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COURT OF APPEALS  
STATE OF NEW YORK  
-----  
MATTER OF ECHOSTAR SATELLITE CORPORATION,  
Appellant,  
-against-  
TAX APPEALS TRIBUNAL,  
Respondent.

No. 87

-----  
20 Eagle Street  
Albany, New York 12207  
November 14, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Penina Wolicki  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Matter of EchoStar.  
2 Counselor, would you like any rebuttal  
3 time?

4 MR. FRANKEL: Yes, Your Honor. Could I  
5 have two minutes, please?

6 CHIEF JUDGE LIPPMAN: Two minutes. Sure,  
7 go ahead.

8 MR. FRANKEL: I'm Paul Frankel. This is  
9 Irwin Slomka. We're here for EchoStar this morning.  
10 Thank you for taking our case. We - - -

11 JUDGE CIPARICK: You've paid double taxes  
12 here, right?

13 MR. FRANKEL: We did.

14 JUDGE CIPARICK: You paid taxes on your  
15 leasing, and now you're being asked to pay taxes on  
16 your purchase of the equipment, correct?

17 MR. FRANKEL: Right. We bought the  
18 equipment.

19 JUDGE CIPARICK: Right.

20 MR. FRANKEL: We leased the equipment to  
21 the people who - - -

22 JUDGE CIPARICK: The customers, right.

23 MR. FRANKEL: - - - use DISH Network,  
24 thousands in New York. We billed them. Then we have  
25 a lease agreement, Exhibit 1. Our invoices, Exhibit

1           4, have a separately stated bill for five dollars for  
2           each receiver.

3                   JUDGE PIGOTT: Practicality aside, though,  
4           aren't they right that the statute requires that you  
5           can get that money back, provided you refund it to  
6           your customers?

7                   MR. FRANKEL: That's a very difficult thing  
8           to do administratively, Your Honor. One, the  
9           statute's probably run. I'm sure it's run, as these  
10          - - - our years are '00 to '04.

11                   JUDGE PIGOTT: But wouldn't you - - - I  
12          mean, I realize the practicality. But, I mean,  
13          couldn't you - - - assuming - - - let's take one  
14          customer. You mail them back saying the State says  
15          we shouldn't have taxed you; here's your \$4.87. And  
16          then you can apply to - - - they're saying you can  
17          apply to them to get your \$4.87 back.

18                   MR. FRANKEL: One customer we could have  
19          done it.

20                   JUDGE PIGOTT: Yes.

21                   MR. FRANKEL: Thousands of customers - - -

22                   JUDGE PIGOTT: A little tougher.

23                   MR. FRANKEL: - - - we couldn't do it.

24                   JUDGE SMITH: Could you - - - in theory,  
25          could you do it today, or - - - how does the statute

1 of limitations work? Does it run from when you give  
2 the refund or does it run from the tax year?

3 MR. FRANKEL: The typical statute of  
4 limitations runs from the time you paid the tax, and  
5 then it's, I think, a three-year period. So we're  
6 talking about the year 2000 to 2004.

7 JUDGE SMITH: So you're - - - after three  
8 years, even if you decide - - - if you decide to  
9 refund it to your customers, then you can't - - -  
10 still can't get it back from them?

11 MR. FRANKEL: I don't think we'd get it  
12 back from the State.

13 CHIEF JUDGE LIPPMAN: Counselor, so what's  
14 your remedy here? What do you want us to do?

15 MR. FRANKEL: Oh. I would like you to  
16 agree with my reading of your Burger King case - - -

17 CHIEF JUDGE LIPPMAN: Assuming we agree  
18 with it, what do you want us to do?

19 MR. FRANKEL: Then I would like you to - -  
20 - we paid this disputed tax.

21 CHIEF JUDGE LIPPMAN: Right.

22 MR. FRANKEL: You know, first we paid the  
23 two million we collected. Then we paid - - -

24 CHIEF JUDGE LIPPMAN: Right.

25 MR. FRANKEL: - - - the 1.8 million they

1 wanted.

