

OHIO BOARD OF TAX APPEALS

American Fiber Systems, Inc.,) CASE NO. 2006-B-118
)
Appellant,) (PUBLIC UTILITY PERSONAL
) PROPERTY TAX)
)
vs.) DECISION AND ORDER
)
William W. Wilkins,) **Appeal Filed July 10, 2008**
Tax Commissioner of Ohio,) **Ohio Supreme Court**
)
Appellee.)

APPEARANCES:

For the Appellant - Sleggs, Danzinger, & Gill Co., LPA
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For the Tax Commissioner - Attorney General of Ohio
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Entered June 10, 2008

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

Appellant, American Fiber Systems, Inc. (“AFS”), challenges a final determination issued by the Tax Commissioner denying its petition for reassessment and affirming a public utility property tax assessment for tax year 2004. We consider this matter upon appellant’s notice of appeal, the statutory transcript (“S.T.”) certified by the Tax Commissioner pursuant to R.C. 5717.02,

the hearing, and the briefs filed herein by the parties. Appellant waived hearing before this board; however, appellee appeared and a hearing was held.

Following the filing of appellant's 2004 annual report as an interexchange telecommunications company, the Tax Commissioner issued an assessment which reflected an increase in the taxable value of appellant's property. Appellant subsequently filed a petition for reassessment, asserting that the total taxable value of its property should be reduced by \$1,075,180 to \$156,200. S.T. at 117. Thereafter, the commissioner affirmed his previous assessment, stating as follows, in relevant part:

“Within Ohio, the petitioner has built a communications fiber loop in Cuyahoga County. This consists of a forty-one mile fiber optic loop and other network equipment associated with the loop. The fiber loop contains 288 strands of fiber, bundled together. The bundle of fiber runs through one conduit throughout the forty-one mile loop. At the hearing, the petitioner stated that only 36 of the 288 strands have ever been lit, and that the remaining 252 strands have never been lit. The petitioner stated at the hearing that four miles of its fiber loop goes through Shaker Heights, Ohio, which required it to run three conduit pipes through this four mile section. Two of the three conduit sections in Shaker Heights are empty and have never had fiber in them.

“The petitioner has stated that it does not provide telecommunication services, and under its business model it has no intention to do such. The petitioner has stated that its business is to lease fiber to telecommunications carriers and other organizations, which can use the fiber to provide telecommunications services to their customers. It built the fiber loop in order that it could lease fiber to Cable and Wireless, a provider of telecommunication services. The

petitioner started building the fiber loop only after it signed an indefeasible right to use agreement in which Cable and Wireless agreed to lease some of its fiber.

“Subsequent to filing its 2004 Annual Report an assessment was issued reflecting the taxable value of its property as required by statute. The petitioner timely filed a petition for reassessment. The petitioner’s contentions are addressed below.

“Regarding its fiber cable, the petitioner has shown that 252 of its 288 fibers, or 87.5% have never been lit. It now requests that 87.5% of the value of the fiber assessed should be removed from the assessment, arguing that this 87.5% of the fiber is “dark fiber.” This contention is not well taken.

“The petitioner’s business model is to lease or sell fiber to telecommunication service providers and others. These third party lessees control when they want to light the fiber and use it in their telecommunication endeavors. Thus, the petitioner built the fiber loop in order to lease fiber to outside parties.

“R.C. 5701.08 defines “used in business,” in pertinent part:

(A) Personal property is “used” within the meaning of “used in business” when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise. Machinery and equipment classifiable upon completion as personal property while under construction or installation to become part of a new or existing plant or other facility is not considered to be “used” by the owner of such plant or other facility within the meaning of “used in business” until such machinery and equipment is installed and in operation or capable

of operation in the business for which acquired. Agricultural products in storage in a grain elevator, a warehouse, or a place of storage which products are subject to control of the United States government and are to be shipped on order of the United States government are not used in business in this state. [Emphasis added.]

“As described in R.C. 5701.08, property is used in business when it is “employed or utilized with ordinary or special operations,” or when “held as means or instruments for carrying on the business.” In the instant case, the petitioner held the completed fiber for lease, and the fiber was used in its “ordinary operations” as property available for lease. Also, the petitioner’s inventory of fiber is necessary in order for the petitioner to carry out its leasing business. For without fiber available for leasing, the petitioner would have no property to lease, and could not fulfill any upcoming lease arrangements.

