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COURT OF APPEALS

STATE OF NEW YORK

T-MOBILE NORTHEAST, LLC,

Appellant,

-against-

NO. 140

DEBELLIS,

Respondent.

285 Wall Street
Kingston, NY 12401
November 15, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

JOHN G. NICOLICH, ESQ.
YUZEK GAINEN CARROLL BERTOLOTTI LLP
Attorney for Appellant
250 Park Avenue
6th Floor
New York, NY 10177

THOMAS SCAPOLI, ESQ.
INGERMAN SMITH, LLP
Attorney for Respondents
150 Motor Parkway
Suite 400
Hauppauge, NY 11788



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Appearances (Continued):

MICHAEL B. RISMAN, ESQ.
HODGSON RUSS LLP
Attorney for Respondents
140 Pearl Street
Suite 100
Buffalo, NY 14202

Michael Drake
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 140. Matter of T-
2 Mobile Northeast versus Debellis.

3 CHIEF JUDGE DIFIORE: Good morning, counsel.

4 MR. NICOLICH: Good morning, Your Honors. John
5 Nicolich representing T-Mobile.

6 May I have two minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: You may, sir.

8 MR. NICOLICH: Okay. Your Honor, T-Mobile's
9 rooftop antennas, base transceiver systems, and all other
10 components of its transmission system equipment are not
11 taxable real property.

12 JUDGE STEIN: What - - - under - - - under Real
13 Property Tax Law 102(12)(i), what is included as taxable
14 real property?

15 MR. NICOLICH: Okay. So when the legislature
16 passed that statute, the legislative history indicates that
17 long distance carriers at the time, and we're talking about
18 the 1985-1987 period - - -

19 JUDGE STEIN: Well, before we get to legislative
20 history, don't we have to look at the words of the statute
21 themselves?

22 MR. NICOLICH: That - - - that's right.

23 JUDGE STEIN: Okay. So what - - -

24 MR. NICOLICH: So - - -

25 JUDGE STEIN: What do the words say?



1 MR. NICOLICH: So lines, wirings, poles,
2 supports, and enclosures for electrical conductors. So we
3 say that our equipment does not fall into those terms
4 because there's also the caveat, the exclusion for station
5 connections. So your question to me is what, today, I
6 believe, might fall into those terms.

7 JUDGE STEIN: Correct.

8 MR. NICOLICH: So the legislative history
9 indicates that they were long-distance carriers at the
10 time, such as MCI, that bypass the local exchange carrier.
11 So it appears that that type of equipment would be taxable.

12 And we've also identified today cable television
13 companies are not limited to providing cable television
14 service. So, for example, you can buy telephone service
15 from a cable television provider without getting cable
16 television service. So those lines would not come within
17 the exclusion.

18 And it would be my - - - my understanding that
19 then those lines and wires and poles that the cable
20 television company used would clearly fall under the
21 statute as long as it wasn't being used to actually
22 transmit television signals.

23 JUDGE STEIN: So - - - so it's your position that
24 this statute only applies to cable television?

25 MR. NICOLICH: No. I - - - Your Honor, we don't



1 know all the technology that is out there. We're limited
2 to the record in this case as to T-Mobile's equipment. So
3 there may be other telecommunications - - -

4 JUDGE WILSON: So if - - -

5 MR. NICOLICH: - - - equipment.

6 JUDGE WILSON: So if you put up - - - if you put
7 up a pole with a cell tower on top, cell - - - you know,
8 cell tower equipment on top, is that a pole that is
9 taxable?