2 CHIEF JUDGE LIPPMAN: Right.

3 JUDGE CIPARICK: Under protest.

4 MR. FRANKEL: And then we filed a claim for  
5 refund for that 1.8 million.

6 CHIEF JUDGE LIPPMAN: Right.

7 MR. FRANKEL: I'd like you to grant that.

8 CHIEF JUDGE LIPPMAN: So you want 1.8  
9 million back?

10 MR. FRANKEL: Plus the interest.

11 JUDGE GRAFFEO: Plus interest.

12 MR. FRANKEL: Whatever we paid them. We  
13 paid some 1.8 plus interest.

14 JUDGE SMITH: So you - - - you're willing  
15 to let them keep the larger sum, but you get the  
16 smaller sum back?

17 MR. FRANKEL: That's right.

18 CHIEF JUDGE LIPPMAN: How does the nature  
19 of your business affect the tax here?

20 MR. FRANKEL: Well, we have, as I see it,  
21 really, a two-part business.

22 CHIEF JUDGE LIPPMAN: You sell television  
23 programming? What do you do?

24 MR. FRANKEL: We have a satellite TV  
25 business. So people, instead of getting cable,

1           instead of just putting an antenna on their roof,  
2           like we used to - - -

3                       CHIEF JUDGE LIPPMAN:   Right.

4                       MR. FRANKEL:   - - - they sign up with  
5           either DISH Network or DIRECTV, and they get it by  
6           satellite.  Well, that's not enough.  Because you  
7           need hardware to receive it.  You just can't get a TV  
8           signal and it'll appear on your set.  So there's  
9           hardware which we buy, and in some cases sell.  And  
10          when we sell it - - - it's interesting - - - when we  
11          sell it, we collect the sales tax, and they agree  
12          that we bought that equipment for purposes of resale.  
13          I mean, the statute says - - -

14                      JUDGE CIPARICK:  Don't they have to return  
15          the equipment when they no longer are your customers,  
16          when they stop using your service?

17                      MR. FRANKEL:  Not if they buy it.  You  
18          know, most people lease it because it's less  
19          expensive.

20                      CHIEF JUDGE LIPPMAN:  Yes, but they only  
21          want the equipment to get your service, right?

22                      MR. FRANKEL:  Right.  But they could - - -  
23          they could buy it.  They could lease it, which most  
24          people do, because it's only five dollars a month.

25                      JUDGE GRAFFEO:  If they buy the equipment

1 and they discontinue DISH service - - -

2 MR. FRANKEL: It's theirs.

3 JUDGE GRAFFEO: - - - is there any - - - is  
4 there any use of the box?

5 MR. FRANKEL: Well, you know, I think they  
6 could probably convert it to whatever else. Some  
7 people, I think, can buy their own equipment at Radio  
8 Shack. But most people lease it.

9 JUDGE GRAFFEO: What - - - what are you  
10 asking us to do as the definition for what's a resale  
11 under the statute?

12 MR. FRANKEL: Right. We think that the  
13 statute is clear that a sale of tangible personal  
14 property to any person for any purpose other than for  
15 resale as such - - - "as such" means you don't change  
16 it - - -

17 JUDGE SMITH: And resale includes any  
18 transfer for consideration?

19 MR. FRANKEL: Yes.

20 JUDGE SMITH: A lease or a license or  
21 anything else?

22 MR. FRANKEL: Anything.

23 JUDGE PIGOTT: They make a distinction, at  
24 least the courts did, with respect to Galileo.

25 MR. FRANKEL: Right.



1 JUDGE PIGOTT: They said that Galileo  
2 wasn't because it was - - - there were other uses, I  
3 guess, for that hardware. Was that - - - is that the  
4 distinction that's trying to be made here?

5 MR. FRANKEL: Well, that's what the State  
6 said. But the purpose of it was to be connected up  
7 with Galileo's travel information.

8 JUDGE CIPARICK: But they could use the  
9 computer for other purposes, whereas here, you really  
10 can't use the dish, and the box, or the remote for  
11 anything else other than that - - -

12 MR. FRANKEL: Remember that was a different  
13 time, Your Honor. People didn't have computers.  
14 There were no personal computers.

