resale because the equipment was never put into any eventual use subject to tax — the manufacturer was held directly liable for the uncollected tax. In *Petra Cablevision Corp.*,<sup>102</sup> the Tax Commission reconfirmed that the telephone equipment exemption at section 1115(a)(12) did not apply to cable television and that "drop" materials were not exempt as resale items.

In *People's Cable Co.*,<sup>103</sup> the Tax Commission held that the purchase of Home Box Office (HBO) monthly program guides from HBO for distribution to subscribers of that service was a taxable purchase. Moreover, this ruling also determined that sales tax was collectable on the payments made to contracting installers for the erection and relocation of distribution wires on utility poles. This determination was reached because the property at issue was considered to be tangible personal property

---

95. TSB-M-80(6)S at 4.

96. *Id.*

97. *Id.*

98. TSB-H-80(208)S (State Tax Comm'n, Nov. 18, 1980).

99. Purchases for resale are exempt. N.Y. TAX LAW § 1101(b)(4)(i) (McKinney Supp. 1986).

100. TSB-H-82(28)S (State Tax Comm'n, Mar. 11, 1982).

101. The sale is presumed to occur in New York, and compensating use tax would apply to tax those sales which would have been taxable under the sales tax but for such technical distinctions. See *supra* note 24.

102. TSB-H-82(27)S (State Tax Comm'n, Mar. 11, 1982).

103. TSB-H-83(9)S (State Tax Comm'n, Jan. 21, 1983).

under section 1105(a), and not a part of any capital improvement to real property which would have been exempt under section 1115 of the Tax Law and section 527.7(a)(3) of the regulations.<sup>104</sup> Thus, the installation of such tangible personal property, unless itself purchased for taxable resale, must be a taxable service under section 1105(c)(3) of the Tax Law.

The ruling in *People's Cable Co.* is important for another reason. It addresses the question of whether the payments made by a cable television company to a utility company for the erection or relocation of cable television facilities on the utility's poles are subject to sales tax.<sup>105</sup> The Tax Commission notes in passing that such payments are exempt if they are part of the rental charged by the utility.<sup>106</sup> The tax imposed on *People's Cable* resulted from the fact that its payments were made to a third-party contractor, and not to the utility. This highlights the basic distinction that the cable company's own plant installation costs are taxable under section 1105(c)(3), if payments are made to outside contractors,<sup>107</sup> but no sales tax is due on the work done by the utility company as part of the pole attachment arrangements generally.

In *Cablescope, Inc.*,<sup>108</sup> it was confirmed that "drop" lines installed to subscriber homes were subject to tax when originally bought by the cable company essentially because there was no real transfer of ownership to the customer. The company's purchases of converter boxes were also taxable, even though these boxes were eventually installed in subscriber homes to facilitate the use of certain optional services at extra charge to the customer.

This converter tax ruling in *Cablescope, Inc.* illustrates a particularly awkward issue for cable television operators. By and

---

104. N.Y. COMP. CODES R. & REGS. tit. 20, § 527.7(a)(3) (1984).

105. TSB-H-83(9)S at 4.

106. The Tax Commission cited its own Sales Tax Information Letter No. 46, dated September 30, 1976. *Id.* Note, however, that such payments might be treated now as "current income" under the new federal tax laws. I.R.C. § 118 (1987). Previously, these were treated as "contributions in aid of construction," and did not generate the tax liability which may now be faced by the utilities and passed on to the cable television operators. I.R.C. § 118 (1986).

107. No sales tax is due if this work is performed by employees of the cable company.

108. TSB-H-83(146)S (State Tax Comm'n, July 25, 1983).

large they are strongly opposed to the imposition of any sales tax on any portion of their subscriber service bills. This attitude results from a natural concern that cable service purchases are sensitive to price.<sup>109</sup> However, the rental of an item of tangible personal property would be subject to sales tax on a recurring basis with each month's rental payment under section 1105. Therefore, cable television companies are pleased that the Tax Commission has consistently treated the converter boxes installed in subscriber homes as merely incidental to the provision of the cable television service, which they truly are in any practical sense. However, the unfortunate effect of this determination, from the cable operator's point of view, is that the wholesale purchases of such equipment become subject to the tax. Cablescope tried to avoid paying the tax at either end, and the Tax Commission found that this was too aggressive.

That inasmuch as petitioner failed to prove that the charge for the Home Box Office converter boxes was a separately billed rental and not merely part of the monthly service charge, petitioner neither purchased said converters for resale as such, nor for use by it in providing a service subject to tax under section 1105(c) of the Tax Law and, therefore, the purchases of said converter boxes by petitioner were subject to sales and use tax.<sup>110</sup>

In *Manhattan Cable Television, Inc.*,<sup>111</sup> the Tax Commission again confirmed several of these issues in newly argued circumstances. It found that no telephone equipment exemption was available under section 1115(a)(12) even during the 1976 to 1977 period when the Tax Commission itself had erroneously ruled that such an exemption applied. It ruled that the equipment purchased for installation in the public streets and ways, and the purchases of installation services to put such equipment into place in those public streets, were subject to sales tax. This determination was made notwithstanding the fact that the subject equipment is used as a basis of annually assessing a form of real property tax under article 6 of the Real Property Tax Law, "Special Franchises." The ruling noted that the equipment might have to be removed from the streets at the expiration of

---

109. This is dramatically different in effect from traditional "utility" services.

110. TSB-H-83(146)S at 4 (citation omitted).

111. TSB-H-86(78)S (State Tax Comm'n, Mar. 6, 1986).

the franchise contract, and therefore no permanent capital improvement was evident, and that the tax liability under the Real Property Tax Law (RPTL) was upon the municipal "franchise" itself, not the equipment installed.<sup>112</sup> But, on the bright side, the ruling did allow that payments to installation contractors for putting wiring and equipment into subscriber homes and buildings were *not* subject to sales tax, because the purchase of this service, normally subject to tax under section 1105(c)(3), was in this case for resale to the subscribers. Here, the fact that subscribers pay a distinct, one-time installation fee which is subject to tax was held to be a basis for exempting the cable company from tax on the same service purchase.

#### E. *The Sale of a Cable Television System is Taxable*

One other important aspect of potential sales tax liability deserves particular attention from cable television companies. Under New York law, the bulk sale of an entire business can be treated as taxable under section 1105 of the Tax Law. The sale or transfer of the assets of a cable television system or company in New York could be subject to such sales tax, at least to a substantial extent.

For many types of businesses this tax liability may not be dramatically significant for a number of reasons. The assets sold in the transfer of many businesses may consist to a large extent of intangible factors such as "good will" or business franchises. Likewise, much of the asset base may be held in the form of real property which is subject to its own transfer tax liabilities, but exempt from sales tax under section 1105.<sup>113</sup> In the case of retail product sales businesses, the major assets may be in the form of inventory held towards eventual resale to the public, and which are therefore exempt from immediate tax on the transfer for this reason. Even many retail service businesses may find their assets

---

112. N.Y. REAL PROP. TAX LAW §§ 600-26 (McKinney 1984 & Supp. 1986).

113. Section 1105 specifically taxes tangible personal property, which by its own terms excludes real property. N.Y. TAX LAW § 1105(a) (McKinney 1975).

Since 1983, New York has imposed a tax on gains derived from certain real property transfers — essentially those in excess of one million dollars in value. N.Y. TAX LAW §§ 1440-1449-c (McKinney Supp. 1987). Almost any form of transfer of control of such property would trigger this tax. However, the definition of "real property" used for purposes of this tax (§ 1440(6)) does not include a cable television franchise.

exempt because their services are taxed under section 1105 when provided to the public. But, for cable television companies the situation may be much more serious.

As noted above, the business of cable television is treated as essentially non-taxable and, as a result, the property held by such businesses is generally treated as taxable upon transfer. Cable television companies sell services rather than products, or at least they sell intangible rather than tangible products. For this reason their sales are not taxed under section 1105(a) of the Tax Law. Because this service is not identified as specifically taxable, it is not subject to section 1105(b) or (c). This situation supports the rulings which deny resale exemptions to cable companies for the purchase of equipment used.<sup>114</sup> Likewise, the Commission has consistently refused to grant exemptions to the taxation of most such equipment purchases on theories of real property improvements. The sad result is that the sale of the assets of a cable television system might be described as including a large amount of tangible personal property which is not exempt from transfer taxation. To make matters worse, the cable television business environment seems to continue to produce rather frequent ownership changes in operating cable television systems; each such change could produce a repetition of the same tax liability. The payment of tax in the last purchase would not be a defense to the next tax payment on the same equipment, because none of these sales could be claimed effectively to have been for the purpose of resale.

One solution to this problem is simply to avoid asset sales. The sale of corporate ownership would be exempt from this tax liability. This approach is not always available, and other business considerations may well have to be treated as paramount. Such other business considerations may include a desire to avoid undetermined corporate liabilities, or to operate the acquired cable television system under a more appropriate corporate name and management structure. Recent changes in the federal tax liabilities of operating businesses will undoubtedly make these decisions more complex.<sup>115</sup>

---

114. See *supra* text accompanying notes 67-91.

115. Section 631 of the federal Tax Reform Act of 1986 will repeal the General Utilities doctrine, now contained at I.R.C. §§ 336 & 337, which gives preference to assets

Another approach to this situation suggests that the transferring parties take great care to avoid overstating the value of the tangible personal property included in the assets described for sale in their negotiated purchase-and-sale agreement. Likewise, the value of the intangible assets should not be understated in this context. However, attempts to describe some assets as real property rather than personalty may prove ineffective when challenged by the Tax Commission under its own standards.

