BEFORE THE STATE TAX APPEAL BOARD

OF THE STATE OF MONTANA

GOLD CREEK CELLULAR d/b/a VERIZON WIRELESS, Appellant, - vs - THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, Respondent.	)	DOCKET NO.: SPT-2007-8 ORDER ON MOTIONS FOR SUMMARY JUDGMENT

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Status of the Case:

Gold Creek Cellular, a Montana Limited Partnership, d/b/a Verizon Wireless (Verizon) brings this case to challenge the 2007 Montana Department of Revenue's (DOR) property tax classification of their Montana business as class thirteen property, that is, as a centrally assessed telecommunications service company under § 15-6-156, MCA. Prior to 2007, Verizon's property was locally assessed as class four under § 15-6-134, MCA, and class eight under § 15-6-138, MCA. As class thirteen, Verizon's property bears a six percent tax rate rather than the three percent applied to classes four and eight property.

Both parties have petitioned this Board for summary judgment. A grant of summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c), *Jarrett v. Valley Park,* 277 Mont. 333, 338, 922 P.2d 485, 487 (1996). Generally, the first step is to determine whether the moving party has shown both the absence of issues of material fact and entitlement to

judgment as a matter of law. *In re Estate of Lien,* 270 Mont. 295, 298, 892 P.2d 530, 532 (1995). In this case, however, the parties have filed cross motions for summary judgment, so the absence of material fact issues has been mutually agreed upon by the parties. The sole question for decision, therefore, is whether the property should be taxed as class thirteen or class eight.

Background

Verizon operates a wireless communications business in Montana and is a limited partner of a nationally operating Verizon parent company (Cellco d/b/a Verizon Wireless). The company now operates throughout the state and within other states, transmitting voice and data. Undisputed testimony indicates that currently 20 percent of Montana homes rely solely on wireless telephone communications. The wireless industry in Montana has increased greatly in the past ten years, growing from an urban-based enterprise offering limited service to a statewide industry.

The DOR's Position

The DOR determined that Verizon's property is subject to central assessment and properly classified under class thirteen. In reaching its decision, the DOR cites classification statute § 15-6-156 (1)(d), MCA: "allocations of a centrally assessed telecommunications company" for a determination of its classification. For purposes of determining whether the company is properly centrally assessed, the Department cites § 15-23-101(2), MCA: "property owned by a corporation or other person operating a single and continuous property operated in more than one county or more than one state, including but not limited to telegraph, telephone, microwave. . . " and accompanying Rule 42.22.102 which requires the interstate and inter-county continuous property of telecommunications companies be centrally assessed.

A telecommunication service provider is a company providing retail telecommunications services as defined in § 15-53-129(2), MCA as "the two-way transmission of voice, image, data or other information over wire, cable, fiber optics, microwave, radio, satellite, or similar facilities that originates or terminates in this state and

is billed to a customer with a Montana service address. The term includes but is not limited to local exchange, long-distance, two-way paging, wireless telephony, and related services."

There is no disagreement that Verizon offers a full range of telephony services including voice and data transmission, so that their services compete fully and interconnect seamlessly with other telecommunications service companies. Further, there is no contention that Verizon is not properly centrally assessed. The question is whether class thirteen is the proper classification.

The DOR argues that class thirteen is the proper classification because the property is properly centrally assessed, and that the property is classified as class thirteen which includes "allocations of centrally assessed telecommunications services companies." § 15-6-156(1)(a), MCA.

Verizon's Position

Verizon does not dispute that it fits the definition for central assessment.(*See, e.g.,* Verizon Brief in Opposition to the Department's Motion for Summary Judgment, page 6.) Verizon admits that it operates across county lines and that its properties are subject to central assessment. Verizon contends, however, that its property should be classified as class eight property under § 15-6-138(1)(i), MCA, as "mobile telephones" under § 15-6-138(1)(j), MCA, as "radio and television broadcasting and transmitting equipment." Verizon claims that since the purpose of its cellular radio towers and related equipment is to broadcast and receive radio waves, its property should be classified as radio transmitting equipment. Claiming that the radio transmission language of class eight is more specific than the telecommunications service company language of class thirteen, Verizon contends the specific should control the general and thus, class eight must control as a matter of statutory construction. Verizon further claims there has been no change in the law to justify the DOR's change in its classification of prior years.

