

KEANMILLER

KEAN MILLER HAWTHORNE D'ARMOND McCOWAN & JARMAN LLP
ATTORNEYS AT LAW

NAPTR-TEC LITIGATION UPDATE October 26, 2004

By:
Christopher J. Dicharry

(Arizona) CITIZENS TELECOMMUNICATIONS COMPANY OF THE WHITE MOUNTAINS v. ARIZONA DEPARTMENT OF REVENUE, 206 Ariz. 33, 75 P.3d 123 (8-26-03) - The Court of Appeals, Sheldon H. Weisberg, J., held that: (1) companies had standing to claim that valuation method violated Uniformity Clause of State Constitution; (2) companies which filed counterclaims had no obligation to name specific counties as parties; (3) failure of company, which appealed valuation, to name one county as party to appeal did not require dismissal of properly named counties; (4) company's delinquent payment of property tax installment to one county did not require dismissal of company's appeal in its entirety; (5) company and its competitors were using functionally identical property for functionally identical uses, and thus application of "market value" method to value company's commercial property violated Uniformity Clause; and (6) Tax Court failed to address issue of functional equivalency in determining whether application of valuation method to other companies violated Uniformity Clause, and thus case would be remanded to Tax Court.

(California) COSO ENERGY DEVELOPERS et al., Plaintiffs and Appellants, v. COUNTY OF INYO, Defendant and Respondent, 2004 WL 2293938 (Cal.App. 4 Dist.) (10-13-04) - The Court of Appeal, -ing, J., held that 1891 statute ceding exclusive jurisdiction to United States of land that had been ceded to United States, did not apply to the land at issue, which had been ceded to United States by Mexico in 1848. Affirmed.

(California) COUNTY OF LOS ANGELES, et al., Plaintiffs and Appellants, v. SOUTHERN CALIFORNIA EDISON COMPANY, et al., Defendants and Respondents, 112 Cal.App.4th 1108, 5 Cal.Rptr.3d 575 (10-23-03) - The Court of Appeal, Croskey, J., held that: (1) county could not argue first time on appeal that value of real property was not at issue; (2) decision of Public Utilities Commission (PUC) did not establish value of plants; (3) county could not argue for first time on appeal that damages awarded were inadequate; (4) proper method was used in valuing plants; and (5) county was not entitled to prejudgment interest or penalty assessment.

(Florida) GTE FLORIDA, INC., Appellant, v. Jim TODORA, as Property Appraiser of Sarasota County; Barbara Ford-Coates, as Tax Collector of Sarasota County; and Jim Zingale, as Executive Director of the Florida Department of Revenue, Appellees, 854 So.2d 731, 28 Fla. L. Weekly D1957 (8-22-03) - The District Court of Appeal, Northcutt, J., held that property appraiser's valuation of taxpayer's tangible personal property based on income approach was unconstitutional.

(Idaho) UNION PACIFIC LAND RESOURCES CORP., Plaintiff-Respondent, v. SHOSHONE COUNTY ASSESSOR and Shoshone County Board of County Commissioners, Defendants-Appellants, --- Idaho ---, 96 P.3d 629 (7-30-04) - The Supreme Court, Burdick, J., held that: (1) Tax Commission has exclusive authority to classify property owned by railroad as operating property; (2)

876824-1

Christopher J. Dicharry
Kean, Miller, Hawthorne, D'Armond, McCowan, & Jarman, L.L.P.
225.382.3492
chris.dicharry@keanmiller.com

assessor had no statutory right to appeal Commission's classification decision; (3) res judicata did not apply to Commission's classification decision; and (4) taxpayer was entitled to award of appellate attorney fees. Affirmed.