A few recent cable television system transfers have been targeted by the state Tax Commission for failure to pay appropriate transfer taxes on the tangible personal property involved. One such case has gone to a full evidentiary hearing within the Department of Taxation and Finance, with the taxpayer cable company principally arguing that almost all of the tangible assets were elements of real property. A recent decision of the Tax Commission has denied these arguments and held that antennas, towers, distribution wires, signal processing electronics and subscriber connections are not real property and are therefore subject to sales tax on transfer.<sup>116</sup>

#### IV. Corporate Earnings Taxes

##### A. *Articles 9 and 9-A of the Tax Law*

Perhaps the most ambiguous field of state tax liability for cable television involves the payment of taxes on corporate franchises under articles 9 and 9-A of the Tax Law. No clear determination has been made regarding which of the various provisions under these articles apply to cable television companies. Few cable operators even have a clear understanding of the nature of these taxes or how they might impact on the structure or operations of cable television corporations.

The tax provisions under these articles are in many respects similar, but contain significant and important differences. All business corporations conducting commercial activities within

---

distributed upon the complete liquidation of a corporation. Tax Reform Act of 1986, Pub. L. No. 99-514, § 631, 100 Stat. \_\_\_, \_\_\_ (1986). This has encouraged corporate sales in the closing months of 1986, and will discourage such sales starting in 1987.

116. *In re Glenville Cablesystems Corp.* (State Tax Comm'n, Oct. 9, 1986).

New York will be obligated to pay taxes on their corporate franchises under one or another of these provisions.

Article 9, which dates back to 1909,<sup>117</sup> is described as a Corporate Tax.<sup>118</sup> Its provisions, sections 180 through 207-b, contain a variety of taxing mechanisms. Notwithstanding its title, this article does not contain all of the tax provisions applicable to the corporate franchises of businesses, and many businesses are not subject to many of its provisions. Section 180 imposes a limited tax on the incorporation of almost all forms of business corporations.<sup>119</sup> Section 181 imposes a limited tax on foreign corporations operating in this state. However, for our purposes attention is focused on sections 183 and 184, the franchise tax and additional franchise tax, respectively, on transportation and transmission corporations and associations, and to some extent on section 186-a, the tax on furnishing of utility services. In these respects it must be noted that article 9 applies to only a limited class of corporations or business activities. By comparison, those corporations which are not subject to certain of the provisions of article 9, including especially for our purposes those not subject to sections 183 or 184, are subject to the taxes arising out of article 9-A.

Article 9-A is described as a Franchise Tax on Business Corporations,<sup>120</sup> and it dates back in its modern form to 1944.<sup>121</sup> Under this article we focus on section 209, which describes the imposition of the tax and some exemptions to its liability, and on section 210, describing the tax computation.

For cable television companies, the essence of these provisions is that a company is either subject to the tax program described in sections 183 and 184 of article 9, or to the tax described at section 209 of article 9-A, but not both. Which of these approaches is correct, and which is more beneficial to the company, have become key questions in recent years. In a very general way, regulated utilities and those companies with utility-like operations are subject to the article 9 provisions, while the

---

117. Ch. 62 [1909] N.Y. Laws 20.

118. N.Y. TAX LAW §§ 180-207-b (McKinney 1986).

119. There are some limited exceptions to the forms of business corporations that are subject to the tax.

120. N.Y. TAX LAW §§ 208-19-a (McKinney 1986).

121. Ch. 415 [1944] N.Y. Laws 876.

great bulk of all other business corporations are taxed under article 9-A. Nonetheless, it should be noted that these provisions all apply to *corporate* entities; those cable television businesses which may still be operating entirely in unincorporated form may escape these considerations altogether.

B. *Cable Television is not Taxed as a Utility*

A certain attention should be paid to section 186-a, which imposes a special tax on the furnishing of utility services.<sup>122</sup> This tax may be imposed in addition to the tax imposed by section 209 on a more general business corporation, if the corporation engages in the furnishing of utility services to some limited extent.<sup>123</sup> For purposes of this section a "utility" is defined to include, "every person subject to the supervision of the state department of public service"<sup>124</sup> and also

every person . . . who sells gas, electricity, steam, water, refrigeration, telephony or telegraphy, delivered through mains, pipes or wires, or furnishes gas, electric, steam, water, refrigerator, telephone or telegraph service, by means of mains, pipes, or wires; regardless of whether such activities are the main business of such person or are only incidental thereto, or of whether use is made of the public streets . . .<sup>125</sup>

Those utilities subject to public service department supervision, such as a certified telephone company, pay a hefty tax of three percent of all "gross income." Those covered by the law, but not subject to the regulatory oversight, pay three percent of "gross operating income" from their utility-type service activities. In either event the tax may be considered as an operating expense of the utility.<sup>126</sup>

It seems that even those companies which are subject to taxation under sections 183 and 184 may be subject to addi-

---

122. Imposed as a "temporary" taxing measure. Ch. 321 [1937] N.Y. Laws 856.

123. Note that subdivision four of § 209 exempts corporations subject to §§ 183 through 186 inclusive, but not those subject to section 186-a.

124. N.Y. TAX LAW § 186-a(2) (McKinney 1986). There are certain exceptions for companies not in the communications or power businesses. *Id.*

125. *Id.*

126. As an operating expense, such tax payments may be used by a regulated utility in seeking greater customer rates in its tariffs.

tional tax under section 186-a. Likewise, "utility" status under this section can be determinative of similar utility taxes on a municipal level.<sup>127</sup> Moreover, a "utility person" may not need to be a corporation, thus contradicting the general premise stated above.

However, notwithstanding the somewhat broad language of this section, it seems reasonably safe to assume that it is *not* applicable to cable television operations. The Tax Commission has not alleged that this section applies to cable television, and the staff of the Department of Taxation and Finance supports this view, as far as can be determined. Moreover, the highly relevant decisions in *Holmes Electric Protective Co. v. McGoldrick*,<sup>128</sup> and more particularly in *Quotron Systems, Inc. v. Gallman*,<sup>129</sup> seem to preclude tax attempts on services such as cable television under this provision, particularly since the Third Department has found these two precedents so relevant to cable television service in the context of sales tax.<sup>130</sup>

Two opinions of the state comptroller support the conclusion that cable television is not a "utility" subject to section 186-a of the Tax Law.<sup>131</sup> These opinions seem to be completely determinative of the issue. "[T]he Comptroller has stated quite unequivocally that commercial closed circuit television is not a public utility and is not subject to taxation as such under Tax Law § 186-a."<sup>132</sup>

A note of caution is warranted here, however. As cable television companies begin to consider dabbling in service arrangements which might become directly subject to Public Service Commission regulation as "telephonic," their potential future tax treatment under section 186-a should be carefully considered. One might even have some concern that a company which becomes "subject to the supervision" of the public service de-

---

127. N.Y. VILLAGE LAW § 5-530 (McKinney 1973); N.Y. GEN. CITY LAW § 20-b (McKinney 1968 & Supp. 1986).

128. 262 A.D. 514, 30 N.Y.S.2d 589 (1st Dep't 1941), *aff'd without opinion*, 288 N.Y. 635, 42 N.E.2d 737 (1942). *See supra* text accompanying notes 53-60.

129. 39 N.Y.2d 428, 348 N.E.2d 604, 384 N.Y.S.2d 147 (1976). *See supra* text accompanying notes 61-62.

130. *New York State Cable Television Ass'n v. State Tax Comm'n*, 59 A.D.2d 81, 397 N.Y.S.2d 205 (3d Dep't 1977). *See supra* text accompanying notes 15-22.

131. 13 OP. N.Y. COMP. 351 (1957); 23 OP. N.Y. COMP. 708 (1967).

132. 23 OP. N.Y. COMP. 708, 709 (1967).

partment because a small portion of its activities falls within the regulations could be held subject to a tax of three percent on *all* of its "gross income." Such a result seems obviously inequitable and unintended, but this threat should not be ignored.

### C. *Is Cable Television Transportation or Transmission?*

The applicability of sections 183 and 184 depends on whether the taxpayer is principally engaged in the conduct of a transportation or transmission business. Subdivision one of section 183, and similarly subdivision one of section 184, describe applicability to a specified range of conduct, including "aviation, railroad, canal, steamboat, ferry . . . , express, navigation, pipeline, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car"<sup>133</sup> operations, and add reference to "every other domestic corporation, joint-stock company or association principally engaged in the conduct of a transportation or transmission business."<sup>134</sup>

The staff of the Department of Taxation & Finance now takes the position that these sections do apply to cable television companies. They continue to rely on a single informal Opinion of Counsel issued in letter form in 1953.<sup>135</sup> This issue appears to remain unsettled. Although several cable television companies have been challenged in recent years for filing tax reports under section 209 and article 9-A, rather than sections 183 and 184 and article 9, there have been no formal determinations of the question. Moreover, it appears that there are some cable television companies that have been filing under the article 9 provisions

---

133. N.Y. TAX LAW § 183(1) (McKinney 1986).

134. *Id.* There are certain exceptions for gas, steam, lighting and power companies and banking corporations.