10 MR. NICOLICH: A - - - a pole - - -

11 JUDGE WILSON: I drove past a whole bunch of them
12 coming down here, big, tall thirty-foot, forty-foot tall
13 poles - - -

14 MR. NICOLICH: Okay.

15 JUDGE WILSON: - - - that have cell equipment on
16 top.

17 MR. NICOLICH: There you're talking about
18 structures.

19 JUDGE WILSON: Is that a pole - - -

20 MR. NICOLICH: And - - -

21 JUDGE WILSON: - - - under the statute?

22 MR. NICOLICH: I'm not sure that it would be a
23 pole, but it may well be a support.

24 JUDGE WILSON: Wait, so - - -

25 MR. NICOLICH: And the - - -



1 JUDGE WILSON: So the forty-foot pole I drove by
2 is not a pole?

3 MR. NICOLICH: If you - - - I'm sorry. Maybe
4 we're talking about different things. But if it's a pole
5 or a structure, I believe - - -

6 JUDGE WILSON: Do you know what kind of - - -

7 MR. NICOLICH: - - - in that circumstance - - -

8 JUDGE WILSON: Do you know what kind of thing I'm
9 talking about or not?

10 MR. NICOLICH: Excuse - - -

11 JUDGE WILSON: Do you know the sort of device I'm
12 talking about?

13 MR. NICOLICH: I've seen different types of
14 devices like that along the highway. Some are poles; some
15 are larger structures. So for - - -

16 JUDGE WILSON: Well, so let me ask you about
17 that. If it's a straight pole that is just a single
18 member, looks like a tree trunk and it's forty feet tall
19 and it's got a big kludge of cell things on top, is that a
20 pole?

21 MR. NICOLICH: That - - - that's a pole.

22 JUDGE WILSON: Okay. And that's a taxable pole?

23 MR. NICOLICH: That's a taxable pole.

24 JUDGE WILSON: And if it's a different kind of
25 structure that looks more like one of those electrical



1 towers that has a latus framework but it has the same stuff
2 on top, is that a pole?

3 MR. NICOLICH: That - - - I would say it's not a
4 pole, but it may well be a structure. Remember, the - - -

5 JUDGE WILSON: Well - - -

6 MR. NICOLICH: A support. I'm sorry. The
7 statute - - -

8 JUDGE WILSON: Okay.

9 MR. NICOLICH: - - - refers to supports.

10 JUDGE WILSON: Okay.

11 MR. NICOLICH: Okay? And - - -

12 JUDGE WILSON: So those are taxable?

13 MR. NICOLICH: Well, I would say - - - so, for
14 example, to make an analogy, buildings are used also as
15 support for this equipment. But you don't take the
16 position that building are not taxable. So in those
17 circumstances that you've just identified - - -

18 JUDGE WILSON: Uh-huh.

19 MR. NICOLICH: - - - for these purposes, on this
20 record, I would agree that those particular structures
21 you've identified would be taxable as - - - not necessarily
22 under 102(12)(i), but perhaps under 102(12)(b) which - - -

23 JUDGE GARCIA: Counsel.

24 MR. NICOLICH: - - - refers to that type of
25 equipment.



1 JUDGE GARCIA: Counsel, so these two lines of
2 questioning, the statute has terms within the plain text.
3 And there are different structures out there that you can
4 go and look at and you can argue is this a pole, is it a
5 structure, is it - - - what would you have us do? I mean,
6 isn't - - - aren't those types of cases and that analysis
7 more appropriate for a lower court or a taxing authority
8 and some type of civil administrative proceeding to go onto
9 the roof and look in the box and say is it this, is it
10 that? What rule would you have us change? What would you
11 have us do in this case - - -

12 MR. NICOLICH: I think it's - - -

13 JUDGE GARCIA: - - - rather than go back and open
14 the box and say is it this, is it that, is it a structure,
15 is it a pole?

16 MR. NICOLICH: I think it's - - -

17 JUDGE GARCIA: What's the role of this Court
18 here?

19 MR. NICOLICH: Here it's a straight matter of
20 statutory construction. So, for example, Section 6 and 7
21 of Chapter 416 of 1987 laws very clearly indicate that
22 telecommunications equipment and central office equipment
23 are not to be taxable after December 31st, 1991. I think
24 even my adversaries would agree with that.

25 So if this stuff is that type of equipment, it



1 should not be subject to tax.