Board Discussion

As a "centrally assessed telecommunications services company" under § 15-6-156(1)(d), MCA, Verizon must be valued as a single operating entity, a unitary business that logically cannot be divided into state or county divisions without understating the value of the whole. The DOR is charged with assessing property at 100 percent of market value, § 15-8-111 M.C.A., that is, what a willing buyer would pay a willing seller (§ 15-8-111(2)(a) M.C.A.). The DOR uses a variety of methods to calculate that value, with a goal of finding the value of the business as a going concern. For a comprehensive discussion of these methodologies, see *Pacificorp v. DOR, CT-2005-3, 07/31/07.*

The concept of unitary assessment for appraising multi-county or multi-state companies has been an established rule in Montana for over 50 years. *See, e.g.*, *Yellowstone Pipeline v. State Board of Equalization*, 138 Mont. 603, 358 P.2d 55 (1960); *DOR v. Pacific Power and Light Co.*, 171 Mont. 334, 338-9; 558 P.2d 454, 457 (1976), and recently re-affirmed in *DOR v. PPL Mont., Inc.*, 2007 MT 310, 172 P.3d 1241. Some of the earliest unitary valuation cases involved communication companies (*see Western Union Tel. Co. v. State Board of Equalization,* 91 Mont. 310, 7 P.2d 551 (1932) because the "unit approach relies on the proposition that each part of an organization is indispensable to the existence of the whole and contributes, proportionally, to its principal earnings." *Qwest Corporation v. DOR, SPT-2008-2, 11/30/09.*

Standards of Classification

Montana courts have established that property is classified according to "the use to which the property is devoted and its productivity." *Chicago, Milwaukee & St. Paul Railway Co. v. Powell County,* 76 Mont. 596, 599, 247 P. 1096, 1097(1926). This process is separate from the assessment and valuation. *See, e.g.*, *Pacific Power and Light Company v. Department of Revenue*, 249 Mont. 33, 36, 813 P.2d 433, 435 (1991); *Butte Electric Ry. Co. v. Mcintyre*, 71 Mont. 21, 227 P.61 (1924); *Omimex Can., Ltd. v. DOR*, 2008 MT 403, PP27, 347 Mont. 176, 201 P.3d 3.

The Court in *Wheir v. Dye*, 105 Mont.347, 354, 73 P. 2d 209, 213 (1937)stated that "two identical articles of personal property in the hands of different owners, when applied to different uses and consequent productivity, may be placed in different classes, and, therefore, subject to a different burden of taxation." The case involved property taxes imposed on automobiles which were set at different rates for dealers than for individual and corporations. Verizon claims that the nature of the property itself (*i.e.,* radio transmission equipment) is the sole determinant of its classification, so that an automobile would always bear the same rate of tax regardless of its use, but as discussed above, the Supreme Court of Montana has held otherwise.

The language of the code sections at issue is straightforward. Verizon clearly fits every part of the definition of class thirteen property under § 15-6-156(1)(d), MCA, as a centrally assessed telecommunications service company whose property and income are "allocated," or apportioned, from its nationwide property and income for taxation within the state. "Retail telecommunications" are clearly defined in § 15-53-129, MCA to include transmission over radio, among other media, and specifically to include wireless telephony. Radio transmission is, therefore, mentioned in several different contexts in the taxing statute, not just class eight property, but also in the definition of telecommunication companies in class thirteen and Verizon fits most accurately into class thirteen.

On the other hand, the plain language of the phrase "radio and television broadcasting and transmitting equipment" suggests the legislature was referring to entertainment broadcasting equipment (a one-way broadcast system) rather than the two-way telephonic transmission Verizon uses. Verizon only fits that definition if several words are removed from the middle of the statute. This Board assumes its function in construing a statute is "not to insert what has been omitted nor to omit what has been inserted. . . A statute must be read and considered in its entirety and the legislative intent may not be determined from the wording of any particular sections or sentence, but only from a consideration of the whole. . ." *Gaub v. Milbank Ins. Co.,* 220 Mont.424, 715 P.2d 443 (1986).

There is no dispute that at least part of Verizon's equipment is radio transmission equipment but its purpose is providing retail telecommunications. There is no indication, however, that it was intended to be covered by the language "radio and television broadcasting and transmitting equipment" in § 15-6-138(1)(j), MCA. Indeed, the DOR claims that Verizon's equipment was formerly treated as class eight property because it fell under subsection (n) which includes "all other property that is not included in any other class in this part," § 15-6-138(1)(n), MCA.

Verizon's full-service telecommunications system, in fact, relies on extensive computer controls and a worldwide network of wirelines, not just radio transmission. According to the deposition of their operations director, Michael Sandoval, the equipment in question consists of a base station, a mobile switch and a base station controller (Tr. Michael Sandoval, Exh. D, DOR's Response Brief to Petitioner's Motion for Summary Judgment, pp.14,15). The radio transmission is merely the method of communication between the cell phone and the base station antennas, after which the mobile switch and the base station controllers transfer the call to a landline, using extensive computer networks to find and signal the recipient's phone, and then transfer the call to that phone, which could be on any phone system anywhere in the world.

It is also worth noting that Mr. Sandoval stated that the base station was the least costly part of the equipment. Radio transmission equipment is included in many other types of productive equipment but is always classified according to the purpose for which the equipment is used. Airplanes, for example, have substantial communication and navigating equipment that uses radio transmission essential to the piloting of the plane. When centrally assessed, the equipment is still classified as airline equipment for property tax purposes.

Verizon requests that if their property is not all radio transmission equipment, then that which is, should be taxed as class eight and the remainder taxed in the appropriate class, such as class thirteen. However, the concept of unitary valuation of a going concern

is that the entire business is valued as a single entity, not divided up so that its bits and pieces are taxed under whatever specific section might describe them.

