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Case Law Updates Program
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SECTION ONE: LOCAL PROPERTY TAX CASES

A. EXEMPTIONS AND ABATEMENTS

Outfront Media LLC v. Board of Assessors of the City of Boston, ATB 2022-176 (September 15, 2022). Submitted by Mark DeFrancisco, Chairman, Massachusetts Appellate Tax Board.

Taxpayer appealed to the ATB from the Boston Assessors' refusal to abate property tax assessed on billboards owned by the Massachusetts Bay Transportation Authority (MBTA), an entity exempt from tax. Although the MBTA retained ownership of the billboards, taxpayer had the exclusive right to contract with advertisers and produce the advertising on the billboards. Taxpayer paid a guaranteed minimum payment to the MBTA plus a share of revenues in excess of a set amount. The fundamental issue before the ATB was whether the billboards were "leased, used, or occupied in connection with a business conducted for profit" for purposes of a statute providing that such property owned by the MBTA would be subject to tax.

The assessors and the taxpayer filed cross motions for summary judgment. Taxpayer maintained that: 1) it had limited rights to the billboards under its contract with the MBTA that fell short of a possessory interest in the billboards; 2) it was merely a service provider to the MBTA; 3) taxation of the billboards interfered with the MBTA's essential functions; and 4) the advertisers are the real users of the billboards. The assessors relied on the plain wording of the statute ("used. . . in connection with a business conducted for profit") to argue that there need not be an unlimited or possessory interest in the billboards to establish taxability. Rather, the use of the broad term "used" evidenced an intent to allow property to be taxed where a for-profit entity utilizes the property in its business.

The ATB granted summary judgement in favor of the assessors. The ATB noted that the monetary maximation of the billboards was entirely due to the business expertise of the taxpayer. The installation, licensing, operation, maintenance, permitting, sales and marketing, and negotiation and execution of contracts with advertisers were all within the province of the taxpayer. The taxpayer was more than a mere service provider such as a janitor, plumber, food concessionaire, or independent contractor that are paid for their services; rather, the taxpayer is conducting its business and taking on the risk of the business's success by paying the MBTA a guaranteed minimum plus a share of revenues. After the ATB's granting of summary judgment, the taxpayer waived its valuation claims, and the case is now on appeal to the Massachusetts Appeals Court.

Eichorn v. Yamhill County Assessor (Estoppel), TC-MD 210323R (September 30, 2022), Submitted by Richard Davis, Judge, Oregon Tax Court.

The issue addressed in this case was whether a county should have been estopped from disqualifying real property from special tax assessment when a taxpayer detrimentally relied on erroneous information provided by the county.

Oregon's public policy promotes preservation and safeguarding of forestland by granting special assessment. In Eichorn, the prior owners of an 18-acre property benefited from such an assessment that substantially reduced their tax burden. They wanted to develop the property and asked the county to rezone it; however, they were worried that a powerful environmental group would challenge the action.

Seeking to avoid litigation, the county and prior owners agreed to permanently disqualify the property from forestland special assessment and the county took the highly unusual step of creating an ordinance codifying the agreement.

Later, the prior owners sold the property to a development company. When financial distress forced the development company to sell the property, the property's tax status became an impediment. Consequently, the development company reapplied for, and was granted, forestland special assessment. The county's exemption specialist responsible for this oversight was unaware of the ordinance and conditionally granted the special assessment, contingent that the property be reforested.

Eichorn, who sought to acquire the property from the development company, diligently consulted the county assessor and the county planning department, conducted a thorough review of the records, and received written assurances from the county confirming the property was in forestland special assessment. Relying on this information, Eichorn purchased the property, invested in forestry equipment, and replanted trees on the parcel. Subsequently, when Eichorn sought permission to construct a house on the land, the county discovered its error, disqualified the property from the special assessment, and imposed five years' worth of back taxes.

On appeal to the Magistrate Division of the Oregon Tax Court, the court noted that estoppel in tax cases or against the government is "rarely applied[.]" For an estoppel claim to prevail, the taxpayer must establish 1) misleading conduct by the defendant; 2) taxpayer's good faith reliance on that conduct; and 3) injury. The court found that Eichorn satisfied each element. Misleading conduct and injury were not seriously challenged. The county disputed Plaintiff's good faith reliance because the ordinance was publicly available. However, the court found that the issuance of the ordinance was so unusual for the circumstances and the ordinance so difficult to find that Plaintiff did rely in good faith on information from the county.