2 JUDGE GARCIA: And that's - - - everything - - -

3 MR. NICOLICH: That's a straight matter of - - -

4 JUDGE GARCIA: - - - we're talking about here
5 falls - - -

6 MR. NICOLICH: Well - - -

7 JUDGE GARCIA: - - - within that category.

8 MR. NICOLICH: Well, no, that's not exactly - - -

9 JUDGE GARCIA: Right.

10 MR. NICOLICH: - - - the position we've taken
11 because - - - so, for example, the cables that - - - the
12 lines and cables are - - - right, there are lines and
13 cables. But we say, wait a minute, they're not for
14 electrical conductors as you construe the statutes. But
15 even if they are, they are station connections under the,
16 you know, uniform system of accounts and the type of
17 regulations that were in effect back in 1985 and 1987 when
18 the statute was passed. So that's - - - as a matter of law
19 - - -

20 JUDGE FAHEY: Well, we - - -

21 MR. NICOLICH: - - - that's not a factual
22 determination.

23 JUDGE FAHEY: Yeah. But see, what I struggle
24 with here is the question of the fixtures that are attached
25 to the real property and if those fixtures meet the common



1 law standard for taxability. And so what I'm struggling
2 with is I'm saying are these permanent fixtures or not.
3 And how do you address that problem?

4 MR. NICOLICH: In two ways, Your Honor.

5 JUDGE FAHEY: Go ahead.

6 MR. NICOLICH: Number one is, as a general
7 principle, this is - - - 102(12)(i) is a very specific
8 statute - - -

9 JUDGE FAHEY: Right.

10 MR. NICOLICH: - - - addressed to telecom
11 equipment. And therefore, it overrides the - - -

12 JUDGE FAHEY: But the - - -

13 MR. NICOLICH: - - - general statute.

14 JUDGE FAHEY: Yeah. But the underlying common
15 law principles is a three-prong test that would apply. It
16 would seem to still apply in 102(i). Go ahead.

17 MR. NICOLICH: What - - - you're saying assume it
18 applies?

19 JUDGE FAHEY: Yeah. Assume it applies.

20 MR. NICOLICH: Okay. So the other thing is it
21 doesn't meet the three-factor test because this equipment
22 is swapped out from time to time.

23 JUDGE FAHEY: How - - - how often?

24 MR. NICOLICH: Well, in the record that we have,
25 it was done once for each of the - - -



1 JUDGE FAHEY: What - - - let me just ask - - -

2 MR. NICOLICH: - - - in a period of time.

3 JUDGE FAHEY: - - - this question. And I - - - I
4 don't want to get you off it because it's a relatively
5 complicated subject. But would we be required to make a
6 factual determination that, because of the nature of the
7 equipment itself, it's moved, it's changed out so often,
8 that therefore it doesn't meet the requirements of 102(i)
9 and therefore it's not taxable to rule in your favor?

10 MR. NICOLICH: I'm sorry.

11 JUDGE FAHEY: In other words, would we be
12 required to say, yeah, they change it out every six years,
13 it's not permanent?

14 MR. NICOLICH: So that's under 102(12)(b).

15 JUDGE FAHEY: Yeah.

16 MR. NICOLICH: Yes, you would - - -

17 JUDGE FAHEY: Yes.

18 MR. NICOLICH: - - - I believe.

19 But also, the second factor of the test
20 identified in Metromedia and explained further in the
21 Kaiser Woodcraft case - - -

22 JUDGE FAHEY: Uh-huh.

23 MR. NICOLICH: - - - is that it has to be applied
24 to the use of the underlying realty.

25 Now, in the Metromedia case, the sign frames that



1 were there were there to generate revenue. And the
2 underlying freeholder, which was the Transit Authority, was
3 actually getting a portion of those revenues.

4 JUDGE FAHEY: Uh-huh.

5 MR. NICOLICH: So there the freeholder - - - you
6 know, it was used for the purpose of the underlying realty
7 to obtain revenues. That is not happening here from the
8 use of the antennas and other equipment. We just pay lease
9 rent, and the landlord value of his property comes from the
10 rent. They do not get any portion of the - - - any
11 revenues that might be attributable to this cell phone
12 equipment. So therefore, it's not applied - - -

13 JUDGE FAHEY: So you're saying - - -

14 MR. NICOLICH: - - - to the use of - - -

15 JUDGE FAHEY: - - - this would be similar to the
16 - - - to taxing a tenant for a property tax when, in fact,
17 the landlord is the one who owns the property and has to
18 pay the property tax?