“In its petition, the petitioner argues that its unleased fiber is exempt from taxation as “dark fiber.” However, in the petitioner’s business of leasing fiber, such unlit fiber held in inventory is used in its business as inventory awaiting leasing.” S.T. at 1-2. (Emphasis sic.)

In its notice of appeal, AFS alleges thirteen specifications of error. Therein, appellant disagrees with the commissioner’s ruling that its unlit fibers are “used in business” and subject to tax. Appellant also asserts that the taxable value of the remainder of its property, i.e., conduit pipe, above-ground poles, and computer monitoring system, should be reduced on a pro rata basis to correlate with the unlit, i.e., unused, fiber optic wire within its network. In addition, appellant claims the commissioner’s refusal to make such an adjustment results in a violation of rights guaranteed by the Ohio and United States Constitutions.

Finally, AFS argues that the commissioner's determination violates the principle of collateral estoppel as it is inconsistent with this board's decision in *Am. Fiber Systems, Inc. v. Wilkins* (Sept. 16, 2005), BTA No. 2004-K-1222, unreported.

We first dispense with appellant's constitutional challenges by pointing out that the Board of Tax Appeals is a statutorily created quasi-judicial administrative agency, which lacks jurisdiction to declare a statute unconstitutional. *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, paragraph one of the syllabus; *Herric v. Kosydar* (1975), 44 Ohio St.2d 128, 130; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7, 8; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, paragraph one of the syllabus. As discussed in *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 197-198, the court agreed with this board's conclusion that we are equally without jurisdiction to consider whether a statute has been applied in an unconstitutional manner. See, also, *GTE North, Inc. v. Zaino*, 96 Ohio St.3d 9, 2002-Ohio-2984. Given our inability to grant the relief requested, we must decline to rule upon the constitutional arguments which appellant has advanced within its notice of appeal.

In considering the remainder of appellant's arguments, we refer to the court's decision in *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215, in which it held that "when an assessment is contested, the taxpayer has the burden '*** to show in what manner and to what extent ***' the commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect." *Id.* Subsequently, in *Alcan Aluminum Corp.*

v. Limbach (1989), 42 Ohio St.3d 121, the court succinctly set forth the standard which this board is to use in conducting our review:

“Absent a demonstration that the commissioner’s findings are clearly unreasonable or unlawful, they are presumptively valid. Furthermore, it is error for the BTA to reverse the commissioner’s determination when no competent and probative evidence is presented to show that the commissioner’s determination is factually incorrect. ***” *Id.* at 124. (Citation omitted.)

See, also, *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, paragraph one of the syllabus; *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 499, 2003-Ohio-2149, ¶ 26.

On February 8, 2007, AFS filed a “Motion on the Issue of Collateral Estoppel.” We overrule appellant’s motion. In its attached memorandum, appellant argues as follows:

“The Appellant owns a 41.26 mile fiber optic loop in Cuyahoga County, Ohio. See Tax Commissioner Transcript (hereinafter TR) at pages 130 and 131. The Appellant constructed the fiber optic loop and utilizes only 12.5% (36 strands\288 strands) of the fiber that comprises the loop. TR at pages 132 and 133. The Appellee Tax Commissioner acknowledged this fact in his final determination on the Appellant’s 2003 tax year assessment and reduced the assessed taxable value of Appellant’s unused and unlit fiber optic cable from \$1,758,057 to \$219,757 (an 87.5% decrease). TR at pages 124 and 125.

“The 2003 tax year final determination of the Tax Commissioner was affirmed by this Board in case no. 2004-K-1222, decided September 16, 2005. A copy of the Board’s decision is attached as Exhibit A. This Board’s decision and order on the Tax Commissioner’s

2003 tax year final determination was issued prior to the 2004 tax year final determination at issue in this appeal. The Tax Commissioner did not reduce his assessment of these same assets for the tax year 2004 even though the Tax Commissioner in his final determination explicitly found ‘[t]he petitioner’s assets and business have not changed materially since the Board’s ruling on the petitioner’s public utility property tax for the 2003 tax year.’

“***

“The purpose of the doctrine of Collateral Estoppel is to avoid the relitigation of issues. See *Mentor Industrial Park Limited Partnership v. Lake Cty. Bd. of Revision*, Board of Tax Appeals Case no. 89-X-907, et al., decided June 30, 1992, Slip op. A copy is attached as Exhibit B. By ignoring this Board’s decision and order in case no. 2004-K-1222 the Tax Commissioner is attempting to relitigate the issues decided by this Board in that case, this is contrary to the purpose and policy behind the doctrine of Collateral Estoppel. ‘See *Judicial Application of Issue Preclusion in Tax Litigation. Illusion or Illumination.*’ Vol. 59, No. 1, *The Tax Lawyer*, by Grover Hart, III and Jonathan L. Blacker.”¹ Id. at 2,4.