(Illinois) The KENDALL COUNTY BOARD OF REVIEW v. The PROPERTY TAX APPEAL BOARD, 337 Ill.App.3d 735, 787 N.E.2d 363, 272 Ill.Dec. 548 (2003) - The Appellate Court, McLaren, J., held that: (1) sufficient evidence supported PTAB's decision regarding assessed value of telecommunications company's property; (2) telecommunications company, in BOR's assessment of value of its property before PTAB, provided sufficient documentary evidence to challenge correctness of assessment; (3) PTAB properly included value of land in its final calculation of value of telecommunications company's property; and (4) PTAB properly used cost approach to value telecommunications company's property.

(Kansas) In the Matter of the Application of CENTRAL ILLINOIS PUBLIC SERVICES COMPANY, et al., for Exemption from Ad Valorem Taxation in Meade County, Kansas, 276 Kan. 612, 78 P.3d 419 (10-21-03) - The Supreme Court, Luckert, J., held that: (1) the utilities were not "public utilities" for purposes of state constitutional provision that merchants' and manufacturers' inventories, other than public utility inventories, are exempt from property tax; (2) the legislature had the power to define "public utilities" for purposes of the provision and did so in a manner consistent with it; and (3) taxing the natural gas inventory of state public utilities, but not the natural gas inventory of out-of-state public utilities, did not violate the Equal Protection Clause.

(Kansas) In the Matter of The Appeal Of COLORADO INTERSTATE GAS COMPANY, 276 Kan. - 72, 79 P.3d 770 (11-7-03) - The Supreme Court, Davis, J., held that: (1) competent substantial evidence supported BOTAs decision to use original cost allocation method, rather than rate base or net book cost, in determining fair market value of taxpayer's in-state assets for purposes of ad valorem taxation; (2) BOTAs adoption of original cost allocation method did not amount to violation of taxpayer's constitutional rights under due process and commerce clauses; (3) taxpayer's interest and overhead expenses were properly included by BOTAs in its unit value; and (4) amendment to state constitution which specifically designated public utilities' inventories as tangible personal property subject to taxation did not violate equal protection clause of U.S. constitution.

(Kentucky) Revenue CABINET, Commonwealth of Kentucky, Appellant, v. COMCAST CABLEVISION OF THE SOUTH; and Kentucky Board of Tax Appeals, Appellees. Cite as: 2003 WL 22681542 (Ky.App.) (12-31-03) - The Court of Appeals, McAnulty, J., held that: (1) review was de novo; (2) value of operating property included future income; and (3) statute taxing operating property was not unconstitutional. Affirmed in part, vacated and remanded. (Not final).

(Louisiana) ANR PIPELINE COMPANY, Appellant v. LOUISIANA TAX COMMISSION et al., Respondents. 2002-1479, 851 So. 2d 1145 (7-12-03) - On grant of writ of certiorari, the Supreme Court, C.J. Calogero, held that taxpayers' protest to tax assessment based solely on constitutional challenge was not prematurely filed in district court, even though Commission had not issued final determination of assessed valuation.

(Louisiana) ANR PIPELINE COMPANY, Appellant v. LOUISIANA TAX COMMISSION et al., Respondents. 2001-2594 (La. App. 1 Cir. 2-23-04) 868 So. 2d 950 - The Court of Appeals, J. Fitzsimmons, held that tax collectors were not necessary party defendants in taxpayer suit challenging constitutional solidity of taxation by Commission. Motion to dismiss denied; proceedings before Tax Commission stayed; reversed and remanded.

(Michigan) COUNTY OF WAYNE v. MICHIGAN STATE TAX COMMISSION, 261 Mich.App. 174, 682 N.W.2d 100 (1-20-04) - The Court of Appeals held that: (1) State Tax Commission (STC) is not the "final agency" with respect to administration of property tax laws; (2) erroneous conclusion by MTT that its review of STC decision was governed by constitutional provision stating that no appeal could be taken from final agency provided for administration of property tax laws was not prejudicial; (3) evidence supported failure of STC to use sales-comparison approach in assessing personal property of utilities; (4) STC was not precluded from using net book value, or original cost less depreciation (OCLD), approach as evidence in valuing utility property, abrogating Consumers Power Co. v. Port Sheldon Twp., 91 Mich.App. 180, 283 N.W.2d 680; (5) STC was not precluded from using income-capitalization approach as evidence in valuing utility property; (6) STC was not required to perform objective tests as part of its development of multiplier tables; and (7) STC was not precluded from using unit valuation approach in developing multiplier tables.

