

Matter of T-Mobile Northeast, LLC v DeBellis

2013 NY Slip Op 34102(U)

November 15, 2013

Supreme Court, Westchester County

Docket Number: 4798/12

Judge: Susan Cacace

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the application of

T-MOBILE NORTHEAST, LLC,

Petitioner,

For the Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

-against-

ANTHONY V. DEBELLIS, as Commissioner of
Assessment of the City of Mount Vernon, THE CITY
OF MOUNT VERNON, THE BOARD OF EDUCATION
FOR THE MOUNT VERNON CITY SCHOOL DISTRICT,
THE MOUNT VERNON CITY SCHOOL DISTRICT,
THE WESTCHESTER COUNTY TAX COMMISSION,
DAVID B. JACKSON, as Commissioner of the
Westchester County Tax Commission and THE
COUNTY OF WESTCHESTER,

Respondents,

-----X
CACACE, J.

**FILED
AND ENTERED**

ON 11/18, 2013

**WESTCHESTER
COUNTY CLERK**

Decision & Order
Index No.: 4798/12

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NOV 18 2013
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER



This is a proceeding pursuant to Article 78 of the Civil Practice Law and Rules wherein petitioner seeks a judgment annulling a determination by the respondents that certain property and equipment of the petitioner is subject to taxation pursuant to the New York State Real Property Tax Law.

Petitioner T-Mobile is a provider of cellular radio and other telecommunications services to the public. It owns equipment comprising rooftop antenna systems, cables and line, base transceiver station equipment, including radio frequency transceivers, rectifiers, multiplexing and demultiplexing equipment, battery backup power supply, modulation and

demodulation equipment, patch bay cabling, frequency converters and supporting network and power equipment. This equipment is located in or on five buildings in the City of Mount Vernon. T-Mobile leases space for this equipment from the property owners.

In 2009, 2010 and 2011, the equipment of petitioner was included in the assessment rolls for real property in the City of Mount Vernon. This was done under the authority of New York State Real Property Tax Law § 102 (12)(i). These assessments were challenged by the petitioner. The challenge to the assessments of school taxes which were directed to the School District were denied by the action of the City School District on November 30, 2011.

The petitioner now brings this proceeding pursuant to Article 78 of the Civil Practice Law and Rules challenging the denial.

Real Property Tax Law § 102 (12)(i) provides that,

“Real property”, “property” or “land” mean and include:

(i) When owned by other than a telephone company as such term is defined in paragraph (d) hereof, all lines, wires, poles, supports and inclosures for electrical conductors upon, above and underground used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street, or other public domain, except that such property shall not include: (A) station connections; (B) fire and surveillance alarm system property; (C) such property used in the transmission of news wire services and (D) such property 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.

The thrust of the petitioner’s argument is based upon a scientific analysis attempting to convince the court that their equipment does not fall squarely under the definition of Real Property Tax Law § 102(12)(i).

The Court realizes that technology is constantly changing. Interpretation of statutes can be adapted to be applied in present day situations. *People v. Hildreth*, 86 AD 3d 917. In applying the law, the court is to be guided by the legislative intent.

The court addressed this issue in *Matter of Nextel of New York v. Assessor for the Village of Spring Valley*, 4 Misc 3rd 233. In that case, the petitioner presented a similar argument to the one advanced in this petition. In a well reasoned and exhaustive analysis of the legislative history, Judge Dickerson concluded that equipment of the type in issue here is properly taxable as real property under the Real Property Tax Law.

In arriving at this conclusion, the court examined the history of the telecommunications industry and regulation and the factors considered in the evolution of the applicable statute.

As the court noted, Real Property Tax Law § 102(12)(i) was added by an amendment in 1987 in response to the effects of deregulation of the telecommunications industry. Prior to 1967, "telephone companies were required to provide 'end to end' or 'bundled' service to subscribers who were prohibited from purchasing discrete components of the service from different suppliers." *Nextel, supra* at 239. New York State classified all telephone company equipment from "end to end" as taxable real property. "The lines, wires, poles and 'appurtenances' which made up the integrated telephone system were classified as real property for which the telephone company was taxed...even though, under common law, the equipment would be classified as personalty and even though it was located on the customer's premises." *AT&T Information Systems v. City of New York*, 137 AD 2d 7, 9 [1st Dept., 1988], *aff'd* 73 NY 2d 842.

"In 1983, the Federal Communications Commission ordered that customer premises equipment (CPE) be provided on a deregulated competitive basis separate and distinct from regulated telephone service." *AT&T Information Systems, supra* at 10.

"These changes in the telecommunications industry threatened a substantial loss of revenue to New York State inasmuch as the embedded CPE, taxable as real property when owned by the telephone utility, would become untaxed personalty in the hands of a nonutility." *AT&T Information Systems, supra* at 11.

The legislature addressed this threat by enacting chapter 895 of the Laws of 1984 which provided that telephone equipment transferred to an owner engaged in the business of selling or leasing CPE shall be deemed taxable pursuant to Real Property Tax Law §102(12)(d). This law was challenged by AT&T Information Systems on the grounds that the provision was discriminatory.

Recognizing the likelihood of the success of this challenge, the legislature amended Real Property Tax Law § 102(12)(d) by including as taxable property, the outside plant of local telephone companies and adding § 102(12)(i) which defined as taxable real property the telecommunications outside plant of entities other than local telephone companies.

The court in *Nextel* went on to analyze how the operation of the equipment being utilized fell within the definition of Real Property Tax Law § 102(12)(i).

This court finds that this analysis is applicable to the situation presented in this matter. Any differences in the equipment considered in the *Nextel* case and this matter are minimal evolutions in technology and are not such as to take this equipment out of the purview of the Real Property Tax Law.

Accordingly, the petition is denied and the proceeding is dismissed.

The court does not find merit to the respondent's second affirmative defense. See *Niagra Mohawk Power Corp. v. City School District of the City of Troy*, 59 NY 2d 262. The court did not consider this affirmative defense in arriving at its determination. Likewise, the respondents' motion to dismiss the petition based upon the objections in point of law is denied.

The Court considered the following papers in connection with this matter: (1) notice of petition and petition verified March 28, 2012 with attached exhibits; (2) Petitioner's memorandum of law in support of petition; (3) Affidavit of Robert Ott, sworn to October 24, 2012 in support of petition with attached exhibits; (4) Affirmation of John G. Nicolich, Esq. in support of petition dated October 25, 2012 with attached exhibits; (5) Respondents' answer verified August 16, 2013; (6) Respondents' exhibits to verified answer; (7) Affidavit of Richard Comi sworn to August 16, 2013 in opposition to petition; (8) Respondents' memorandum of law in support of verified answer dated August 16, 2013; (9) Respondent's notice of motion to dismiss petition dated August 19, 2013 with attached affirmation in support; (10) Affidavit of Stephanie G. Vanderpool sworn to August 19, 2013 with attached exhibit; (11) Petitioner's notice of motion to strike second affirmative defense dated September 12, 2013; (12) Petitioner's memorandum of law in opposition to motion to dismiss; (13) Undated opposition affidavit of Erinson Febles in support of petition; (14) Affirmation of John G. Nicolich in opposition to motion to dismiss dated September 21, 2013 with attached exhibits; (15) Respondents' reply affirmation dated September 26, 2013; (16) Respondents' memorandum of law in opposition to motion to strike affirmative defense dated September 23, 2013; (17) Petitioner's memorandum of law in support of

motion to strike affirmative defense dated September 27, 2013.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
November 15, 2013



HON. SUSAN CACACE

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