The Tax Commissioner filed his reply brief on July 3, 2007.

Therein, the commissioner argues three propositions of law. First, that the unlit dark fiber was “used in business” within the meaning of R.C. 5701.08 and therefore subject to taxation. Id. at 3-11. Next, that AFS failed to meet its burden of proof of showing the “extent” of the claimed error by reason of its estimates of value. Id. at 11-14. And, finally, that appellant never raised the issue of collateral

¹ Appellant also filed a brief on this matter consistent with the above. Therein AFS noted that the parties waived the evidentiary hearing before the board. This brief was filed on April 24, 2007.

estoppel in its petition for reassessment and is now precluded from doing so before this board. *Id.* at 14-16.

The appellee contends that the threshold question is whether AFS addressed the collateral estoppel issue in its petition for reassessment. This proposition, in the context of public utility property tax appeals, has been approved by the board in *Ohio Edison Co. v. Tracy* (Interim Order, May 21, 1999), BTA No. 1997-K-322, unreported, as well as *Am. Fiber Systems*, *supra*, based upon R.C. 5727.47 and *CNG Dev. Corp. v. Limbach* (1992), 63 Ohio St.3d 28. The present appeal was taken from a final determination issued by the commissioner on November 30, 2005. By that time, not only was the appellant aware of the commissioner's position for the prior year, but it also had the board's decision in *Am. Fiber Systems*. Clearly, appellant could have asserted before the commissioner that by virtue of his actions taken with respect to the 2003 tax year, the same result was compelled for the subsequent tax year. Therefore, we agree that this argument could and should have been raised by the appellant previously and its failure to do so precludes it from consideration on appeal. However, even if appellant were entitled to pursue such argument, it falls within the general rule announced by the court in *Recording Devices, Inc. v. Bowers* (1963), 174 Ohio St. 518, paragraph one of the syllabus, that "[e]stoppel does not apply against the state of Ohio as to a taxing statute." See, also, *NDM Acquisition Corp. v. Tracy* (1996), 76 Ohio St.3d 83. Herein, we find no circumstances warranting an exception to this rule.

Even if we were to consider AFS's contention that the judgment in *American Fiber Systems Inc.*, supra, has a collateral estoppel effect on the commissioner's final determination, we would not find merit in appellant's argument. In the modern view, collateral estoppel is embraced by the broader doctrine of res judicata. *Hicks v. De La Cruz* (1977), 52 Ohio St.2d 71.

The doctrine of res judicata has been defined as follows by the Ohio Supreme Court:

"A final judgment or decree rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action upon the same cause of action between the parties and their privies, and is a complete bar to any subsequent action upon the same cause of action between the parties or those in privity with them. The prior judgment is res judicata as between the parties or their privies. (Paragraph No. 1 of syllabus of *Norwood v. McDonald*, 142 Ohio St. 299, approved and followed.)" *Whitehead v. General Telephone Co.* (1969), 20 Ohio St.2d 108 paragraph one of the syllabus.

And in the second syllabus of the same case, the court defined collateral estoppel:

"A final judgment or decree in an action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter. However, a point of law or a fact which was actually and directly in issue in the former action, and was there passed upon and determined by a court of competent jurisdiction, may not be drawn in question in a subsequent action between the same parties or their privies. The prior judgment estops a party, or a person in privity with him, from subsequently relitigating the identical issue raised in

the prior action. (Paragraphs Nos. 2 and 3 of syllabus of *Norwood v. McDonald*, 142 Ohio St. 299, approved and followed.)”

However, in the matter before us, the subject issue of the taxability of dark fiber was never litigated before this board in the earlier case.