19 MR. NICOLICH: Yes. The landlord is the property
20 owner. And these are tenant - - -

21 JUDGE FAHEY: Is that - - - do I have your
22 argument right? Is that - - - is that the - - -

23 MR. NICOLICH: Yes. And it's tenant leasehold
24 improvements that no tenant pays - - - when they go in and
25 lease space and build out their office and put up



1 partitions and things like that or have other equipment
2 that they use for their space, they don't get taxed on that
3 property as - - - as real property.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.
5 Counsel?

6 MR. SCAPOLI: Good morning, Your Honors.

7 CHIEF JUDGE DIFIORE: Good morning.

8 MR. SCAPOLI: Tom Scapoli from Ingerman Smith,
9 attorneys for respondent, Respondent Mount Vernon City
10 School District.

11 T-Mobile has negotiated language into their lease
12 agreements which affords them the opportunity and the right
13 to obtain a mortgage and title insurance on these
14 installations. That language undeniably constitutes an
15 admission that this installation is a fixture. It is not
16 personal property. And it is intended to be a permanent
17 addition to the freehold.

18 When you look at that language, in light of the
19 affidavit of their own expert who testified that their
20 antennas are affixed to the parapet walls of the buildings
21 with brackets, pipes. When you look at the photographs of
22 these installations, there's steel I-beams everywhere.
23 There are stealth shields. There are enclosures for
24 electrical conductors or - - -

25 JUDGE RIVERA: But are you saying that - - -



1 MR. SCAPOLI: - - - or circuit breakers.

2 JUDGE RIVERA: - - - that's the sole requirement
3 for fixture, the - - - the physical attachment?

4 MR. SCAPOLI: No. I'm saying it's not. I'm
5 saying that when you look at the - - - at the - - - the
6 cases and the precedent, the intention of the parties is
7 really the predominant factor. And when you consider that
8 they have multiyear leases, we're talking about
9 twenty-five-year leases, and they intend to - - - to make
10 it a fixture by - - - by allowing them to get a mortgage
11 and title insurance, I think that satisfies the tasks. I -
12 - -

13 JUDGE STEIN: What - - - what about subdivision
14 (i)? Do you agree with your adversary as to the
15 legislative intent of the 1987 amendments and - - - and as
16 to how that applies to what is or is not covered in that
17 section?

18 MR. SCAPOLI: I - - - I - - - I don't. I - - - I
19 don't agree with - - - with the petitioner appellant in
20 this case. And I think when you look at 102(i) - - -
21 excuse me, 102(12)(i), in order to accept the
22 interpretation espoused by the petitioner appellant here,
23 and in order to do so for the reasons that that petitioner
24 appellant espouses, you would have to interpret the statute
25 in a way that is inconsistent with an industry term of the

1 - - - of the statute.

2 When we talk about enclosures for electrical
3 conductors, we have - - - we have industry manuals and we
4 have court rulings which establish that an enclosure for an
5 electrical conductor is a term of art in the industry. The
6 petitioner appellant is asking this Court to interpret that
7 statute in a way which is inconsistent with the industry
8 manuals and inconsistent with the industry terms and the
9 way that that equipment is identified in the industry.

10 So I - - - I think - - - I - - - I don't agree
11 with the petitioner appellant. I - - - I think - - -

12 JUDGE STEIN: So what happens if we interpret it
13 the way you interpret it? Then - - - then - - - then what
14 is covered by the section?

15 MR. SCAPOLI: I - - - I think these installations
16 on - - - on the - - - on the roofs of these buildings are
17 taxable properties. They're lines, wires, poles, supports,
18 and enclosures for electrical conductors. I think this is
19 exactly the type of facility that - - -

20 JUDGE FAHEY: So - - - so could you - - -

21 MR. SCAPOLI: - - - the legislature intended.

22 JUDGE FAHEY: - - - tax a homeowner for DirectTV
23 satellite that's put on - - -

24 MR. SCAPOLI: Could I tax a homeowner?

25 JUDGE FAHEY: Yeah. Could you tax a homeowner?



1 I own my house. I put a DirectTV satellite on the roof.
2 Can you tax me for that?

3 MR. SCAPOLI: I - - - I think if it's intended to
4 be an extension to the freehold, then - - - then you could.
5 But that's - - - that's not what we're talking about.