135. Op. of Counsel (Oct. 8, 1953). This opinion, written by Mortimer M. Kassell, Deputy Commissioner and Counsel, provides, in relevant part, as follows:

The activities referred to in this letter consist of the transmission, as above defined [by reference to items in Webster's Third New International Dictionary], of electrical impulses from a centrally located antenna to the television receivers of the corporate subscribers. It is this transmission which is the business of the corporation. Accordingly, it is my opinion that a corporation principally engaged in the erection and maintenance of a centrally located antenna to pick up and relay television signals by cable to television receivers of its subscribers is engaged in a transmission business subject to tax under section 183 of the Tax Law.

*Id.*

and others that have been filing under the article 9-A provisions. In fact, it is possible that cable television companies may benefit from one approach or the other depending upon their current financial and revenue circumstances.

The tax under section 183 is to be paid annually and is imposed upon the value of the outstanding capital stock of a subject corporation. The amount of this tax has been summarized as follows:

Article 9, Section 183, of the Tax Law provides for a franchise tax based on the net value of issued capital stock employed in New York State . . . . The net value of issued capital stock may be allocated within and without New York. The allocation is based on the gross assets employed in New York . . . . The franchise tax required to be paid under Section 183 is the highest tax computed by three methods: 1. Allocated value of issued capital stock multiplied by the tax rate of 1.5 mills (.0015) 2. Allocated value of issued capital stock on which dividends are paid at a rate of 6% or more multiplied by the tax rate of .375 mills (.000375) for each 1% of dividends paid. The rate of 1.5 mills (.0015) is applied to capital stock on which dividends are not paid or are paid at a rate of less than 6%. 3. Minimum tax of \$75.00. A combination of tax on capital stock using the tax rate of 1.5 mills and the dividend rate as computed in Schedule F [of the Department's Filing Forms] is possible if a corporation has more than one kind of stock . . . .<sup>136</sup>

Section 184 also provides for an annual tax on transportation and transmission companies. It imposes tax on the "gross earnings" received from business in New York State during the year; for most subject companies this is at the rate of 3/4 of one percent of such gross earnings, but for telephone or telegraph companies — which are also subject to tax under section 186-a — the rate is fixed at only 3/10 of one percent.

By comparison, the tax imposed by section 209 in article 9-A, on those companies not subject to taxation under sections 183 and 184, is described in terms of the "*net income*." At section 210(1) this tax liability is defined as the greater of: 1) ten percent on its entire net income, or the portion thereof allocated within the state, or 2) 1.78 mills (.00178) times the total business

---

136. Taken from the Instructions for Forms CT-183 and CT-184 (11/85).

and investment capital (allocated in the state), or 3) ten percent of thirty percent of entire net income PLUS salaries and other compensation paid to officers and to stockholders owning more than five percent of issued capital stock MINUS \$30,000 and any net loss for the year allocated to the state, or 4) \$250.00.<sup>137</sup>

Naturally, the "net income" described in section 210 is calculated by use of a substantial number of deductions, credits, and depreciation factors. These are addressed in section 210, but are too complex and too extensive to relate in this report. Nonetheless, the general interpretation of these provisions is that companies that are able to make extensive use of adjustments to income will prefer to pay the "net" tax in article 9-A, while those with few such adjustments may benefit by taxation under sections 183 and 184 of article 9 as an alternative.

Because cable television systems carry extensive capital investments in their early operating years, the application of article 9-A would seem preferable. But, some cable systems may have matured to a stage where such investments have been substantially written off, and therefore, benefit from article 9 treatment. In any event, an analysis of this preference should take into consideration the fact that cable television companies have consistently shown an inclination to make substantial capital improvements and reconstruction commitments towards their operating cable television systems. One tends to forget how quickly the standards of acceptable cable service operations continue to change. Moreover, consideration should be given to the fact that a brisk trade in cable television ownership transfers continues to be evident, and recapitalization may therefore be frequent. These factors argue for the long-term benefits of article 9-A.

Moreover, several factors argue that sections 183 and 184 are inappropriate to cable television operations. The context of the terms transportation and transmission does not seem to lend itself to cable television service, where the business is contained in the sale of video products whose delivery is almost incidental. Likewise, the fact that incorporation has been made under the Transportation Corporations Law does not seem to carry over-

---

137. N.Y. TAX LAWS § 210(1). The elements of "net income" are defined in N.Y. TAX LAW § 208(9) (McKinney 1986).

riding weight.<sup>138</sup> The fact that the courts and the legislature have in recent years consistently refused to place cable television services in the same tax circumstances as telephone or telecommunications operations<sup>139</sup> supports these contentions. Also and perhaps most important is the fact that other non-utility transmission companies, such as television and radio broadcasters, have long been considered exempt from article 9 and section 184 by the State Tax Commission itself. In a recent dispute on this point, Capitol Cablevision Systems, Inc. argued that an unconstitutional discrimination would occur if its cable television system were held subject to article 9 while broadcast television companies continue to be subject only to article 9-A. It noted that the highest New York and federal courts have distinguished cable television from telephone services, and have compared it with broadcast-type entertainment.<sup>140</sup> Likewise, similar treatment is afforded to print magazine publishers<sup>141</sup> to which cable television companies may bear an even closer operational resemblance.

A recent case of some interest casts a new light on the application of section 184 to cable television operations. In *Air Transport Association of America v. Department of Taxation & Finance*,<sup>142</sup> the appellate division held that section 184 of the Tax Law was effectively a tax on "gross receipts" and that it was therefore barred from application to interstate air carriers by a

---

138. See *supra* text accompanying notes 30-62.

139. See N.Y. REAL PROP. TAX LAW §§ 102(12)(d), (i) (McKinney Supp. 1986) (1985 amendments to the Real Property Tax Law).

140. See Memorandum of Law on Behalf of Petitioner Capitol Cablevision Sys., Inc. at 13 (citing *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *Manhattan Cable TV Serv. v. Freyberg*, 49 N.Y.2d 868, 405 N.E.2d 178, 427 N.Y.S.2d 933 (1980); *American Cablevision of Rochester, Inc. v. Jacobs*, 101 A.D.2d 65, 474 N.Y.S.2d 653 (4th Dep't 1984); *New York State Cable Television Ass'n v. State Tax Comm'n*, 59 A.D.2d 81, 397 N.Y.S.2d 205 (3d Dep't 1977); *Hoffman v. Capitol Cablevision Sys., Inc.*, 52 A.D.2d 313, 383 N.Y.S.2d 674 (3d Dep't 1976)). The treatment of broadcast television corporations under article 9-A was admitted by the Tax Commission and recognized by the courts. See *Capitol Cities Communications, Inc. v. State Tax Comm'n*, 65 A.D.2d 25, 411 N.Y.S.2d 41 (3d Dep't 1978).

141. *Conde Nast Publications, Inc. v. State Tax Comm'n*, 51 A.D.2d 17, 378 N.Y.S.2d 132 (3d Dep't), *appeal dismissed*, 39 N.Y.2d 889, 352 N.E.2d 580, 386 N.Y.S.2d 393 (1976).

142. 91 A.D.2d 169, 458 N.Y.S.2d 709 (3d Dep't 1983), *aff'd mem.*, 59 N.Y.2d 917, 453 N.E.2d 548, 466 N.Y.S.2d 319, *cert. den.*, 464 U.S. 960 (1983).

federal statute which prohibited such taxes on such parties.<sup>143</sup> The United States Supreme Court ruled similarly with respect to a Hawaii taxing statute in *Aloha Airlines, Inc. v. Director of Taxation*,<sup>144</sup> and, as expected, denied certiorari when the New York case came before it.

Although no federal law actually prohibits state taxation of cable television gross receipts, the Cable Communications Policy Act of 1984<sup>145</sup> confirms that cable television service is a form of interstate commerce under the primary authority and jurisdiction of the federal government. It prohibits regulation of any cable system "as a common carrier or utility by reason of providing any cable service"<sup>146</sup> and it limits any "franchise fee" imposed on cable operations to no more than five percent of gross receipts per year.<sup>147</sup> For this purpose a "franchise fee" is defined to include "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such."<sup>148</sup> However, this definition also expressly exempts "any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers)."<sup>149</sup> What this means is that the rulings in *Aloha Airlines* and *Air Transport Association* probably

---

143. 49 U.S.C. § 1513 (1983).

144. 464 U.S. 7 (1983). In *Aloha Airlines*, the Supreme Court held that section 7(a) of the Airport Development Acceleration Act of 1973 prohibits a State from levying a tax, "directly or indirectly, on persons travelling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom," *id.* at 10, and that therefore a Hawaii statute, rather similar to N.Y. TAX LAW § 184 (McKinney 1986), which imposed a tax on the annual gross income of airlines operating within the state, was preempted by federal law and invalid, even though the Hawaii statute purported to impose the tax only on the airline's personal property and not directly on its receipts. The Court held that the mere fact that the state statute described the tax as one on the personal property of the corporation was not controlling, even though the federal statute made clear that property taxes were not prohibited. The tax in this instance was really a levy upon the gross receipts of airlines, thus making it at least an indirect tax on such receipts. 464 U.S. at 13-14.

145. 47 U.S.C. § 521 et seq. (Supp. III 1985).

146. *Id.* at § 541(c).