15 JUDGE CIPARICK: Right.

16 MR. FRANKEL: The computer world was  
17 nothing like it is today.

18 JUDGE PIGOTT: Well, that's - - - would  
19 your argument be, then, with Galileo, that if Galileo  
20 was today the equipment you were supplying them would  
21 do exactly what you wanted it to do, which was to  
22 absorb this information and use it for whatever  
23 purpose, they would not be able to use it for other  
24 purposes.

25 But back then, the only computers, or the

1           only equipment that was around could be used for  
2           other things. But it was incidental - - -

3                     MR. FRANKEL: That's exa - - -

4                     JUDGE PIGOTT: - - - to the purpose.

5                     MR. FRANKEL: I think, at that time, it was  
6           the Galileo-type travel computers and the LexisNexis.  
7           LexisNexis for legal research was invented in the  
8           late 60s. And in the early 70s, to get LexisNexis,  
9           you had to get the computer from LexisNexis. And all  
10          it did was serve it. So it was a very limited  
11          personal computer world, at that period of time.

12                    We think Burger King sets the test, the  
13          critical element test. White light is on. Okay.

14                    CHIEF JUDGE LIPPMAN: Go ahead, finish,  
15          counselor.

16                    MR. FRANKEL: And that's the test that  
17          should apply here. We think that this court  
18          correctly interpreted sale for resale, the New York  
19          City sales tax, which is the same tax, in 1939 - - -  
20          1939 - - -

21                    JUDGE PIGOTT: Well, Burger King was  
22          wrappers, right?

23                    MR. FRANKEL: Burger King was the wrapper  
24          for the hamburger. It was the cup for the soda.

25                    JUDGE PIGOTT: It's hard to tease that out.

1 MR. FRANKEL: And it was the holder of the  
2 French fries.

3 JUDGE PIGOTT: Right.

4 MR. FRANKEL: That's what it was. Now, why  
5 is that more critical than the receiver? If you  
6 don't have the receiver, the hardware, you're not  
7 going to get your television signal. These signals,  
8 you can't just pick them up. So we think it's - - -

9 CHIEF JUDGE LIPPMAN: Okay - - - okay,  
10 counselor. You're going to have your rebuttal time.  
11 Let's hear from your adversary.

12 MR. FRANKEL: Okay, thank you, Your Honor.

13 CHIEF JUDGE LIPPMAN: Thank you.

14 MS. ARNOLD: Good afternoon, Your Honors.  
15 May it please the court.

16 CHIEF JUDGE LIPPMAN: Counselor, did Burger  
17 King state the right test?

18 MS. ARNOLD: Well, Burger King is a  
19 container case.

20 CHIEF JUDGE LIPPMAN: Yes, how does it  
21 relate - - -

22 MS. ARNOLD: This is not a container case.

23 CHIEF JUDGE LIPPMAN: - - - to our case?

24 MS. ARNOLD: Pardon me?

25 CHIEF JUDGE LIPPMAN: How does it relate to

1 our case?

2 MS. ARNOLD: Well, it doesn't. It's  
3 distinguishable. And in fact, what this court did in  
4 - - -

5 CHIEF JUDGE LIPPMAN: So what's the test in  
6 our case?

7 MS. ARNOLD: The test in our case is  
8 whether the equipment is purely incidental to the  
9 service that's provided. So - - -

