NEW YORK COURT OF APPEALS DECLARES TELECOMMUNICATIONS INFRASTRUCTURE AND FIBER OPTIC CABLES ARE TAXABLE REAL PROPERTY

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In a calculated attack by the telecommunications industry, T-Mobile Northeast, LLC and Level 3 Communications challenged the taxability of their telecommunications installations and fiber optic cables around the State, asserting that they do not fit within the definition of taxable real property in New York law. After multiple rounds of litigation produced conflicting opinions, the New York Court of Appeals in *T-Mobile Northeast, LLC v. DeBellis*, 2018 NY Slip. Op. 08539, 2018 WL 6533281 (2018) firmly rejected that argument, holding that telecommunication installations and fiber optic cables are taxable under Real Property Tax Law ("RPTL") § 102(12)(i).

For real property to be taxable in New York, it must be included in a specific definition in the Real Property Tax Law. As defined by that statute,

'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. RPTL § 102(12)(i). The Court determined that the plain language of the statute and legislative intent of RPTL § 102(12)(i) was to tax outside plant telecommunications property as real property.

The installations were composed of telecommunications lines, wires, poles, supports, and inclosures for electrical conductors, known in the industry as "outside plant." T-Mobile commenced an Article 78 proceeding challenging the assessments of its outside plant against the City of Mount Vernon, New York seeking retroactive tax refunds dating back to 2009. The company relied heavily on *Matter of RCN New York Comm's, LLC v. Tax Comm'n of the City of New York*, 95 A.D.3d 456 (1st Dep't 2012), which held that fiber optic cables within buildings were not "electrical conductors" under RPTL § 102(12) and therefore not taxable. T-Mobile further argued that the statute was ambiguous and that certain equipment, base transceiver stations, cabinets, and antennas are not "inclosures" under the statute.

The Respondents City of Mount Vernon and the Mount Vernon City School District moved to dismiss the action, contending that T-Mobile's equipment was taxable under RPTL § 102(12)(i) and (b) and therefore correctly included on the assessment rolls. The Supreme Court, Westchester County (Cacace, J.) agreed with Respondents that the real property was taxable and dismissed the action. In its holding, the Supreme Court examined the history of RPTL § 102(12)(i) and observed that the Legislature amended RPTL § 102(12)(i) in 1987 based upon the deregulation of the telecommunications industry and intended for telecommunications equipment, including the installations at issue, to be taxable.

Prior to the amendment to the RPTL, telecommunications companies provided "bundled services" to consumers and only the equipment supplied by the telephone company could be attached to the facilities. That equipment was the real property of the company and was taxable. In 1983, the Federal Communications Commission ordered that all such equipment be deregulated on a competitive basis. As a result, New York State stood to lose a substantial amount of tax revenue because the equipment was no longer real property owned by the telephone company, but was personal property of a non-utility. To resolve this, the Legislature first amended the RPTL in 1984 to tax the equipment. However, the statute was challenged as discriminatory. In response to the challenge, the Legislature again amended the RPTL to ensure that all telephone equipment was taxed in a non-discriminatory manner. That version of the statute remains today. Based on that legislative history, the Supreme Court held that T-Mobile's installations fell within the scope of RPTL § 102(12)(i) and were therefore taxable.

T-Mobile then appealed to the Appellate Division, Second Department. The Second Department unanimously affirmed the Supreme Court. Worth noting are several points the Second Department made in its holding:

- The taxability of the Facilities' components should be analyzed under RPTL § 102(12)(i);
- "The phrase "for electrical conductors" as used in RPTL § 102(12)(i) does not modify the entire list 'lines, wires, poles supports and inclosures,' but rather modifies only the final term 'inclosures'";
- T-Mobile's fiber optic cables, T-1, coaxial cables and connections between its equipment and that of the local exchange carrier were taxable "lines and wires";
- T-Mobile's base transceiver station cabinets and rooftop antennas were taxable as "inclosures for electrical conductors"; and
- T-Mobile's rooftop antennas were also taxable as fixtures under RPTL § 102(12)(b).

Other decisions held for the telecommunications companies. In *Matter of Level Communications, LLC v. Clinton County*, 144 A.D.3d 115, 119-120 (3d Dep't 2016), the Court held that "petitioner's fiber optic installations are not real property taxable under RPTL 102(12)." Another case, *Matter of Level 3 Communications, LLC v. Chautauqua County*, 148 A.D.3d 1702, 1703 (4th Dep't 2017), held that "fiber optic installations are not taxable under RPTL 102(12)(f)."

Due to the conflict among the departments, leave to appeal was granted by the New York Court of Appeals. At the Court of Appeals, Respondents argued that T-Mobile's equipment should be analyzed under RPTL § 102(12)(i) and the intent and purpose of RPTL § 102(12) was never to exempt such equipment from taxation; rather the whole aim of the statute was to ensure that such installations were taxable. Under the plain language of the statute, the facilities and their components are outside plant (lines, wires, cables, poles and inclosures for electrical conductors), and thus are taxable real property. The legislative history of the statute confirms this.

Separate from the legislative intent and purpose of the statute, Respondents also argued that the installations were taxable because they meet the common law definition of a fixture under RPTL §102(12)(b). That is to say that equipment is (1) actually annexed to real property or something appurtenant thereto; (2) applied to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) intended by the parties as a permanent accession to the freehold. *Matter of Metromedia, Inc. v. Tax Comm'n of the City of N.Y.*, 60 N.Y.2d 85, 90 (1983). The equipment is installed for long-term use and remains permanently in place, meeting the common law definition of fixture. As a fixture, the equipment would also be taxable on that basis.

In upholding the taxability of telecommunications installations, the Court of Appeals unanimously affirmed the Second Department's decision in *T-Mobile*. The Court of Appeals expressly overruled the *RCN* case relied upon by T-Mobile and rejected T-Mobile's argument that its installations were not taxable. The Court held that "[b]ecause the property at issue here consists of lines that transmit signals between users across public domain, taxation of this property comports with the plain text of paragraph i [of RPTL § 102(12)] and the legislative intent underlying [RPTL § 102]."). The Court focused on the nature of the property rather than the actual physical makeup. More specifically, the Court held that there was no ambiguity in the statute and T-Mobile's installations and fiber optic cables were clearly taxable. The Court declined to reach the question of whether the equipment was also taxable as a fixture.

The ruling by the Court of Appeals resolves the conflict among the Appellate Divisions and answers affirmatively the question of the taxability of telecommunication installations under the RPTL. The financial impact of this decision is significant, as telecommunications companies had sought millions of dollars of retroactive and prospective relief, and their equipment and fiber optic cables statewide will now be taxed and future installations will be added to the tax rolls. Jurisdictions that removed outside plant from their tax rolls can now add it back for future tax years. If you have any questions about the ruling and its implementation, contact Michael Risman (716.848.1291) or Henry Zomerfeld (716.848.1370).