147. *Id.* at § 542(b).

148. *Id.* at § 542(g)(1).

149. *Id.* at § 542(g)(2)(A).

will not provide a simple basis for excluding cable television from section 184 of the Tax Law because of the limited nature of the federal tax preemption contained in the recent federal cable television statute. However, they do provide a comparison of some proximity and interest.

Of greater significance is the fact that other forms of services, including various forms of communications carriers and service-providers, have arisen in recent years posing new competitive challenges to traditional communications utilities and adding to the confusion surrounding the state's tax policy. Legislative changes regarding the treatment of telephone equipment and a newly recognized telecommunications equipment exemption under the Real Property Tax Law<sup>150</sup> have resulted in a broad and comprehensive review of the taxation of all telephone, telecommunications, and related communications companies. This analysis clearly includes a review of the appropriateness of current tax treatment of utilities under section 186-a of the Tax Law, and of transmission and transportation companies under sections 183 and 184 of the Tax Law; this review will undoubtedly include consideration of the treatment of cable television services. Presently, a general review of the effect of all state tax obligations on communications companies is being conducted by the firm of Coopers & Lybrand under a grant by the State's Science and Technology Foundation and the Department of Commerce, with the active participation of the State Tax Commission. Moreover, as previously noted with respect to section 186-a, the new forms of activities which may present themselves to cable television operators could significantly affect the success of any efforts on their part to avoid application of sections 183 and 184.

In any event, regardless of which provisions apply to the operations of cable television companies, the careful allocation of company assets and income between New York and out-of-state operations will be increasingly important. All of the relevant sections of articles 9 and 9-A contain important allocation provisions which must be carefully studied. Some recent decisions illustrate this. In *American Telephone & Telegraph Co. v. State*

---

150. N.Y. REAL PROP. TAX LAW § 102(12)(d) & (i) (McKinney Supp. 1986).

*Tax Commission*,<sup>151</sup> the Court of Appeals held that corporate advances to an out-of-state subsidiary by a parent corporation in New York were still to be included in the in-state assets for purposes of the tax under section 183 of the Tax Law, but that accrued interest on such advances was not so includable. But the court also found that interest actually generated from such out-of-state advances to subsidiaries was only relevant for tax calculation under section 183 and not under section 184 which contains a stricter standard of income from sources in the state. Likewise, in *Overseas National Airways, Inc. v. State Tax Commission*,<sup>152</sup> it was held that operations of an international and interstate carrier were not subject to tax under section 184 if the relevant transactions occurred out-of-state and that the relevant tangible assets were not necessarily in New York just because the corporation's headquarters were located there.

#### D. *Cable Television is Subject to the M.T.A. Assessment*

In 1982 the State Legislature passed a group of special revenue measures to generate funds temporarily in support of the public transit operations in the City of New York and the nearby metropolitan area. A critical component of that plan was the imposition of a temporary surcharge on the corporate franchise taxes imposed by both article 9 and article 9-A.<sup>153</sup> Each of the new code sections added to article 9 and article 9-A imposed a similar surcharge upon those companies with operations located within a specifically designated geographic area, to approximate the service area of the metropolitan commuter transportation district defined by Public Authorities Law section 1262.<sup>154</sup> This area includes all of the City of New York and the seven neighboring counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester. The surcharge is described as temporary, and contains a "sunset" provision for

---

151. 61 N.Y.2d 393, 462 N.E.2d 1152, 474 N.Y.S.2d 434 (1984).

152. 91 A.D. 2d 162, 458 N.Y.S.2d 711 (3d Dep't 1983).

153. Specifically, to section 183 was added a new section 183-a, and likewise a new section 184-a was added to section 184. New sections 186-b and 186-c were added to 186-a, and a new section 209-B was added to section 209. N.Y. TAX LAW §§ 183, 183-a, 184, 184-a, 186-a, 186-b, 186-c, 209 & 209-B (McKinney 1986).

154. See N.Y. PUB. AUTH. LAW § 1262 (McKinney 1982). See also *supra* note 27 and accompanying text.

automatic expiration at the end of 1986.<sup>155</sup> The surcharge is imposed in the amount of seventeen percent of the tax paid each year under the principal tax section to which it is added.<sup>156</sup> Thus, section 183-a taxes amount to seventeen percent of the tax paid under section 183; section 184-a taxes amount to seventeen percent of the tax paid under section 184; section 186-b taxes amount to the same percentage of the tax under section 186-a; and section 209-B does the same for the tax amount payable under section 209. There is no dispute that this surcharge in one form or another applies to cable television corporations.

It is interesting to note the new surcharge provisions describing the allocation of tax payments subject to the surcharge by location in the subject district, particularly at sections 184-a and 209-B. At section 209-B(2)(b) express reference is made to include all revenues generated from cable television transmissions of an event, such as a sporting event, regardless of where these transmissions are ultimately displayed, so long as the event originated within the district. However, note that a comparable allocation mechanism described at section 184-a(2) makes no reference to cable television services or transmissions, but is limited to describing traditional forms of transmission or transportation companies. This alone should support the contention that cable television companies are more appropriately taxed under section 209 than under section 184.

## V. Real Property Taxes

Clearly the most controversial aspects of state taxation relating to cable television in recent years arise under the Real Property Tax Law. These controversies under the Real Property Tax Law, as with the others described earlier in this Article, reflect a misunderstanding of the concept of cable television in comparison to telephone and other utilities.

Real property taxes are paid to local governments and are therefore close to the hearts of municipal officials. The assessment of taxable real property is generally done at the local level

---

155. N.Y. TAX LAW § 209-B (McKinney 1986). These provisions have been extended through 1990. Ch. 929 § 7 [1986] N.Y. Laws 2344.

156. The rate is 18% for any year or portion thereof ending prior to December 31, 1983. *Id.*

by municipal assessors, although some forms of utility property are treated differently, as discussed below. For many years, and continuing to this time in some respects, local officials have thought of cable television as very like the utilities whose lines occupy the public and private streets and ways. However, as already shown, cable television is in some critical respects quite different from traditional utilities, and has been recognized as such by the courts and the legislature in the context of real property taxation. This difference has resulted in some confusion and even frustration on the part of the local and state taxing officials.

#### A. *Cable Television Lines are not Real Property*

As a general matter, cable television property, like other types of property, can only be taxed as real property if it meets the specific definition in the Real Property Tax Law.<sup>157</sup> Cable television property can be considered real property for tax purposes under this definition in essentially only three ways: 1) if the property meets traditional elements of real property, such as "land itself"<sup>158</sup> or "buildings and other articles and structures, substructures and superstructures erected upon, under or above the land, or affixed thereto;"<sup>159</sup> or 2) if the property meets a more recent and specific description of items of real property, such as "when owned by a telephone company, all telephone and telegraph lines, wires, poles, supports and inclosures for electrical conductors upon, above and underground and central office equipment"<sup>160</sup> or "telecommunications equipment . . . used to provide transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain, and related equipment . . .";<sup>161</sup> or 3) if the property is "situated in, under, above, upon or through any public street, highway, water or other public place in connection" with operations authorized by a locally granted "special

---

157. N.Y. REAL PROP. TAX LAW § 102(12) (McKinney 1984 & Supp. 1986).

158. *Id.* at § 102(12)(a).

159. *Id.* at § 102(12)(b).

160. *Id.* at § 102(12)(d).

161. *Id.* at § 102(12)(i).

franchise,"<sup>162</sup> then the value of such property may be used as a basis for determining the value of the special franchise which is itself defined as a form of taxable real property.<sup>163</sup>

When considered in this way, it becomes clear that some cable television property is unarguably taxable as real property. Such property would include the land and buildings owned or rented for the cable system headend and operational offices, as well as traditional "fixtures" to such buildings. But, when the sales tax rulings of the Department of Taxation & Finance are considered, it may reasonably be argued that such items as the headend tower and antennae and the racks of electronics within headend and operational buildings are not to be considered as real property.

Local assessors have often tried to assess such property as realty, and have in the past been encouraged to do so by informal advisories from the State Division of Equalization and Assessment.<sup>164</sup> The Equalization and Assessment Division and its related State Board of Equalization and Assessment (SBEA) play a special role in the assessment of utility property. Much of this property is included for assessment as part of the special franchise<sup>165</sup> and in this context the SBEA officials have a direct responsibility to make the valuation for assessment.<sup>166</sup> Moreover, these officials provide recommendations to local assessors regarding the methods for valuation of utility property which is not subject to the special franchise. Familiarity with this procedure has added to confusion regarding cable television property.

It is now evident that no cable television property is subject to taxation under the telephone equipment definition at section 102(12)(d).<sup>167</sup> Moreover, a close reading of the new definition of telecommunications equipment at section 102(12)(i) will show that it does not apply to allow taxation of any cable television services, even those now offered in a form well removed from

---

162. *Id.* at § 102(17).

163. *Id.* at § 102(12)(h).

164. 3 Op. Counsel SBEA No. 31.

165. N.Y. REAL PROP. TAX LAW §§ 102(12)(h), 102(17), & 600-26 (McKinney 1984 & Supp. 1986).

166. *Id.* at § 600.

167. See *Manhattan Cable TV Serv. v. Freyberg*, 49 N.Y.2d 868, 405 N.E.2d 178, 427 N.Y.S.2d 933 (1980).

traditional cable television operations as understood only a few years ago.