10 JUDGE SMITH: Is a wrapper incidental to a  
11 hamburger or not?

12 MS. ARNOLD: Well, what Celestial Food said  
13 is - - -

14 JUDGE SMITH: Well, Celestial - - - what's  
15 the answer - - -

16 MS. ARNOLD: - - - Celestial Food - - -

17 JUDGE SMITH: - - - to the question?

18 MS. ARNOLD: Is it critical to a hamburger?

19 JUDGE SMITH: Incidental?

20 MS. ARNOLD: No. What the court said - - -

21 JUDGE GRAFFEO: Burger King said - - - what  
22 did Burger King say; it was inseparably connected?

23 MS. ARNOLD: Right.

24 JUDGE GRAFFEO: And I'm not sure I  
25 understand the difference between being inseparably

1 connected and incidental to. What's - - -

2 MS. ARNOLD: Well, what Burger King said -

3 - -

4 JUDGE GRAFFEO: In practical terms, what's  
5 the difference here?

6 MS. ARNOLD: What Burger King said is that  
7 it was a critical element. And what Celestial Foods  
8 did was limit Burger King to only cases that deal  
9 with containers. And it said, "Only items that are  
10 necessary to contain the product for delivery can  
11 they be considered a critical element of the product  
12 that's delivered." And since Burger King, we have U-  
13 Need-a-Roll Off and Celestial Foods that address  
14 whether a service - - - equipment that's part of a  
15 service is - - -

16 CHIEF JUDGE LIPPMAN: Can you have the  
17 service without the equipment?

18 MS. ARNOLD: In this case?

19 CHIEF JUDGE LIPPMAN: Yes.

20 MS. ARNOLD: No. You can't get - - - my  
21 understanding is you can't get satellite television  
22 service without equipment, with - - - but the issue  
23 is whether this equipment is - - - has any  
24 independent or - - - value to the customer. Because  
25 it's a sales tax, the sales tax - - -

1 JUDGE PIGOTT: Maybe it's - - - maybe it's  
2 a good wok.

3 MS. ARNOLD: Pardon me?

4 JUDGE PIGOTT: I'm joking. But - - -

5 MS. ARNOLD: I'm sorry, I missed it.

6 JUDGE PIGOTT: That's all right. It was  
7 not worth catching.

8 What I don't under - - - I mean, if you  
9 look at Galileo and you look at this case, you get  
10 good-faith taxpayers who were trying to do the right  
11 thing, and it is like picking up mercury to figure  
12 out, you know, what a taxpayer is supposed to do.  
13 And I think what troubles me the most about - - -  
14 well, first of all, in Galileo, that you should have  
15 been taxing them and you weren't, and so they had to  
16 fix that. And now these people do what they think  
17 Galileo requires, which is we should tax them, and  
18 you said no you shouldn't have. And not only is the  
19 two million that we've taken in, we gratefully thank  
20 you for, but now we want another million and eight  
21 from you for exactly the same thing.

22 MS. ARNOLD: There are two answers to that,  
23 Judge - - -

24 JUDGE PIGOTT: Good.

25 MS. ARNOLD: - - - Pigott. One is that

1 Galileo is distinguishable because the issue there  
2 was whether the leases were taxable, not whether  
3 Galileo's purchases of the equipment were taxable.  
4 So it's a totally separate question.

5 And in addition, there - - -

6 JUDGE PIGOTT: So if they had a lease - - -  
7 I apologize for interrupting you. But are you saying  
8 if this was - - - if they had couched this in terms  
9 of a lease, that then they would have been fine, in  
10 your view?

11 MS. ARNOLD: No, no. It's because the  
12 incident of the tax falls on a different taxpayer.  
13 So the issue in Galileo is whether Galileo should  
14 have been - - - whether the service that it was  
15 selling was taxable.

16 CHIEF JUDGE LIPPMAN: Counsel - - -

17 MS. ARNOLD: In that case it was.

18 CHIEF JUDGE LIPPMAN: - - - counsel.  
19 Putting all these - - - the technical distinctions  
20 aside, what's the policy rationale for your position?  
21 What are - - - the equities of this case would seem  
22 to appear, at least at first glance, that they're  
23 paying twice for the same thing. Why, from a policy  
24 perspective, is that not the case?

25 MS. ARNOLD: Because the general tax

1 principle is that the sales tax falls on - - - it's a  
2 tax on the end user. And here, EchoStar is the end  
3 user, because if - - -

4 JUDGE SMITH: But isn't Judge Pigott right  
5 that it can be very, very hard to figure out who the  
6 end user is in these situations? And here you have a  
7 taxpayer who treated his customer as the end user,  
8 charged him the tax and sent it to you.

9 Has there ever been a case where somebody  
10 did that and you said, oh, no, you didn't purchase  
11 that for resale; you have to pay on your purchases?