In this case the radio equipment is just a small part of the overall mechanism of providing broad-spectrum telecommunications services. Verizon's customers are not billed for just the minimal cost of radio transmission of their voice and data to and from a cell tower; they pay Verizon for the entire call, or text message, or download, or ringtone, or data stream, or web search or whatever the latest complex software can deliver.

This is not a case, as Verizon argues, in which specific and general code definitions are in conflict. This case presents a choice between a complete or a partial definition; between code sections that either fully describe the petitioner's business or describe merely a portion of it; between a code section expressly meant to include Verizon's business or one with no clear intent. Petitioner admits its business is a unified telecommunications company and it should be taxed accordingly.

As an alternate argument, Verizon would have us read "mobile telephones" as "mobile telephone equipment" in § 15-6-138(1)(i), MCA to include Verizon's equipment in class eight. We decline to amend the statutory language and find the argument that the legislature must have meant to include all mobile phone equipment, rather than merely the handsets, unpersuasive.

Change in Classification

Verizon claims the legislature has implicitly consented to the DOR's pre-2007 classification by failing to change § 15-6-138(1)(j), MCA, citing *Hovey v. Dept of Revenue*, 203 Mont. 27, 659 P.2d 280 (1983). There are, however, several contraindications to that implication.

The first is that the Legislature, in 1979, enacted a statute amending § 15-23-101, MCA, which provides for the central assessment of property "owned by a corporation or other person operating a single and continuous property operated in more than one county or more than one state, including . . . telephone, microwave. . . or like properties. . ." The bill was entitled "[a]n act to require that all operating property owned by centrally assessed

companies be assessed by the Department of Revenue and to apply a single property tax rate to that property. . . ." This clearly states the essence of unitary valuation. At the time, according to the testimony of Gene Walborn of the DOR, cellular telephony was in its earliest phase and was largely local in nature, primarily available in the larger cities in the state and frequently operated by local companies. *See* Walborn Tr., pp. 7-8, Exh. A, DOR's Response Brief to Petitioner's Motion for Summary Judgment. As the cellular industry has grown and centralized, cell service has spread across the state and is now offered by national companies, it has expanded into a statewide, centrally assessed business of the type that was contemplated in the adoption of § 15-23-101, MCA. Public policy does not support a static taxation system. Rather, it is proper for the DOR to analyze whether a change in a business requires a change in its taxation.

Second, the legislature, in 1999, enacted a retail excise tax on telecommunications consumers at the same time it lowered the property tax rates applied to telecommunications property and repealed the telephone company license tax imposed on some telephone companies. The legislative findings and declaration of purpose in § 15-53-128, MCA are a clear statement of legislative intent to foster economic competitiveness, efficient and affordable telecommunications infrastructure by encouraging technological advancement by equalizing the tax imposed on all elements of the telecommunications industry and remove the competitive inequities the previous tax system had created. It expressly includes mobile telephony and radio transmissions in the category of telecommunication systems to be equalized. Again, that language supports the concept that the legislature supported taxing all telecommunications companies in the state under the same provisions.

Third, we cannot imply legislative approval of the pre-2007 assessment practice when a legislative audit of the DOR specifically directed the DOR to change the classification of mobile phone companies to be treated as centrally assessed telecommunication companies. (*See* Legislative Audit, Recommendation #7, pp. 22-23 Bates VZ-DOR 001268-001269, Exh. E, DOR's Response Brief to Petitioner's Motion for

Summary Judgment) Presumably this was done with the authority and approval of the Legislature, making clear that the Legislature does not approve of the past classification.

It is also worth noting the 2007 legislative session saw an unsuccessful attempt to specifically exempt wireless telecommunications companies from class thirteen central assessment (House Bill 469, 2007 Session, 60th Legislative Session, Sections 3 and 4, Exh. F, DOR's Response Brief to Petitioner's Motion for Summary Judgment.). The bill was vetoed by Governor Brian Schweitzer because he stated that it ratified the improper practices of prior administrations and could be challenged as unequal taxation when compared to the tax assessment of landline telephone competitors. *See* Letter of Gov. Brian Schweitzer to legislative leadership, Exh. G, DOR Response Brief to Petitioner's Motion for Summary Judgment. The Legislature failed to overturn the veto. Verizon is now attempting to accomplish through this Board what it was unable to accomplish through the legislature. Surely if the language of the statutes so clearly places their property in class four and class eight, the amendment would not have been necessary.

In conclusion, we affirm the DOR's determination which puts Verizon's property in the tax class that best describes its entire operation.

Dated this 10th day of February, 2010.

BY ORDER OF THE STATE TAX APPEAL BOARD

/s/_____
KAREN E. POWELL, Chairwoman

/s/_____
DOUGLAS A. KAERCHER, Member

/s/_____
SAMANTHA SANCHEZ, Member

Notice: You are entitled to judicial review of this Order in accordance with § 15-2-303, MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of February, 2010, a copy of the foregoing order was served on the parties hereto by the method indicated below and addressed as follows:

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