(Minnesota) ENBRIDGE ENERGY, LIMITED PARTNERSHIP, Petitioner, v. COUNTY OF RED LAKE, Respondent, 2004 WL 434484 (Minn.Tax Regular Div.) (2-27-04) - Given the common issues of fact and law presented, we find consolidation is warranted for the sake of judicial economy. In addition, we find consolidation would not significantly inconvenience or prejudice any party. Consolidating five separate actions in five separate Counties, involving the same witnesses, counsel, and evidence, promotes the interests of justice by reducing delay and costs, as well as avoiding multiplicity of litigation. We, therefore, grant the Counties' Motion for Consolidation for purposes of pretrial discovery and trial.

(New Hampshire) VERIZON NEW ENGLAND, INC. v. CITY OF ROCHESTER, 855 A.2d 497 (7-16-04) - The Supreme Court, Duggan, J., held that: (1) company's use of public ways was a private use and thus could be subject to taxation; (2) city could assess taxes even if it did not own public ways in fee simple; (3) use could be subject to tax even though company only had intangible right to use public ways; (4) use could be subject to assessment even though land used had no fair market value; (5) city could amend pole lease agreements to require company to pay real estate taxes; (6) remand was required for trial court to apply equal protection analysis as clarified in recent case; and (7) company was entitled to tax abatement only if it proved disproportionality by establishing that property was assessed at a higher percentage than that at which property was generally assessed. Affirmed in part, vacated in part, reversed in part, and remanded.

(New Jersey) CITY OF TRENTON, PLAINTIFF, v. TRENTON DISTRICT ENERGY CO., DEFENDANT, 21 N.J.Tax 244 (1-16-04) - The Tax Court, Menyuk, J.T.C., held that taxpayer's failure to respond to city's Chapter 91 request for information regarding taxpayer's income producing property did not warrant dismissal of taxpayer's answer and counterclaim. Ordered accordingly.

(New Mexico) FEDERAL EXPRESS CORPORATION a Delaware Corporation, Plaintiff-Appellee, v. Alex A. ABEYTA, Jr., as Bernalillo County Treasurer, New Mexico Taxation & Revenue Department, and John Chavez, as Secretary of the New Mexico Taxation & Revenue Department, Defendants-Appellants, 135 N.M. 37, 84 P.3d 85, 2004-NMCA-011 (11-17-03) - The Court of Appeals, Wechsler, C.J., held that taxpayer's computational error in arriving at allocated value for its aircraft was not an "error in the computation of taxes," for purposes of statute allowing taxpayers to file actions to change property tax schedule for such errors, and thus case was subject to 60-day filing deadline. Reversed and remanded.

(New York) In the Matter of the Application for a review under Article 7 of the Real Property Tax Law of a Tax Assessment by VOICESTREAM WIRELESS CORPORATION, Petitioner, v. ASSESSOR OF THE CITY OF TROY, Board of Assessment Review of The City of Troy, Rensselaer County, New York, and The City of Troy, New York, Respondents, 2 Misc.3d 723, 771 N.Y.S.2d 335,

2003 N.Y. Slip Op. 23927 (12-23-03) - The Supreme Court, Rensselaer County, Canfield, J., held that provider's rooftop installations of "communications equipment" were "lines, wires, poles, supports and inclosures for electrical conductors," and thus, were taxable items of real property. Motion denied.