12 MS. ARNOLD: I'm not aware of such a case.  
13 However - - -

14 JUDGE SMITH: So this is the first time - -  
15 -

16 MS. ARNOLD: - - - it's not unfair - - -

17 JUDGE SMITH: - - - you've tried this kind  
18 of double-dipping?

19 MS. ARNOLD: It's not double-dipping. And  
20 - - -

21 JUDGE SMITH: Well, it looks like it,  
22 doesn't it?

23 MS. ARNOLD: It's not double-dipping. And  
24 - - -

25 CHIEF JUDGE LIPPMAN: Say why it's - - -

1 say why it's equitable.

2 MS. ARNOLD: It's equitable - - -

3 CHIEF JUDGE LIPPMAN: Why is this fair?

4 MS. ARNOLD: It's fair because - - -

5 CHIEF JUDGE LIPPMAN: What are they paying  
6 for? What are they being taxed for? Make it work  
7 together - - -

8 MS. ARNOLD: Sure.

9 CHIEF JUDGE LIPPMAN: - - - the two - - -  
10 the two ways that they're paying.

11 MS. ARNOLD: They're paying a tax that is  
12 due. That they erroneously collected a tax from  
13 their customers is separate - - - is a totally  
14 separate legal issue to whether or not this is a sale  
15 for resale as such. And there's no reason to - - -

16 JUDGE SMITH: Well, isn't it - - -

17 MS. ARNOLD: - - - deny - - -

18 JUDGE SMITH: - - - isn't it relevant? I  
19 mean, in several of the cases we - - - the court  
20 makes a point that the seller, the alleged reseller,  
21 did not separately state a price for what he was  
22 reselling. Here, they - - - I don't know if they  
23 separately stated a price, but they separately kept  
24 track of it and collected the tax. Isn't that  
25 relevant?

1 MS. ARNOLD: No, because it's up to the  
2 tribunal to look at a transaction - - -

3 JUDGE PIGOTT: Well, let's talk about that  
4 for a second.

5 MS. ARNOLD: Okay.

6 JUDGE PIGOTT: I mean, when you're getting  
7 all of these checks from EchoStar saying this is  
8 sales tax we collected from our customers, did  
9 anybody say, why are they doing that?

10 MS. ARNOLD: They did that at the audit.

11 JUDGE PIGOTT: Well, that's what I mean. I  
12 mean, and it was several years later. I mean, I'm  
13 just - - -

14 MS. ARNOLD: No, it only applies to the  
15 audit period.

16 JUDGE PIGOTT: Well - - -

17 MS. ARNOLD: And at some point - - -

18 JUDGE PIGOTT: - - - we're talking two  
19 million dollars that was collected from the  
20 customers. And I - - - it just seems - - - why  
21 wouldn't somebody call them and say don't do this  
22 anymore? I'm just wondering why you were so happy to  
23 take - - - I'll call it double-dipping, because it  
24 apparently is the word of art we're using this  
25 afternoon but - - - I mean, what - - -

1 MS. ARNOLD: Can I just - - -

2 JUDGE PIGOTT: - - - as Judge Lippman said,  
3 what's the policy here? I mean, what are we doing to  
4 businesses in the State of New York who are trying to  
5 sell a service? Because you say well, this is a  
6 lease and this isn't, and because you think you've  
7 sold the stuff but you haven't, we, in our  
8 technological expertise, say that this is what this  
9 is, and therefore, we're going to tax you twice?

10 MS. ARNOLD: EchoStar was absolutely on  
11 notice that these purchases were subject to sales tax  
12 because there's a regulation directly on point, and  
13 that regulation - - -

14 JUDGE PIGOTT: If you - - -

15 MS. ARNOLD: - - - says - - -

16 JUDGE PIGOTT: - - - if you say that, then  
17 you're saying that they, in bad faith, taxed their  
18 customers; that they - - - that they clearly were on  
19 notice, and they nevertheless - - -

20 MS. ARNOLD: No.

21 JUDGE PIGOTT: - - - went forward and  
22 billed their customers two million bucks.

23 MS. ARNOLD: Absolutely not.

24 JUDGE PIGOTT: Okay.

25 MS. ARNOLD: I'm saying that they made a

1 mistake. That I'm - - - that's all that we can say.  
2 The regulation was out there to be read. They  
3 provide a service that's not taxable.