Even in the assessment of special franchises it appears that the real property in question is the franchise itself, not the cable company's hardware.<sup>168</sup> The tangible property located in the public ways is used as a basis for determining the value of the franchise, but it is the intangible franchise which is the actual subject of assessment.<sup>169</sup>

As a general conclusion, one can say that cable television facilities are not taxable as real property, with the exception of traditional forms of land and buildings and with the exception of the real property tax treatment of the special franchise itself.

The most significant case to arise in this area is the 1980 decision of the Court of Appeals in *Manhattan Cable TV Services v. Freyberg*.<sup>170</sup> This dispute arose from an effort on the part of the City of New York to impose an annual real property assessment on certain of the cable television equipment used by the cable system in lower Manhattan. The City alleged that cable television equipment was taxable under the "telephone" definition at RPTL section 102(12)(d).<sup>171</sup>

Property located in the public streets and subject to special franchise valuation was not at issue, nor was traditional land or buildings. The City argued that wires and terminal equipment, such as channel converter boxes, located at subscriber residences, and central office equipment, in the form of headend and operational electronics hardware, and cable television transmission lines and related hardware, were all assessable as real property under the "telephone" standard at section 102(12)(d).

---

168. *In re Manhattan Cable Television, Inc.*, TSB-H-86(78)S (State Tax Comm'n, Mar. 6, 1986).

169. N.Y. REAL PROP. TAX LAW §§ 102(12)(h), 102(17).

170. 49 N.Y.2d 868, 405 N.E.2d 178, 427 N.Y.S.2d 933 (1980).

171. At that time paragraph 12(d) of RPTL § 102, as a part of the definition of real property, provided as follows:

Telephone and telegraph lines, wires, poles and appurtenances; supports and inclosures for electrical conductors and other appurtenances, upon, above and underground; provided, however, for purposes of this paragraph the term "appurtenances" shall not include machinery and equipment used by a radio or television company in connection with furnishing radio or television programming provided such programming is ultimately furnished free of charge to the public.

N.Y. REAL PROP. TAX LAW § 102(12)(d) (McKinney 1984).

It argued that the cable service was functionally analogous to telephone systems.

Special Term of the Supreme Court in New York County<sup>172</sup> agreed with the City, and this ruling was affirmed by the appellate division.<sup>173</sup> The Court of Appeals disagreed and reversed.<sup>174</sup> Citing *Quotron Systems, Inc. v. Gallman*,<sup>175</sup> it noted that as the terms telephone and telegraph were not defined in the statute, they were to be given their ordinary meaning. In essence the court found that cable television was simply not telephone.<sup>176</sup>

When so construed [as a taxing statute with ambiguities resolved in favor of the taxpayer], we do not believe section 102 (subd. 12, par. [d]) of the Real Property Tax Law authorizes taxation of petitioner's equipment as real property. We are satisfied from the record before us that there are significant differences, in both structure and function, between cable television equipment and telephone and telegraph equipment — the former, for example, allowing only one-way communication. These differences, as a matter of law, preclude taxation of petitioner's equipment upon the theory that it is "telephone or telegraph" equipment within the meaning of the statute.<sup>177</sup>

Of great significance was the fact that the Court of Appeals found that cable television was not a utility and that therefore the movable equipment of a cable television system could not be subject to the provisions of section 102(12)(d) as an appurtenance to telephone lines because that paragraph was "aimed principally at expanding the definition of real property with respect to utility companies."<sup>178</sup>

The decision in *Manhattan Cable TV* helped set in motion

---

172. 90 Misc. 2d 135, 393 N.Y.S.2d 877 (Sup. Ct. N.Y. County 1977).

173. 68 A.D.2d 873, 414 N.Y.S.2d 1007 (1st Dep't 1979).

174. 49 N.Y.2d 868, 405 N.E.2d 178, 427 N.Y.S.2d 933 (1980).

175. 39 N.Y.2d 428, 348 N.E.2d 604, 384 N.Y.S.2d 147 (1976).

176. It is reported that at oral argument before the high court counsel for petitioner held up an actual cable TV converter box and noted that "this is not a telephone."

177. 49 N.Y.2d 868, 869, 405 N.E.2d 178, 179, 427 N.Y.S.2d 933, 934 (1980). Cf. *New York State Cable Television Ass'n v. State Tax Comm'n*, 59 A.D.2d 81, 397 N.Y.S.2d 205 (3d Dep't 1977).

178. *Manhattan Cable TV*, 49 N.Y.2d at 870, 405 N.E.2d at 179, 427 N.Y.S.2d at 934 (citing *Quotron Sys. v. Irizarry*, 48 N.Y.2d 795, 797, 399 N.E.2d 948, 948, 423 N.Y.S.2d 918, 919 (1979), quoting *Crossman Cadillac v. Board of Assessors*, 44 N.Y.2d 963, 964, 380 N.E.2d 157, 158, 408 N.Y.S.2d 326, 326 (1978)).

events substantially beyond the scope of cable television equipment taxation, but whose eventual consequences on cable television operators cannot yet be foreseen. At the start of 1984, the Bell Telephone System ceased to exist as a single intergrated conglomerate. Pursuant to a consent decree arising out of the long-standing anti-trust case against American Telephone & Telegraph,<sup>179</sup> the operating elements of that company were separated effective January 1, 1984. New York Telephone Company, now a subsidiary of the regional Bell Operating Company known as NYNEX, continued to provide telephone utility service in New York. However, some facilities including some buildings, some electronic switching hardware and some transmission lines were transferred to the new AT&T. AT&T was itself divided in two, with one part — AT&T Communications — to provide long distance transmission services, and another — AT&T Information Systems — to engage in the rental and sale of hardware in a non-utility context. In addition to other equipment being transferred, the customer-located terminal equipment (the telephone receivers themselves), sometimes described as station equipment, station apparatus, station connections and private branch exchanges, were transferred to AT&T Information Systems. In January of 1984, New York Telephone Company wrote to municipal assessors across the state to inform them that much of the equipment previously assessable to that company was no longer owned by it. At the same time AT&T wrote similar letters claiming exemption from such assessments on the equipment transferred, particularly the customer terminals, claiming exemption under the decision in *Manhattan Cable TV*.

As a result, perhaps as much as a billion dollars of assessable real property was removed from the tax roles. Local governments sought immediate relief from the legislature, which initiated a comprehensive review of tax policy which has not yet run its course. Substantial revisions to the definition of telephone equipment as real property were proposed. Telephone utilities, including New York Telephone Company, sought revisions to remove what they described as inequities in the tax laws favoring newly emerging telecommunications competitors, allegedly in-

---

179. *United States v. A.T. & T.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub. nom.* *Maryland v. United States*, 460 U.S. 1001 (1983).

cluding cable television, which would ultimately impact on the well-being of the public's telephone system. Suddenly, cable television operators found themselves rearguing old tax policy disputes.

Contributing to the frustration of local governments at that time, and to continued legislative focus on cable television, was a decision of the Appellate Division in the Fourth Department in *American Cablevision of Rochester v. Jacobs*.<sup>180</sup> This decision confirmed, almost reluctantly, that cable television lines which are not in the public rights-of-way (and therefore are not subject to special franchise assessment) may not be assessed as real property, even though similar lines of telephone or electric utilities may be so assessed when they are located on either public or private property.

There may be no justification for a taxing policy which allows respondent to avoid assessment of its transmission cables simply because they pass through private rather than public property. However, under the rationale in *Manhattan Cable*, we conclude that respondent's transmission cables are neither telephone or telegraph lines, wires, poles nor appurtenant thereto (Real Property Tax Law, § 102, subd 12, par[d]) nor utility mains, pipes or tanks (Real Property Tax Law, § 102, subd 12, par[e]) and therefore, are not taxable as real property. . . . If equipment such as that involved in this case should be assessable as real property, "the remedy is legislative rather than by strained or distortive judicial decisional analysis" (*Matter of Crossman Cadillac v. Board of Assessors*, . . .). The judgment should be affirmed.<sup>181</sup>

The legislative tempest in 1984 was resolved temporarily by an amendment to section 470 of the Real Property Tax Law, which purported to maintain on the assessable tax roles for one year (1984) the otherwise newly-exempt "station equipment, station apparatus, station connections and private branch exchanges."<sup>182</sup> The new owner of such equipment — AT&T — would be ultimately liable for the tax assessment, but the old owner — New York Telephone Company — would have collection and payment responsibility. A

---

180. 101 A.D.2d 65, 474 N.Y.S.2d 653 (4th Dep't 1984).

181. 101 A.D.2d at 69-70, 474 N.Y.S.2d at 656.

182. Ch. 895 [1984] N.Y. Laws 3403.

study of the entire problem was to be done by the Temporary Commission on the Real Property Tax, whose report was due by year end. In signing the legislation, the Governor noted his request for a similar study by the State Board of Equalization and Assessment.