6 JUDGE FAHEY: Well, I - - -

7 MR. SCAPOLI: But when you look at - - -

8 JUDGE FAHEY: - - - kind of strive - - - I
9 carried it out - - - I - - - filing with taxes that
10 multiply. We've all - - -

11 MR. SCAPOLI: Right.

12 JUDGE FAHEY: We've all had that experience. So
13 - - -

14 MR. SCAPOLI: I - - - if you - - - if you attach
15 that antenna to your building with I-beams and with stealth
16 shields and you hardwire it to the roof of your house with
17 - - -

18 JUDGE FAHEY: So, in other words, the permanency
19 of the attachment is one of the determinative factors?

20 MR. SCAPOLI: Absolutely.

21 JUDGE WILSON: Would that fall under the station
22 connection exemption or no?

23 MR. SCAPOLI: I - - - I don't think it's a
24 station connection. And, again, I think that's one of the
25 other fallacies in - - - in the petitioner's argument. I

1 think if you interpret station connections in the manner
2 espoused by the petitioner appellant here, it - - - it
3 renders 102(12)(i) a nullity. If - - - if you accept their
4 premise that everything on the customer's side of the LECD
5 mark is a station connection, then nothing can be taxable.

6 JUDGE RIVERA: Yeah. But you're - - - well, a
7 property owner gets taxed for their property, right?

8 MR. SCAPOLI: That's true, yes.

9 JUDGE RIVERA: So they don't own the building,
10 correct?

11 MR. SCAPOLI: Correct.

12 JUDGE RIVERA: Correct. So the building owner
13 gets taxed for the property, the land, whatever they're
14 going to tax, with their ownership. I understood the
15 statute to deal with exactly this kind of, frankly, very
16 profitable relationship for both parties. And the tax is
17 on them because they have ownership of the listed
18 equipment. And that's what you're taxing because the
19 owner, I would think, if they destroyed this equipment,
20 would be sued because it's not their equipment.

21 MR. SCAPOLI: That's correct. When you look at
22 the term station connection, the station connection is
23 historically referred to as the equipment owned by the end
24 user. So in the case where I have a station connection in
25 my house, my computer, that is a computer used by me to



1 connect me to the rest of the world. That is not what
2 we're talking about in this installation. These cellular
3 facilities are used to connect millions of people from here
4 to these millions of people over here. So they're not end
5 users. They're not station connections as that term has
6 been - - - is known in the industry.

7 CHIEF JUDGE DIFIORE: Counsel, if we find that
8 the property is not taxable under (i), is there any other
9 telecommunications equipment that would be taxable?

10 MR. SCAPOLI: Is there any other that would be
11 taxable?

12 CHIEF JUDGE DIFIORE: Uh-huh.

13 MR. SCAPOLI: I - - - I don't believe so, no.

14 CHIEF JUDGE DIFIORE: Okay. Thank you.

15 MR. SCAPOLI: Thank you.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MR. RISMAN: Good morning. Michael Risman from
18 Hodgson Russ for the City of Mount Vernon.

19 CHIEF JUDGE DIFIORE: Good morning.

20 MR. RISMAN: Good morning.

21 To me, this is a - - - a simple case that
22 the - - - the petitioner is trying to complicate.
23 The - - - the statute was admitted in 1987 to tax this
24 exact type of equipment. It excluded - - - the Court asked
25 what the intent of the law was. The intent of the law was



1 to change the law to change from ownership to
2 fixtures-based rationale and to exclude the central office
3 and to exclude customer equipment. And everything else in
4 between was to be taxed. And this is everything else in
5 between.

6 JUDGE WILSON: So part of their argument, at
7 least as I understand it - - - I may misunderstand it - - -
8 is that stuff that is now sitting on the rooftops of
9 buildings is functionally like what used to be in the
10 central office of the old AT&T. And so they're looking at
11 it not - - - their argument is, I think, based not on its
12 location. They're saying location doesn't matter; it's the
13 function that matters. And this is the kind of equipment
14 in function that was excluded under the central office.