4 JUDGE SMITH: You would - - -

5 JUDGE GRAFFEO: If this had - - - if this  
6 had to be done all over again, could you clarify at  
7 what point the tax is supposed to be paid? They pay  
8 the tax when they buy this equipment from whoever the  
9 manufacturer is?

10 MS. ARNOLD: Right.

11 JUDGE GRAFFEO: Correct?

12 MS. ARNOLD: Yes.

13 JUDGE GRAFFEO: That's the sales tax they  
14 pay?

15 MS. ARNOLD: Right.

16 JUDGE GRAFFEO: So that would have been the  
17 two million?

18 MS. ARNOLD: Well, I don't know what they  
19 paid. It would have been - - -

20 JUDGE GRAFFEO: Or was that the one-eight?

21 MS. ARNOLD: - - - whatever the - - -

22 JUDGE CIPARICK: Right.

23 MS. ARNOLD: Yes.

24 JUDGE GRAFFEO: And is that it, then?

25 MS. ARNOLD: Yes.

1 JUDGE PIGOTT: Now, practically speaking -  
2 - -

3 MS. ARNOLD: Because - - -

4 JUDGE PIGOTT: - - - if they did that,  
5 wouldn't they take that 1.8 million and say, you  
6 know, if we were - - - if we could pass this on to  
7 the user, it would be eight cents on the five bucks,  
8 eight percent. So we'd be charging them forty cents  
9 sales tax; instead of doing that, we'll raise our  
10 monthly fee by forty percent - - -

11 MS. ARNOLD: Right.

12 JUDGE PIGOTT: - - - right?

13 MS. ARNOLD: Yes.

14 JUDGE PIGOTT: So what have we  
15 accomplished?

16 MS. ARNOLD: Well, that's exactly what  
17 Celestial Food says. And there needs to be a line.

18 JUDGE PIGOTT: Yes.

19 MS. ARNOLD: The container cases make it  
20 very easy to see where the line is. It's a container  
21 or it's not a container. And it's a purchased  
22 product, equipment, that's made provisional for your  
23 service.

24 JUDGE PIGOTT: I forget what you did in  
25 Galileo, other than that you told them they were

1           taxing it wrong. Did you go back and - - - what did  
2           Galileo then have to do? Did they have to then eat  
3           the lack of sales tax that they should have been  
4           charging to their customers?

5                    MS. ARNOLD: I don't know what happened  
6           after the case was decided.

7                    JUDGE PIGOTT: Because it's the reverse of  
8           this, right?

9                    MS. ARNOLD: Correct, yes.

10                   JUDGE PIGOTT: You were saying - - - you  
11           were saying you should have taxed your customers, and  
12           you didn't - - -

13                   MS. ARNOLD: Right.

14                   JUDGE PIGOTT: - - - so you've got to - - -  
15           you know, you've got to pay us.

16                   MS. ARNOLD: I believe that was the - - -  
17           the result of that.

18                   But as far as the equities go, I'd like to  
19           add that in addition to the notice that they had,  
20           there - - - even if they had any doubt about the  
21           applicability of the regulation, they certainly could  
22           have requested an advisory opinion, and they didn't.  
23           And even during the audit, when the tax - - - they  
24           were aware that the Tax Department believed that a  
25           tax was due, that they were - - - the onus of paying

1 the sales tax was on EchoStar, they could have taken  
2 steps at that point to seek a refund, and didn't do  
3 that.

4 So in terms of the equities - - -

5 JUDGE PIGOTT: What you're saying is that  
6 they should have, at the time you came down with  
7 their audit, sent a letter out to all of their  
8 customers saying we want our money back?