The following year (1985) the legislature grappled with the same issues again, now with the benefit of two extensive studies and an abundance of local tax assessment disputes. Its second solution provided a two-year temporary amendment to several tax provisions, including sections 102 and 470.<sup>183</sup> However, at this time, the definition of real property was amended to make even narrower the references to telephone equipment at paragraph (d) of section 102(12),<sup>184</sup> and a new definition was added at a new paragraph (i) to include telecommunications equipment.<sup>185</sup> Cable television equipment was expressly exempted

---

183. N.Y. REAL PROP. TAX LAW §§ 102, 470 (McKinney Supp. 1986).

184. This definition now applies specifically to equipment owned by a "telephone company . . . which provides, to the general public within its local exchange area, non-cellular switched local exchange telephone service at the points of origination and termination of the signal." N.Y. REAL PROP. TAX LAW § 102(12)(d) (McKinney Supp. 1986).

185. New paragraph (i) provides as follows:

(i) Telecommunications equipment, which shall mean and include equipment used to provide transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain, and related equipment necessary to the operation of such equipment or the modification of such signals required by such equipment, and lines, wires, poles, supports and inclosures for electrical conductors upon, above and underground used in connection therewith, except that such equipment shall not include: (A) station apparatus, station connections and private branch exchanges, or equipment performing a similar function or functions, which are not independently capable of providing such transmission or switching; (B) fire and surveillance alarm system equipment; and (C) equipment used in the transmission of news or entertainment radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public, whether or not a fee is charged therefor. With respect to cable television systems, for the purposes of this paragraph real property shall not include equipment used to provide transmission of signals which are generally available to the public, whether or not a fee is charged therefor, or signals or programming required to be provided for the use or benefit of a municipality pursuant to a franchise agreement authorizing the operation of the cable television system owning such equipment in such municipality where such equipment is located; provided, however, that where equipment is used partly as telecommunications equipment as defined herein and partly for other uses, the valuation of such equipment for the purposes of this paragraph shall be the value of such equipment multiplied by a fraction, the numerator of which is the amount of gross revenues derived from its use as telecommunications equipment as defined herein

from this definition by general reference and by description. Moreover, even special telecommunications transmission services for private customers would likely be exempt, because the essential elements of the definition apply only where equipment is used to transmit signals between different entities, defined as separate and distinct businesses or uses. Thus, a company's own communications lines connecting only its own offices would not be subject to assessment, and neither would the lines of a communications service provider if used only to facilitate the communications of a paying user within the user's own organization.

The new telecommunications equipment definition also made clear that cable television equipment could not be subject to tax if such equipment had been mandated by municipal cable television franchise requirements, and that if any cable television equipment were to be subject to the new definition by reason of some partial use of such equipment, then only a prorated real property assessment could be made of such equipment.<sup>186</sup>

A new section 471 was added to the Real Property Tax Law,<sup>187</sup> which provided a twenty-five percent reduction in the assessed value of newly taxed telecommunications equipment for equipment other than the outside distribution plant. This reduction in assessed value was apparently intended to provide some fairness in the treatment of those companies whose transmission electronics had not been taxed previously, when compared to the central office equipment of telephone companies which had been taxed for many years, but under express limits on valuation contained in section 470 of the Real Property Tax Law since 1973.<sup>188</sup> That assessment limit was to be gradually phased out

---

and the denominator of which is the total gross revenues derived from all uses of such equipment. For purposes of this paragraph, the term "entities" shall mean separate or distinct sole proprietorships, partnerships, firms, associations, corporations or other forms of organization, whether acting by natural persons or by electrical or mechanical devices; provided, however, that parent entities and their wholly owned subsidiaries, and entities which are wholly owned subsidiaries of the same parent, shall not be considered separate and distinct entities when communicating with each other.

*Id.* at § 102(12)(i). This provision is automatically repealed and expires on December 31, 1986.

186. *Id.* This figure is based on reported gross revenues from the various services at issue.

187. N.Y. REAL PROP. TAX LAW § 471 (McKinney Supp. 1986).

188. N.Y. REAL PROP. TAX LAW § 470 (McKinney 1984).

under new amendments to section 470.<sup>189</sup>

Subdivision (b) of the new section 471 provided that any taxes paid by cable television companies because of assessments under the new telecommunications equipment provisions of paragraph (i) of section 102(12) could be reduced by any municipal fees imposed on the revenue generated by the same telecommunications use of such equipment and that such a reduction would be non-waivable.<sup>190</sup>

It can be concluded that the 1984 and 1985 Real Property Tax Law adjustments were relatively unhostile to cable television interests. However, municipalities remained frustrated by their loss of some substantial revenues from exempted telephone equipment and the cable facilities located on non-public property. It remains doubtful that new revenues from telecommunications equipment and gradually increasing central office assessments will make local governments whole again, and it is certain that many such localities will be permanent net losers because of their lack of newly assessed property.

Too much simple equity supports the continued exemption of customer-located station equipment and privately located cable television lines for these to become subject to annual assessment once more. The customer telephone equipment has now become too clearly a form of independent personalty, purchasable at many local retail stores and subject to sales tax. The outside cable television plant was simply never a natural element of real property. Its genuinely non-utility use should

---

189. N.Y. REAL PROP. TAX LAW § 470 (McKinney Supp. 1986).

190. Subdivision (b) provides as follows:

(b) Any fee, tax or charge paid to a municipality by a cable television system, pursuant to a franchise agreement authorizing the operation of such cable television system, on account of income or revenue derived from or otherwise based on telecommunications equipment defined in paragraph (i) of subdivision twelve of section one hundred two of this chapter, shall be a credit against any real property tax payable to such municipality which is attributable to such paragraph (i) of subdivision twelve of section one hundred two, notwithstanding any provisions of such franchise agreement to the contrary; provided, however, such credit shall be available only to the extent that such fee, tax or charge or part thereof (i) is not deducted from a special franchise tax pursuant to section six hundred twenty-six of such chapter, and (ii) is not in excess of such real property tax. The procedure for the granting of such credit shall be the same as that provided in such section six hundred twenty-six.

*Id.* at § 471(b). This section is automatically repealed and expires on December 31, 1986.

have always insulated it from the kinds of peculiar tax programs aimed at utilities and which were only justifiable because of the utility nature of the targeted property.

Nonetheless, the 1985 legislation again engendered a further study of the whole field of telecommunications taxation. The Governor has directed his Commerce Department to oversee this project and to present major recommendations, in concert with other state departments and agencies. With the help of a substantial grant from the Science and Technology Foundation, this project has now employed the accounting firm of Coopers & Lybrand to study the financial, fiscal and business factors involved. Once again, cable television services are the focus of broader policy considerations. The upcoming legislative session will again prove an interesting one for cable television.

### B. *Special Franchise Tax*

Article 6 of the Real Property Tax Law provides for the imposition of real property assessment on the value of a "special franchise."<sup>191</sup> A special franchise is a particular privilege which does not arise from the more profound rights of citizenship or corporate certification, but rather from a proprietary arrangement of government.<sup>192</sup> Thus, a permit to occupy the streets of a municipality for a commercial purpose has generally been thought of as such a special franchise.<sup>193</sup> Certain of these special franchises are identified as proper subjects for assessments as though in the form of real property. Subdivision 17 of RPTL

---

191. N.Y. REAL PROP. TAX LAW § 622 (McKinney 1984).

192. *Id.* at § 102(17). "In the strict and technical sense a 'franchise' has been defined as a special privilege conferred by the government on an individual or individuals and which does not belong to the citizens of the country generally, of common right." 37 C.J.S. *Franchises* § 1 (1943). "The charter of a corporation is its 'general' franchise, while a 'special' franchise consists in any rights granted by the public to use property for a public use but with private profit." BLACK'S LAW DICTIONARY, 592 (5th ed. 1979).

193. A special franchise has been defined as:

[T]he right granted by the public to use public property for a public use but with private profit, and, in respect of a right of way over a public street or highway with right to construct, maintain, or operate an instrumentality intended for public use, as a right to do something in the public highway, which, except for the grant, would be trespass. As defined in some statutes, "special franchise" has the same meaning as "franchise" when the latter term is used in the true sense.

37 C.J.S. *Franchises* § 1 (1943) (citations omitted).

section 102 identifies these as: "the franchise, right, authority or permission to construct, maintain or operate in, under, above, upon or through any public street, highway, water or other public place mains, pipes, tanks, conduits, wires or transformers, with their appurtenances, for conducting water, steam, light, power, electricity, gas or other substance."<sup>194</sup>

In view of the cases discussed earlier in this article relating to the application of sales tax and real property tax on cable television, an interesting question presents itself regarding whether the limited nature of the definition of special franchise at subdivision 17 could withstand a challenge in applicability to cable television facilities.<sup>195</sup>

The special franchise tax in New York may be unique as a form or method of taxation in the United States. Its history illustrates its essential purpose, which is to ensure that an adequate minimum franchise fee is paid for commercial street use franchises.<sup>196</sup> The original version of this tax was introduced as an anti-corruption measure aimed at city officials and supported by a young Governor Theodore Roosevelt. This law was adopted in a special session of the legislature called by Governor Roosevelt in 1899 as an amendment adding sections 44, 45 and 46 to the Tax Law adopted in 1896.<sup>197</sup> It was elegant in its approach to the perceived problem of favoritism and nepotism in the award of local street use. As an artificial form of "real property" tax, the revenues produced would flow directly to the local governments where they should have been generated originally.