(New York) In the Matter of the Application of NEXTEL OF NEW YORK, INC., Petitioner, v. The ASSESSOR FOR the VILLAGE OF SPRING VALLEY, the Board of Assessment Review, and the Village of Spring Valley, New York, Respondents, 4 Misc.3d 233, 771 N.Y.S.2d 853, 2004 N.Y. Slip Op. 24026 (2004) - The Supreme Court, Rockland County, Thomas A. Dickerson, J., held that: (1) equipment was taxable, and (2) failure to submit appraisal warranted dismissal. Petition dismissed.

(New York) NEW YORK TELEPHONE COMPANY, Appellant, v. NASSAU COUNTY et al., Respondents. (Action No. 1.), 1 N.Y.3d 485, 808 N.E.2d 340, 776 N.Y.S.2d 205, 2004 N.Y. Slip Op. 02290 (3-30-04) - The Court of Appeals, G.B. Smith, J., held that Appellate Division erred in denying tax refunds to the utilities because of the financial impact such refunds would have on the county where the amount of the refunds had not been established, nor proof submitted demonstrating the impact the refunds would have on the county. Reversed and remitted.

(Oregon) AT & T WIRELESS SERVICES OF OREGON, INC., Plaintiff, v. JACKSON COUNTY ASSESSOR, Defendant, 2003 WL 21263634 (Or.Tax Magistrate Div.) (2003) - Plaintiff failed to timely appeal Defendant's action within 90 days of the correction as required by ORS 311.223(4). As a consequence, the court finds Plaintiff's appeal should be dismissed.

(Pennsylvania) PPL HOLTWOOD, LLC, Appellant, v. PIKE COUNTY BOARD OF ASSESSMENT and Revision of Taxes, 846 A.2d 201 (4-6-04) - The Commonwealth Court, Nos. 1668, 1690, 1691, and 1692 C.D. 2003, Mirarchi, Senior Judge, held that penalties and interest for nonpayment of local real property taxes by a taxpayer subject to the Fourth to Eighth Class County Assessment Law are to be based on taxes assessed at conclusion of appeal process, not on the original assessment. Reversed and remanded.

(Tennessee) ANR PIPELINE CO., Colonial Pipeline Co., Columbia Gulf Transmission Co., et al., v. TN BOARD OF EQUALIZATION, 2002 WL 31840689 (Tenn.Ct.App.) (6-30-03) - Pipelines and surface equipment treated as personal property for purposes of *ad valorem* taxation.

(Texas) HARRIS COUNTY APPRAISAL DISTRICT, Appellant v. PANHANDLE EASTERN PIPELINE COMPANY, Appellee, 2004 WL 36218 (Tex.App.-Hous. (1 Dist.) (1-8-04) - The Court of Appeals, Tim Taft, J., held that prior years' appraisal rolls could not be corrected, under statute permitting change in appraisal rolls to correct inclusion of property that does not exist in form described in rolls, to reflect previously unrequested interstate allocation of property. Reversed.

(Vermont) USGEN NEW ENGLAND, INC. v. TOWN OF ROCKINGHAM, 2004 WL 2071722 (9-17-04) - The trial court denied this motion, heard from all three experts, and in its order relied principally on Dr. Silkman's testimony. The trial court's order also accepted the Town's recommendation and allocated 90% of the value of USGen's facility to the Town of Rockingham. USGen now appeals, arguing that the trial court erred when it: (1) admitted Dr. Silkman's testimony; (2) relied on Dr. Silkman's testimony; and (3) accepted the Town's allocation. We affirm.

(Wyoming) AIRTOUCH COMMUNICATIONS, INC. v. DEPARTMENT OF REVENUE, STATE OF WYOMING, 76 P.3d 342 (9-12-03) - The Supreme Court, Kite, J., held that: (1) taxpayers' cellular service companies were "telephone companies" for purposes of *ad valorem* taxation, and (2) taxpayers failed to prove the value of intangible property was identifiable and separable from the enhanced value of

the business determined through the unitary method.

876824-1

Christopher J. Dicharry
Kean, Miller, Hawthorne, D'Armond, McCowan, & Jarman, L.L.P.
225.382.3492
chris.dicharry@keanmiller.com