9 MS. ARNOLD: Well, whatever they - - - the  
10 statute req - - - not that they want their money  
11 back. But they need to repay - - -

12 JUDGE SMITH: No, here's your money back.

13 MS. ARNOLD: - - - the customers.

14 JUDGE PIGOTT: Yes, that they had to repay.

15 MS. ARNOLD: Right, right.

16 JUDGE SMITH: Suppose - - - in Celestial  
17 Food, suppose that Burger King - - - unlikely - - -  
18 suppose they had charged separately for the salt and  
19 pepper, or whatever it was, the - - -

20 JUDGE CIPARICK: Ketchup.

21 JUDGE SMITH: - - - the extra stuff - - -  
22 the coffee stirrers, and collected sales tax on it.  
23 That would have changed the result, wouldn't it?

24 MS. ARNOLD: Not necessarily. Because  
25 there are other cases - - - in other words, are you

1 concerned about the - - -

2 JUDGE SMITH: Well, wait a minute - - -

3 MS. ARNOLD: - - - double taxation - - -

4 JUDGE SMITH: - - - wait a minute, wait a  
5 minute. I'm Burger King.

6 MS. ARNOLD: Yes.

7 JUDGE SMITH: I have coffee stirrers. I  
8 decide I'm going to sell my coffee stirrers to my  
9 customers. I have to collect sales tax, don't I?

10 MS. ARNOLD: Yes.

11 JUDGE SMITH: And you're saying - - - and  
12 that - - - and so then when I purchased those coffee  
13 stirrers, I wouldn't have to pay tax on it, right?  
14 Because it would have been for resale?

15 MS. ARNOLD: Right.

16 JUDGE SMITH: So it would change the  
17 result, if they had separately stated and charged - -  
18 - the price and charged the sales tax?

19 MS. ARNOLD: I would say it could change  
20 the results, because there are other cases like XO  
21 New York where they purchased electricity, and then  
22 they changed the configuration of it - - -

23 JUDGE SMITH: Why - - - I guess what I'm bo  
24 - - - it seems to me, these cases are all - - - a lot  
25 of them are very debatable. It's hard to reconcile

1           them. In this case, it sounds to - - - the taxpayer  
2           resolved the doubt in a way adverse to the taxpayer  
3           and favorable to the State. Why are you complaining?  
4           You got more money from the way he did it than you  
5           would have got from the way you did it.

6                   MS. ARNOLD: Well, because the issue is to  
7           do it right. And if the taxes you - - -

8                   CHIEF JUDGE LIPPMAN: Yes, but don't you  
9           have the flexibility to stand back and take a look at  
10          the totality of what's going on here and say that  
11          gee, we shouldn't be getting what, in effect, is kind  
12          of almost a windfall?

13                   MS. ARNOLD: Right. The problem with that,  
14          however, Judge, is that we have two separate  
15          taxpayers here. And you - - - what you're  
16          suggesting, I think, is to take one taxpayer's  
17          liability - - - tax liability, EchoStar's, and use a  
18          separate tax that another taxpayer paid to offset  
19          that liability.

20                   JUDGE PIGOTT: No, it's more fundamental  
21          than that.

22                   MS. ARNOLD: And that's not fair - - -

23                   JUDGE PIGOTT: You're claiming an expertise  
24          in an area of technology that, at least this  
25          taxpayer's saying you don't have. And that you are

1 making distinctions between Galileo and EchoStar that  
2 if you walked a mile in their shoes, you would not  
3 any longer make. And rather than slicing the bologna  
4 this thinly, there ought to be a policy of, for  
5 example, if you disagree with them, say stop doing  
6 it, and then - - - and do it this way, and challenge  
7 that, rather than collect money twice.

8 MS. ARNOLD: Well, I would say, Judge, that  
9 this case fits very nicely, squarely, with the Albany  
10 Calcium Light and the U-Need-a-Roll Off cases,  
11 holding that the tribunal can look at a transaction,  
12 and a tribunal can look at a taxpayer's business and  
13 make some determination, at that point, whether the  
14 equipment is incidental to a service or not. And  
15 that's the test. Is this equipment incidental - - -

16 CHIEF JUDGE LIPPMAN: Okay, counselor.

17 MS. ARNOLD: - - - to the service? Is it  
18 all tied in? Or is it a container?

19 CHIEF JUDGE LIPPMAN: Okay. Thank you,  
20 counselor.

21 MS. ARNOLD: Thank you, Judge.

22 CHIEF JUDGE LIPPMAN: Counselor, your  
23 adversary basically says that you made a mistake and  
24 you have to live with it. What is your counter?  
25 What should the court be doing?