---

194. N.Y. REAL PROP. TAX LAW § 102(17) (McKinney 1984).

195. See *supra*, notes 30-66 and accompanying text. A case might be made that the "special franchise" definition at RPTL § 102(17) simply does not include reference to cable television franchises, because cable television companies are not in the business of "conducting . . . electricity . . . or other substance." Reliance might be made on the cases distinguishing cable television from telephone and telegraph services, such as *New York State Cable Television Ass'n. v. State Tax Comm'n*, 59 A.D.2d 81, 397 N.Y.S.2d 205 (3d Dep't 1977), and *Manhattan Cable TV Serv. v. Freyberg*, 49 N.Y.2d 868, 405 N.E.2d 178, 427 N.Y.S.2d 933 (1980). Consider also the constitutional issues discussed *infra* at text accompanying notes 231-34; the argument might be made that because cable television companies have an inherent first amendment right to use municipal streets (with no more than minimally necessary regulations), they do not even hold a taxable "special franchise".

196. Ch. 712 [1899] N.Y. Laws 1589. See also *People v. Grout*, 119 A.D. 130, 103 N.Y.S.2d 975 (2d Dep't 1907).

197. Ch. 908 [1896] N.Y. Laws 795.

The valuation of the subject property was removed to a state agency to prevent a corrupt local administration from defeating the purpose of the law by intentional undervaluation. The "tax" was on the value of the intangible franchise itself and made subject to the normal local real property tax rate, just as though a building of that worth were located within the taxing district.<sup>198</sup> The benefit of the revenue was directed at the local residents, whose own tax burdens would be consequently eased. It ensured a minimum fair return on every award of local street use.

However, it originally failed to account for the fact that some such street use awards have been made fairly and for contractually negotiated compensation of significance. Therefore, the early version was amended to provide, as does section 626 of the law today, that any payments made to the same taxing entity for enjoyment of the same franchise should be allowed as a deduction from the assessed tax in order to avoid the double taxation of the same value.

The current version of this tax has been applied to cable television franchises for many years.<sup>199</sup> The valuation of the franchise is governed by the regulations of the State Board of Equalization and Assessment (SBEA).<sup>200</sup> Each cable television company is required to submit a number of regular reports to the Board,<sup>201</sup> the most important of which is an annual inventory report due at the end of October of each year. The franchise value is determined by calculation of the current value of the property located in the public ways, plus the addition of an intangible value factor.<sup>202</sup> The current property value is determined by the method known as "reproduction cost new, less depreciation."<sup>203</sup> This attempts to find the actual cost of reproducing the very same equipment (not replacing it with comparable and perhaps less costly equipment) in the current base year, minus an almost straight line depreciation factor for each year expired since the base calculation year.<sup>204</sup> Although

---

198. N.Y. REAL PROP. TAX LAW § 622 (McKinney 1984).

199. 1 Op. Counsel SBEA No. 38; 1 Op. Counsel SBEA No. 71.

200. N.Y. COMP. CODES R. & REGS. tit. 9, § 197 (1986).

201. *See id.* at §§ 197-2.6 to 197-2.12.

202. *Id.* at § 197-3.

203. *Id.* at § 197-3.1.

204. *Id.* at § 197-3.4.

this approach can produce very high assessments in comparison to the original installation cost of the facilities, let alone their current economic return, it has been held to be fair and appropriate because the subject property is "specialty property" designed or uniquely adapted to the business conducted, for which there is no market, and which cannot be converted to other uses without the expenditure of substantial sums of money.<sup>205</sup>

A key component of the valuation calculation is the Board's determination of the depreciation period applicable to the subject property. Schedules of depreciation are stated in the Board's regulations.<sup>206</sup> An important element of these schedules is the fifteen-year life attributed to cable television lines on leased poles and the fifteen-year life attributed to buried cable television lines.<sup>207</sup> The staff of the SBEA has attempted to seek a modification of these depreciation periods over the past two years. They recommended an increase in the service life figures described above. A twenty-year life for cable on leased poles was recommended. Such a change would have significantly increased the annual valuations of cable television property. These recommendations were issued by the Board as a rulemaking proposal at the end of 1984.<sup>208</sup> Active opposition from the State's Cable Television Association, in this case supported by comments of the State's Commission on Cable Television, was successful in preventing the adoption of this rule change. However, this effort may not have been abandoned permanently.

The intangible value factor is usually established at a flat rate of five percent of the established current tangible property value.<sup>209</sup> However, this intangible value may also be set by calculation of the "capitalized excess earnings" on the use of the assessed tangible property. Thus, if revenues are higher than some calculated standard for the subject industry or the authorized rate of return for a regulated utility, an effective penalty can be imposed. In the case of the non-utility operations of cable televi-

---

205. *Brooklyn Union Gas Co. v. State Bd. of Equalization & Assessment*, 65 N.Y.2d 472, 482 N.E.2d 77, 492 N.Y.S.2d 598 (1985).

206. N.Y. COMP. CODES R. & REGS. tit. 9, § 197-6 (1986).

207. *Id.* at § 197-6.3.

208. Notice of Proposed Rulemaking in EQA 01 85 00013 P, December 12, 1984.

209. N.Y. COMP. CODES R. & REGS. tit. 9, § 197-3.7 (1986).

sion, such an assessment might be highly suspect.

The most serious error committed by cable television operators faced with special franchise assessments is the overvaluation of their own equipment in their annual inventory reports. Typical in this respect is the failure to describe accurately the nature of equipment in place or deduct the facilities located on private property.

A lingering controversy surrounds the tax payment offsets allowed for contractual franchise fees paid to the same local government under section 626 of the Real Property Tax Law. Many cable television operators still fail to make full use of this potentially valuable credit, either because of ignorance or a reluctance to engage in municipal dispute. The full amount of any municipal franchise fees paid under contract may be deducted from the tax due the same year to the same local government entity.<sup>210</sup> But common complications arise from the reluctance of local taxing authorities to accommodate this offset, or from the fact that local taxes are due earlier in each year than contractual franchise fee payments.

These difficulties are addressed in a number of ways. Often the full tax is paid and the offset is taken the wrong way around, on the contract fee.<sup>211</sup> Offsets may also be taken on the basis of estimated fee payments (with later adjustments) or on the basis of the prior year's fee payments. A recent ruling by the State Comptroller confirms that refunds may be paid by local taxing authorities to cable television systems.<sup>212</sup> No basis exists for a

---

210. N.Y. REAL PROP. TAX LAW § 626(1)(a) (McKinney Supp. 1986). However, fees paid to a town or village would not be allowed as an offset to school district tax assessments.

Villages are now permitted to defer their real property assessments to their encompassing towns. N.Y. REAL PROP. TAX LAW § 1402(3) (McKinney Supp. 1987). Under such circumstances, cable television franchise fees paid to the village under contract should still be allowed as an offset to special franchise taxes assessed by the town, at least as those taxes apply to facilities located in the village.

211. Frequent informal reports indicate that local arrangements are made between the taxpaying cable television companies and the local official tax receiver and municipal franchise fee collector. These arrangements apparently often provide that the assessed special franchise tax will be paid in full and that the tax credit amount otherwise available under RPTL § 626 will be taken instead as a credit against the contractual franchise fee which would otherwise be payable in full. *See also* 7 Op. Counsel SBEA No. 124 (1983).

212. 1985 OP. N.Y. COMP. No. 32.

municipality's refusal to allow the credit provided at section 626, except in the event that a voluntary contractual clause contains a waiver of the otherwise available credit. However, the courts have consistently held that such waivers can be valid to eliminate this credit.<sup>213</sup>

The essential rationale for upholding the validity of such waivers is the conclusion that they represent a contractual agreement to pay a higher fee, which would itself be lawful if expressed more directly in the contract language. This may be a reasonable conclusion for most other special franchise holders; there appears to be no limit on the amount of fee which may be voluntarily assumed by most such companies. But, the same is not true for cable television companies. Federal law clearly preempts the amount of local franchise fee which may be negotiated with a cable television company in exchange for the award of a local franchise or the exercise of such franchise rights.<sup>214</sup> For this reason, it seems that a credible attack on such a municipally-contracted waiver of RPTL section 626<sup>215</sup> may be made if it can be shown that the effect of such agreed language will cause payments in excess of five percent of gross cable television revenues annually.<sup>216</sup> Such a challenge may be appropriate soon in order to discourage expansion of these contractual waiver provisions.

## VI. Regulatory and Franchise Fees: Franchise Fees are not Taxes

Article 28 of the Executive Law creates a New York State Commission on Cable Television with broad regulatory oversight over cable television operations and the award of municipal

---

213. *Brooklyn Union Gas Co. v. City of New York*, 56 N.Y.2d 881, 438 N.E.2d 1113, 453 N.Y.S.2d 398 (1982); *Consolidated Edison Co. v. New York*, 61 N.Y.2d 623, 459 N.E.2d 1282, 471 N.Y.S.2d 845 (1983); *Teleprompter Corp. v. City of New York*, 82 A.D.2d 145, 441 N.Y.S.2d 239 (1st Dep't 1981).

214. 47 U.S.C. § 542 (Supp. III 1985).

215. An attack may also be made on similar language which purports to make contractual fees a payment obligation in addition to any other tax or payment.