In *Am. Fiber Systems*, supra, we stated as follows:

“Following the filing of appellant’s 2003 annual report as an interexchange telecommunications company, the Tax Commissioner issued an assessment which reflected an increase in the taxable value of appellant’s property. Appellant subsequently filed a petition for reassessment, asserting that the total taxable value of its property should be reduced from \$1,323,740 to \$156,200. The commissioner granted a reduction, but only to the extent of \$943,000, which comported with that amount of fiber optic wire which was “unlit” and not used in appellant’s business. In reaching this conclusion, the commissioner dispensed with the issues raised by appellant in the following manner:

“Within Ohio, the petitioner operates a communications network in Cuyahoga County. This network consists of a forty-one mile optic loop and other network equipment. The fiber loops contains 288 strands of fiber, bundled together. The bundle of fiber runs through one conduit throughout the forty-one mile loop. The petitioner states that only 36 of the 288 strands have ever been lit, and that the remaining 252 strands have never been lit.

“The petitioner contends that the assessed taxable value should be reduced from \$1,323,740 to \$156,200, a reduction of \$1,167,540, to compensate for the unused and unlit fiber optic cable on its books. This contention is well taken in part.

“In a telephone conversation, the petitioner stated that the total network cost of \$5,439,057 is comprised of approximately \$3,275,000 for installation of the one

conduit pipe that traverses the entire 41 mile fiber loop, \$406,000 for poles for the above-ground part of the fiber loop, \$1,758,057 for fiber costs, and \$38,000 for monitoring equipment. The petitioner is requesting an 87.5% reduction in the value of all of its personal property due to its primarily unlit fiber optic cable system. While the petitioner can be granted a reduction in the value of its fiber cable due to the unlit fiber in its system, the fact that it has unlit fiber does not reduce the value of all of its other equipment besides its fiber. The fiber that has been lit uses the conduit pipe, the above-ground poles, and the monitoring system. As the lit fiber uses these components, the components are considered used in business pursuant to R.C. 5701.08. However, the petitioner has shown that 252 of its 28 fibers, or 87.5%, have never been lit, are not used in business and therefore the value of the fiber assessed, \$1,758,057.00, shall be reduced by 87.5% to reflect this.’ S.T. 1-2.

“Although appellant agrees with that aspect of the commissioner’s ruling that its unlit fibers are not used in business and, as a result, are not to subject to tax, through multiple specifications of error, appellant asserts that the taxable value of the remainder of its property, i.e., conduit pipe, above-ground poles, and computer monitoring system, should be reduced on a pro rata basis to correlate with the unlit, i.e., unused, fiber optic wire within its network.” Id. at 2-3.

In that case, the board simply recounted the decision of the Tax Commissioner on the issue of the unlit dark fiber. The matter was not litigated before the BTA. The issue which was litigated dealt with the remainder of AFS’s property, i.e., conduit pipe, above-ground poles, and computer monitoring system. Therein, the board determined that said property should not be reduced on a prorated basis to correlate with the unlit fiber optic wire within its network.

Collateral estoppel does not apply to the issue of taxability of the dark fiber and is hereby rejected.

AFS also contended that the dark fibers were not “used in business” as they were unlit and therefore not subject to taxation. Appellant cited *United Tel. Co. of Ohio v. Tracy* (1999), 84 Ohio St.3d 506 in support. The record reflects that AFS owned a 288 fiber optic strand network, of which 36 were lit and 252 were unlit. S.T. at 107. However, AFS was in the business of leasing these fiber optic strands to other entities. S.T. at 1, 88, 138. Therefore, we must disagree with AFS’s application of *United Tel.*. That case is distinguishable given that appellant leases the property in issue rather than using it in its own right. Thus, absent other evidence before us, we would conclude that the dark fiber was indeed “used in business” and therefore taxable. See *Equilease Corp. v. Donahue* (1967), 10 Ohio St.2d 18; *CC Leasing Corp. v. Limbach* (1986), 23 Ohio St.3d 204

AFS has waived an evidentiary hearing before this board and has provided no new evidence before the commissioner.² In doing so, we have no detailed breakdown of costs involved if we were to accept, which we do not, AFS’s proposition that only 36 lit fibers were “used in business” and the rest were exempted from taxation. We have no way of determining the costs which should be considered fixed and those which are variable and the proper allocation of costs. AFS’s proposition is far too simplistic to be useful. Therefore, we have no

evidence before us which would show error in the Tax Commissioner's final determination.

Based upon the foregoing, we must conclude that appellant has failed to satisfy its burden of proof by providing competent and probative evidence which would support its claims. It is therefore the decision of the Board of Tax Appeals that appellant's arguments are not well taken and the Tax Commissioner's final determination must be, and hereby is, affirmed.

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² AFS provided the commissioner with a transcript of this board's hearing on the previously cited 2003 AFS property tax appeal. S.T. at 7-103.