1 MR. FRANKEL: We don't think we made a  
2 mistake. We think the statute is clear. You know,  
3 we're not dealing with an exemption.

4 CHIEF JUDGE LIPPMAN: You think your  
5 interpretation is better than theirs?

6 MR. FRANKEL: Well, we think we're right.

7 CHIEF JUDGE LIPPMAN: I know you think  
8 you're right.

9 MR. FRANKEL: And we think that - - -

10 CHIEF JUDGE LIPPMAN: Theoretically, they  
11 have an expertise in this area.

12 MR. FRANKEL: In Galileo, my recollection  
13 is, we had to eat it. So we paid twice.

14 JUDGE PIGOTT: Ms. Arnold says that you  
15 could have asked for an opinion, you know, an  
16 advisory opinion on this.

17 MR. FRANKEL: You know, when you have a  
18 statute, you don't ask for an advisory opinion. When  
19 we have a Burger King case - - -

20 CHIEF JUDGE LIPPMAN: Do you think the  
21 statute is clear in the direction that you  
22 interpreted it?

23 MR. FRANKEL: Yes, yes. It's - - - a  
24 taxable sale is a sale of tangible personal property  
25 other than a sale for resale.

1                   JUDGE SMITH:  Would it be - - - would it be  
2                   a closer - - - is it relevant that you chose to do it  
3                   the way you did it, and to itemize these things and  
4                   pay the tax on them separately?  Would this be a  
5                   closer case if you had not collected the sales tax  
6                   from the customer?

7                   MR. FRANKEL:  Well, that does distinguish  
8                   us from the two cases that were cited by counsel,  
9                   because the two cases which this court decided after  
10                  American Molasses, this is, I think, before Burger  
11                  King, it was stated in both cases that they did not  
12                  separately bill.  We did separately bill.  The bill  
13                  that we sent out had a line on it, five dollars for  
14                  each receiver, taxed so much on that.

15                  There's nothing in Burger King that limits  
16                  it to container - - - to containers.  The law is  
17                  something for resale.

18                  JUDGE PIGOTT:  Well, Calcium was cylinders,  
19                  right, gas cylinders?

20                  MR. FRANKEL:  Cylinders, right.

21                  JUDGE PIGOTT:  And what was Molasses?  It  
22                  wasn't the barrels, was it?

23                  MR. FRANKEL:  They were like cylinders,  
24                  too.

25                  JUDGE SMITH:  They were bags, weren't they?

1 The molasses was in bags - - -

2 MR. FRANKEL: I guess they were different -  
3 - -

4 JUDGE SMITH: - - - molasses in sugar bags.

5 MR. FRANKEL: - - - but still it was part  
6 of the sale. You know, somebody paid five dollars  
7 and they got two things. They got the molasses and  
8 they got the bag of the molasses. So that was for  
9 resale.

10 The - - - I don't think "purely incidental"  
11 is a test under this court's authority. I think the  
12 authority is Burger King. It's the critical element,  
13 which this is. It's a critical element. It's not  
14 inseparably connected. It retained its form.

15 JUDGE GRAFFEO: Why is "incidental" not as  
16 good a rule as the container rule in Burger King?  
17 Because in Burger King, the consumer throws away that  
18 container.

19 MR. FRANKEL: Well, because it's a critical  
20 element. You don't get coffee without the container.  
21 You don't get the burger without a wrapper. You  
22 don't get the French fries without something to hold  
23 it. And you don't get your TV signal without the  
24 hardware to receive it.

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

1 Thank you. Thank you both.

2 MR. FRANKEL: Thank you very much.

3 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of EchoStar Satellite Corporation v. Tax Appeals Tribunal, No. 87 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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