A recent order issued by Presiding Magistrate Boomer added an additional layer to the analysis. This order held that a taxpayer cannot invoke estoppel to secure a benefit not provided by law. *Bailey v. Josephine County Assessor*, TC-MD 200321N, 2021 WL 1884930 at *5 (Or Tax M Div, May 11, 2021). In *Bailey*, the taxpayer's property, although statutorily ineligible, was mistakenly granted special assessment because the account had been miscoded in the system. There, the court found that the property could not receive special assessment as a matter of law. Consequently, the court in *Bailey* did not estop the county from disqualifying the property from special assessment.

In *Eichorn*, the county argued that based on *Bailey*, its ordinance effectively precluded the taxpayer's property from receiving forestland special assessment as a matter of law, rendering estoppel unavailable to provide relief to the taxpayer. However, the court distinguished *Bailey* by holding that the state's special assessment scheme, which defined precise conditions under which a county could disqualify a property from forestland special assessment, conflicted with the county's ordinance, and thus state law superseded the county ordinance.

B. VALUATION

In the Matter of the Appeal of Alpenhof Lodge Associates (Valuation Income Approach and Due Process), 2020-40 (May 4, 2021), Submitted by Martin Hardsocg, Chairman, Wyoming State Board of Equalization.

Facts
Hotel challenged the 2020 taxable valuation of its hotel property in Jackson, Wyoming, claiming that County Assessor overvalued the property at $12 million. Hotel asserted that its income demonstrated a valuation closer to $7.1 million. The County Board affirmed the valuation in a 3-2 decision. Hotel appealed to the State Board of Equalization.

Issues

1. Whether Assessor erred when she did not perform and consider an income valuation along with the cost and market valuations?
2. Whether Hotel offered sufficient evidence that Assessor failed to correctly apply the cost and market valuation?

Case Analysis and Conclusion
The State Board reversed in part and affirmed in part. As to Hotel's claim that the Teton County Assessor failed to consider and apply the income valuation method, the Board agreed. The Board rejected a common defensive argument that methodology selection falls within the assessor's exclusive purview. Methodology selection, the Board explained, is not generally challengeable, but that assumes the appraiser considered and performed all three valuation methods to the extent possible, as required by appraisal guidelines. Hotel had provided Assessor with income information. Assessor was unable to adequately explain why she could not apply the income valuation method and weigh the valuation results.

The State Board, however, rejected Hotel's challenges to Assessor's application of the cost and market valuation methods. In particular, Hotel struggled to counter Assessor's compelling evidence demonstrating that in Jackson, Wyoming, the value of land (relative to improvements) is almost everything, and that her 3.26 market adjustment, supported by her ratio study, was warranted. The Board also rejected Hotel's preferred depreciation deduction. Hotel offered insufficient evidence to demonstrate error. The Board remanded the case so that Assessor could perform all three methodologies and properly reconcile the results.

In the Matter of the Appeal of Contango Resources, LLC (Cost Approach Evidence), 2022-31 (June 20, 2023), Submitted by Martin Hardsocg, Chairman, Wyoming State Board of Equalization.

Facts
Taxpayer purchased all oil and gas production and processing assets of a group of companies in 2021, including substantial lease and attendant rights required to produce sour natural gas and oil, for $67 million. It did so pursuant to a third-party, private bidding process. However, the assets acquired comprised only a portion of the total production rights in the field, and others retained ownership of a portion of the gas, oil, and other assets. Taxpayer would assume the primary seller's role as operator of the wells, processing equipment, and gathering equipment (compressors and pipelines).

Taxpayer pressed Assessor and her consultant, T.Y. Pickett, to use the purchase agreement as a basis (*starting point*) to value the real and personal properties under the cost method of valuation. The lease rights and unproduced minerals were not subject to property taxation but were included in the $67 million purchase price. The purchase contract included a simple allocation assigning a portion of the $67 million to categories of assets, but it included no detail on who authored it or how it was devised. Taxpayer hired a consultant to prepare a second allocation, assigning a theoretical price reflecting an allocation of the property's prices, had Taxpayer purchased all production and related assets. The total theoretical price was approximately $122 million.