15 MR. RISMAN: Well, I think - - - Your Honor, I
16 think the analysis is - - - when they changed the law, they
17 wanted to change it to a fixture space analysis. The
18 equipment that was in the central office was switching
19 equipment which was personal property and those old desks
20 and telephones that we used to have in our house and the
21 customer's - - - his personal property.

22 But if you look at the record on appeal, it
23 actually said that even some central office equipment under
24 the new statute could be determined to be fixtures if it's
25 permanently attached. So it didn't say no central office



1 equipment. So I think it's really a matter of the fixtures
2 analysis.

3 And we keep this - - - this confusion about
4 electrical and closure for electrical conductors. It's a
5 very simple analogy. Let's think about it - - - and it
6 applies here. You think about a lightbulb. A lightbulb is
7 just not light. It's an electric signal that becomes
8 light.

9 And actually, in the Chautauqua County case that
10 I'm - - - that I've attached the decision from the lower
11 court, we - - - we learn that this - - - this works - - -
12 it's an electrical signal which becomes a light. And then
13 to get it, move it down the - - - the - - - the conduit, it
14 has to be amplified with electric again. It becomes
15 electric, light, and then electric in the end.

16 So when this - - - this language about enclosure
17 for electrical conductors, that wasn't meant to change this
18 or undermine the entire statute. It just reflects that
19 it's the energy that - - - that drives this. Enclosures
20 for electrical conductors, if you look at our expert's
21 affidavit or if you look at their expert's affidavit, it
22 talks about electrical equipment within closed racks and
23 cabinets. How can we say an enclosure with electrical
24 equipment is not an enclosure for electrical conductors?

25 JUDGE WILSON: I mean, the - - - the sentence



1 does make a distinction between electrical and
2 electromagnetic. And light would be electromagnetic but
3 not electrical. Do you agree with that?

4 MR. RISMAN: Well - - - well, I just think that
5 they're - - - they're interrelated.

6 JUDGE WILSON: Well, they are.

7 MR. RISMAN: You know, the light - - -

8 JUDGE WILSON: One is a subset of the other.

9 MR. RISMAN: - - - the electric - - -
10 electric - - - and the cable - - - the other big picture, I
11 think, issue to think about is why is cable out. The cable
12 is out for - - - cable company for one particular reason.
13 They're treated differently under both New York State
14 Public Service Law and under the Federal Telecommunications
15 Act. They have a franchise fee. They pay five percent
16 gross sales revenue. So it's not like the cable companies
17 are not getting taxed. They're getting taxed in a
18 different manner. So, you know, they're - - - that's an
19 entirely different situation, the cable company, in my
20 mind.

21 In terms of fixtures, I agree with my co-counsel.
22 If you look at those leases, those are long-term leases.
23 These are not your antennas that my father used to go to
24 the hardware store. They're not like a single pole you
25 just throw up there. If you look at - - - I think it's



1 page 312 for the record, there's an interesting picture of
2 this - - - the Court ruled that the antenna was not a pole
3 because it said it was an enclosure for electrical
4 conductors. And I was wondering, well, why did they say
5 that, why didn't they just say pole. But if you look at
6 the picture on page 312 of the record, it has an antenna
7 that's five feet high, two feet wide - - - two feet deep,
8 four feet wide. It's - - - and it has electrical lines, it
9 looks like, coming into it.

10 JUDGE WILSON: Is it a wire?

11 MR. RISMAN: It's an enclosure for - - -

12 JUDGE WILSON: Well, no. The - - - the antenna
13 itself. Is the antenna a wire? Is that a reasonable - - -

14 MR. RISMAN: No. It's - - - it's - - - it's a
15 structure. It's a five feet high by two feet deep by four
16 feet wide. And they're so big that they have to put
17 stealth shields over it to not upset the neighbors because
18 these are very nice apartment buildings.