216. This result could occur when these payments are considered in addition to the payments made to the State's Commission on Cable Television under section 816 of the Executive Law and other forms of state or local franchise payments.

cable television franchises.<sup>217</sup> Section 817 of this article provides for the expenses of this Commission to be recovered by an annual assessment on the regulated companies.<sup>218</sup> Section 818 of this article provides:

Nothing in this article shall be construed to limit the power of any municipality to impose upon any cable television company, a fee, tax or charge, provided that any such fee, tax or charge when added to the amount payable to the commission pursuant to section eight hundred seventeen does not exceed the maximum amount permitted by applicable federal law, rules or regulations.<sup>219</sup>

This section limits the amount of such municipal fee, tax or charge, and it makes clear that the regulatory authority granted to the State Commission does not otherwise affect the validity of such fee, tax or charge, *but* this section does not expressly authorize the imposition of any such fee, tax or charge, nor clarify the nature of such. Some other provisions of state or federal law must be considered in these regards.

Section 622 of the Federal Communications Act of 1934, as amended, confirms the validity of such local fees,<sup>220</sup> but limits the total amount of combined local fees to no more than five percent of a cable operator's gross revenues.<sup>221</sup> At subdivision (g), paragraph (1), of this section, the franchise fee is described as including, "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such."<sup>222</sup> Thus, the federal law does not indicate whether a municipal cable television franchise fee can be considered a "tax" in New York.

Two opinions of the New York State Comptroller, mentioned earlier in the context of Tax Law section 186-a,<sup>223</sup> seem to

---

217. N.Y. EXEC. LAW §§ 811-831 (McKinney 1982 & Supp. 1986).

218. The annual assessment was not to exceed two percent of gross revenues. *Id.* at 817(b) (McKinney Supp. 1986). Currently, it is calculated at just over one half of one percent of gross receipts.

219. N.Y. EXEC. LAW § 818 (McKinney 1984).

220. 47 U.S.C. § 542 (Supp. III 1985).

221. *Id.* at § 542(b).

222. *Id.* at § 542(g).

223. *See supra* text accompanying notes 90-91.

make clear that municipalities may not impose discretionary taxes on franchised cable television services.<sup>224</sup> The 1957 opinion discussed the probable federal authority of cable television systems as a form of interstate commerce, but confirmed a village's authority to regulate such entities in the absence of a clear federal preemption. It indicated that a "franchise" award was an appropriate form of village regulation here, and that a "license" may be given for such operations. However, the opinion described clear limits on the methods of remuneration which may be demanded: *"It must be noted that the fee for such a license is limited to the reasonable cost of issuing the license and policing the licensee and that license fees are not to be prohibitory."*<sup>225</sup> It also made clear the inapplicability of village utility taxation.

A village would have no power to tax commercial closed-circuit television where the telecast originates without the boundaries of the village, even if commercial closed-circuit television fell within the definition of "utility." We are of the opinion, however, that commercial closed-circuit television is not subject to a village utilities tax even if the telecast originates within the village.<sup>226</sup>

The 1967 opinion attempted to clarify the preferability of the franchise rather than the license approach for municipal<sup>227</sup> regulation of cable television.

A license in the situation here presented would be impracticable since a license fee is limited by Town Law § 137 to the amount which will compensate for the issuance and recording of the license. The receipt by the town of a percentage of revenue would certainly be excessive according to this standard, since it would have no relation to the cost of issuance and recording of the license. So a franchise rather than a license should be used by this town in dealing with a closed circuit television operation, if the town is to receive a percentage of operating revenues.<sup>228</sup>

In summary, the Comptroller's opinions make clear that

---

224. 13 OP. N.Y. COMP. 351 (1957); 23 OP. N.Y. COMP. 708 (1967).

225. 13 OP. N.Y. COMP. 351, 352 (1957) (emphasis added).

226. *Id.* at 352-53.

227. Note that the 1957 opinion refers to "village" whereas the 1967 opinion refers to "town."

228. 23 OP. N.Y. COMP. 708, 709 (1967).

municipalities may not impose utility taxes on cable television operations, that reasonable municipal franchise or license fees may be imposed, and that regulation in the form of municipal licenses would limit applicable fees to license program costs, while an alternative franchise approach would allow fees in the form of a percentage of operating revenues.<sup>229</sup>

These conclusions are consistent with the regulatory and statutory provisions relating to municipal fees discussed above. On the state court level, decisions have raised questions regarding the validity of municipal fees which exceed the amounts needed to recoup reasonable local regulatory expenses.<sup>230</sup>

## VII. Constitutional Limits on the Taxation of Cable Television

In *Minneapolis Star & Co. v. Minnesota Commissioner of Revenue*,<sup>231</sup> the United States Supreme Court ruled that a Minnesota use tax on the cost of paper and ink products consumed in the production of publications violated the first amendment by imposing a significant burden on the freedom of the press. The Court noted that this tax was impermissibly offensive because it effectively singled out the press for a special tax. A similar argument may be made with respect to franchise fees imposed on cable television, because other federal decisions have since made clear that cable television services enjoy the same protections of the first amendment which clothe other media.<sup>232</sup>

Following the reasoning in *Minneapolis Star*, a three-percent tax on the gross receipts of the subscription television ser-

---

229. A more recent opinion of the State Comptroller makes clear that a municipality may not impose a cable television tax on its citizens in order to provide for the support of cable television services. 1985 Op. N.Y. Comp. 85-32.

230. In Wisconsin, it was held that a franchise fee may violate municipal law by amounting to a tax rather than a franchise fee where it exceeds the costs associated with regulation of the franchise. *Ripon Cable Co. v. City of Ripon*, No. 82-CV-684, slip op. at 3-4 (Wisc. Cir. Court of Appeals, Fond du Lac County, Nov. 2, 1984). Cf. *Satellink of Chicago, Inc., v. City of Chicago*, No. 85-CH-4263, slip op. at 23-24 (Ill. Cir. Ct., Cook County, June 20, 1986).

231. 460 U.S. 575 (1983).

232. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986); *Quincy Cable T.V., Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 2889 (1986); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985).

vice business was struck down.<sup>233</sup>

Constitutional challenges to cable television franchise fees have already been initiated in other states<sup>234</sup> and may well be initiated soon in New York. Even if such a challenge is never brought, the combined regulatory and tax burdens faced by cable television operations in New York are so unusually substantial that some form of relief is warranted and may be demanded of the legislature. More than fourteen years ago the legislature noted its determination that cable television operations involve "vital business and community service, and, therefore, are of state concern"<sup>235</sup> and that they "must be protected from undue restraint and regulation so as to assure cable systems . . . optimum technology and maximum penetration in this state as rapidly as economically and technically feasible . . ."<sup>236</sup>

It may be time again for the state to confirm this pledge and provide meaningful and fair adjustments toward the elimination of overlapping and repressive tax and fee impositions on cable television services. The combination of 1) local contractual fees (approaching five percent of all gross revenues); with 2) local sales taxes on the full value of almost all of the capital investment of the cable television system (possibly repeated with each transfer of system ownership); with 3) extensive state corporate franchise taxes on the same revenues (generated by exercise of what is in essence the same operating authority in another form); with 4) substantial annual payments of "special franchise" assessments on the same franchised operating rights again (ofttimes without benefit of normal credits for contractual fees — including tangible property valuations which are blind to uneconomic investments in low population service areas or non-remunerative public benefit facilities demanded in franchise contracts); with 5) additional new potential real property tax lia-

---

233. *City of Alameda v. Premier Communications Network, Inc.*, 156 Cal. App.3d 148, 202 Cal. Rptr. 684 (Cal. Ct. App.), *cert. denied*, 469 U.S. 1073 (1984).

234. *Tribune Cable of California v. City of Lakewood*, No. 85-2721 (C.D. Cal. filed Apr. 24, 1985); *Erie Telecommunications, Inc. v. City of Erie*, Civ. No. 85-185 (W.D. Pa. filed July 16, 1985); and *Sheboygan v. Lakeside Cablevision*, No. 85-CV-306 (Wisc. Cir. Ct., Sheboygan County counterclaim filed May 20, 1985). The *City of Lakewood* case was settled in the summer of 1986. The *Sheboygan* case was subsequently settled.

235. N.Y. EXEC. LAW art. 28, § 811 (McKinney 1984).

236. *Id.*

bilities for so-called telecommunications services; and with 6) state regulatory fees in the neighborhood of one-half of one percent of gross revenues per year, can all give cause to potential investors to look hard at development opportunities in other states and to potential subscribers to examine the virtues of more limited — and more costly — satellite receiving dishes. Furthermore, when one adds to this equation the recurring expenses of utility pole attachment fees,<sup>237</sup> and the numerous local and state street, road and highway use fees<sup>238</sup> it is not surprising that cable television investments have lost their previous attraction.<sup>239</sup>

---

237. These fees are set by order of the Public Service Commission. N.Y. PUB. SERV. LAW § 119-a (McKinney Supp. 1986). They now amount to \$6.60 per pole each year in the case of New York Telephone Company and over \$10 per pole in the case of Consolidated Edison. These also include a prorated portion of the various taxes already paid by those companies but not otherwise applicable to cable television.

238. It can be argued that these street, road and highway use fees are additionally applicable in order to exercise the same operational authority already paid for several times over.

239. "Acquisitions of systems based on current cash flow and cost-per-subscriber multiples are increasingly more difficult to justify by existing management 'technologies' — even with the promise of deregulation and market-determined rates." *Financial Notes*, CABLE TELEVISION BUSINESS, Aug. 15, 1986, at 60 (quoting Russ Barnes, President of TeleDirect, Inc. of Austin, Tex.).