Assessor considered, but refused to rely upon the purchase agreement in her 2022 valuation of the property and equipment. Her consultant, T.Y. Pickett, which valued the most complex properties such as the processing facility, used the purchase agreement only to increase obsolescence—not as the basis for its cost valuation. The County Board, following a hearing, affirmed Assessor's valuation of the assets at $190 million, much less than the total theoretical price of $122 million paid for all assets. Taxpayer appealed to the State Board.

Issues

1. Was Assessor, under the facts, required to rely principally upon the purchase price as a basis to value the acquired real property and facilities?
2. Was the Assessor's total rejection of the purchase agreement price error in light of her consulting appraiser's slight reliance upon the purchase agreement for his obsolescence determination?

Analysis and Conclusion
The Board agreed that Assessor (and her consultant) had not erred when they refused to rely upon the purchase agreement price of $67 million. While a recent arm's length purchase price of property was arguably the best evidence of value, appraisers retained discretion to consider and reject such as evidence of value. Assessor was unable to learn how the private bidding process was performed, including the other bids or who marketed and performed the bidding. Appraisers have ample discretion to reject sales processes that are not public in nature. Assessor also reasonably rejected the allocations, which offered no understanding of how they were prepared. The Board cited a range of appraisal authorities warning against reliance on allocations that are not well understood, as well as multi-faceted conveyances or sales of entire business groups of properties.

As for Assessor's complete rejection of the purchase agreement, in contrast to her consultant's slight reliance upon the agreement, the Board held this was not sufficient evidence of error and that the consultant's reliance did not bind Assessor to do the same.

Machu Picchu Holdings, LLC v. Pinal County (Constitutional Objection to Assessment/Jurisdiction) 1 CA-TX 21-0003, 1 CA-TX 21-0007 (March 16, 2023), Submitted by Elena Cottam, Staff Attorney, Arizona Tax Court.

Under the Rule B method for calculating limited property value, a property's limited property value "shall be established at a level or percentage of full cash value that is comparable to that of other properties of the same or a similar use or classification" (A.R.S. § 42-13302(A)). Both Pinal County and Yavapai County used a method which divided each county into *neighborhoods* or *market areas* and then calculated and applied Rule B ratios for the neighborhoods or market areas rather than using a countywide Rule B ratio for each property classification. Taxpayers argued that the Rule B ratios applied to their properties were greater than Rule B ratios applied to other properties in the same property classification in other parts of the county. The Arizona Court of Appeals held that the *neighborhood system* used to determine limited property value violated A.R.S. § 42-13302 because location is not a classification set out by the legislature in statute.

Walmart Real Estate Business Trust v. City of Bad Axe (Big Box), 19-001078 (October 20, 2022), Submitted by Marcus Abood, Judge, Michigan Tax Tribunal.

Petitioner, Walmart Real Estate Business Trust, appeals ad valorem property tax assessment levied by Respondent, City of Bad Axe, against Parcel No. 3251-724-002-91 for the 2019 tax year.

The subject property is a parcel of land improved with an approximately 184,000 square-foot *big box* store. Petitioner owns the land and improvements, and Petitioner is the owner-occupant of the big box store. Petitioner challenged Respondent's determination that the TV of the subject property for the tax year 2019 was $4,329,500.

Following an evidentiary hearing at which each party presented expert witness testimony regarding valuation of the subject property, the MTT issued a written opinion and judgment concluding that for 2019, the TCV of the subject property was $4,270,000, the SEV of the property was $2,135,000, and the TV of the property was $2,135,000. The MTT found that the market analysis and methodology of Petitioner's valuation expert would be "given weight and credibility" in the MTT's independent determination of the subject property's market value. The MTT found the analysis of Respondent's valuation expert to not be credible. The MTT further found that the independent determination of the subject property's market value was based on the property's status as "an owner-occupied commercial property with fee simple property rights" that was not encumbered by a lease. The MTT stated that a "fee simple estate is defined as 'absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power and escheat.' The MTT rejected Respondent's method of valuation that was based on assuming a hypothetical lease for the subject property. The MTT stated in its opinion, "The subject's fee simple property rights in the context of market value does not contemplate the non-existent lease as prescribed by Respondent's appraiser."