19 So if you - - - it's - - - we should look
20 at - - - if you look at - - - you see why the court said
21 not your normal - - - normally, I would have said pole
22 antenna. But it's not - - - it's not that same antenna.
23 If you look at it, the antenna structures - - - and that
24 they may upgrade it once in a while during this twenty-five
25 year term doesn't mean it's not a permanent - - - permanent



1 installation. They're not meant to be - - -

2 CHIEF JUDGE DIFIORE: Counsel, in your brief, you
3 - - - after defending the AD on the merits, you advanced a
4 procedural argument. Am I right to conclude that if we
5 were to go your way and affirm the AD, that your first
6 choice would be that we affirm on the merits argument and
7 that you've advanced a procedural argument as an
8 alternative ground for affirmance?

9 MR. RISMAN: Absolutely. I'd like you to resolve
10 the merits of it. And - - -

11 CHIEF JUDGE DIFIORE: Uh-huh.

12 MR. RISMAN: - - - I feel that this issue - - -
13 this is not a close question in my mind. If you look at
14 the case law, Nextel, Voicestream, Judge - - - case, Judge
15 Geraci, the Second Department, the only case they
16 cite - - - that RCN case, five months later, the - - - if
17 you read the second to last paragraph of the second RCN
18 case, they - - - they specifically reject petitioner's
19 interpretation. So the only authority they have is a First
20 Department case that the First Department actually
21 overruled or explained. Thank you.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 Mr. Nicolich?

24 MR. NICOLICH: Your Honor, a couple of brief
25 points.



1 Mr. Risman referred to the legislature adopting a
2 fixtures-based analysis back in 1987. And the support for
3 that is an internal SBEA memorandum that was their own view
4 of what this legislation was. But if you look at the
5 legislative history, they actually proposed legislation
6 with language that would have made central office equipment
7 taxable if it qualified as a fixture. And the legislature
8 did not accept that proposal. So to my mind, Your Honor,
9 that means that any central office equipment is not going
10 to be taxable even if it would qualify as a fixture. So
11 the fixtures-based analysis just does not make sense. And
12 it would indicate that the legislature passed legislation
13 in 1987 specifically making - - -

14 JUDGE RIVERA: Well, wouldn't that perhaps only
15 suggest that you make a decision on a fixture on a
16 case-by-case basis, based on facts?

17 MR. NICOLICH: I don't think so. The legislature
18 - - -

19 JUDGE RIVERA: As opposed to all equipment
20 falling within that particular classification?

21 MR. NICOLICH: Yes. If the legislature comes out
22 and basically says central office equipment and switching
23 and transmission equipment is not going to be taxable and
24 then lets the taxing authorities backdoor it by using
25 another provision under the statute - - -



1 JUDGE RIVERA: Well, it doesn't say that.
2 Your - - - your point is - - - your point is that someone
3 proposed particular language in the legislation. You don't
4 find it in the legislation. My only question was might
5 that just mean that as a - - - as a broad classification,
6 the legislature didn't adopt that view. But that doesn't
7 prevent an individual case-by-case analysis.

8 MR. NICOLICH: Your Honor, given the legislative
9 reports that the legislature commissioned here and
10 everything said about central office equipment, I don't
11 think that the legislature contemplated that at all.

12 The - - - Mr. Scapoli referred to an industry
13 manual about what equipment for electrical conductors is.
14 That is not anywhere in the record. But what is in the
15 record is SBA report indicating when they referred to this
16 type of statute, they referred to lines, wires, poles, and
17 conduit. And the ORKS report that Mount Vernon has cited
18 also refers in several pages to lines, wires, poles, and
19 conduit. So it's not limited to this electrical box that
20 respondents are referring to. It's really a much broader
21 term.

22 And when you apply that term that way that - - -
23 the way that Second Department has construed the statute,
24 it means that conduit for fiber optic cables would not be
25 taxable, but conduit for coaxial cable would, it makes



1 absolutely no sense. And I ask you not to reach that
2 absurd result. Thank you.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 (Court is adjourned)

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

I, Michael Drake, certify that the foregoing transcript of proceedings in the Court of Appeals of T-Mobile Northeast, LLC v. DeBellis, No. 140 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Michael Drake

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: November 23, 2018