1300 Nicollet, LLC v. County of Hennepin (Discovery), A21-1493 (August 24, 2022), Submitted by Jane Bowman, Chief Judge, Minnesota Tax Court.

Taxpayer, which owned Hotel, brought action against County, challenging County's assessment of market values for several tax years. The Tax Court, Bradford S. Delapena, J., in response to Taxpayer's motion to compel production of information regarding other downtown hotels, indicated that only information County provided to its expert, and upon which he relied, needed to be provided to Taxpayer in discovery, made adjustments to Expert's valuations after accepting appraisal report, and granted County's motion in limine to exclude certain proposed exhibits. Taxpayer petitioned for review through certiorari.

Key Holdings:

Statute that permitted assessor's records to be offered at trial, subject to applicable rules, could be read together with statute that required Tax Court, upon finding data was discoverable under applicable rules, to weigh benefit to petitioner against confidentiality interests so that each had effect.

Tax Court did not abuse discretion when it used the *parsing income method* to value the hotel. Parsing income method for separating real property value from business and other intangible value, in valuing property for tax purposes, involves estimating a business entity's total value, or *going concern*, and then removing value of income and expenses that are not attributable to real estate itself.

C. STATUTORY INTERPRETATION/CONSTRUCTION

Elkhart County Assessor v. Lexington Square, LLC, N.E.3d 2023 WL 5660790 (September 1, 2023), Submitted by Martha Blood Wentworth, Judge, Indiana Tax Court.

According to court records, in September 2016, Lexington Square LLC purchased a multi-building apartment complex in Elkhart. Although the property had been assessed at $3,490,500 for tax year 2015, the Elkhart County Assessor increased the property's assessment to $7,683,000 for 2016, $7,028,200 for 2017, and $7,059,800 for 2018.

Alleging that the 2016 to 2018 assessments were not only incorrect, but also were unfair when compared to the assessments of other apartment complexes in Elkhart County, Lexington Square initiated appeals first with the Elkhart County Property Tax Board of Appeals and then with the Indiana Board of Tax Review.

The Indiana Board conducted a consolidated hearing on all of Lexington Square's appeals on May 18, 2021. At the Indiana Board hearing, the Assessor admitted she bore the burden of proof on the valuation issue under Indiana Code § 6-1.1-15-17.2 (the burden shifting statute) because she had increased the subject property's assessment by more than 5 percent between 2015 and 2016. The parties agreed that the burden of proof on the uniformity issue, however, remained with Lexington Square.

To demonstrate that the original assessment valuations were correct, the Assessor submitted an appraisal, completed in conformance with the Uniform Standards of Professional Appraisal Practice, that valued the subject property between $7,277,349 and $7,990,000 during each of the years at issue. In rebuttal, the vice president of Lexington Square's property management company testified that he believed the subject property's assessed value should have been between $6,776,466 and $7,535,545 during each of the years at issue.

He explained that he arrived at those values by applying a capitalization rate to the average of the property's actual net operating income for tax years 2015 through 2017.

With respect to the uniformity issue, Lexington Square presented the Indiana Board with evidence comparing its assessed value to recent sales prices of numerous other apartment complexes in Elkhart County. Lexington Square asserted that the comparison demonstrated that those properties were *underassessed* on average by more than 26 percent, while the Lexington Square property was underassessed by only 4 percent.

The Indiana Board's final determination was based on the Indiana Tax Court's decision in *Southlake Indiana, LLC v. Lake County Assessor* (Southlake II), 181 N.E.3d 484, 489 (Ind. Tax Ct. 2021), finding that the Assessor did not prove her assessment was "correct," the statutory standard expressed, because her appraisal evidence did not conclude "exactly and precisely" to the values actually assessed during the years at issue.

On the other hand, the Indiana Board determined that Lexington Square failed to show what the proper value of its property should have been because it "based [its] analysis solely on the subject property's historical income, expenses, and occupancy without comparing that data to the market."

Regarding the uniformity issue, the Indiana Board determined that Lexington Square failed to demonstrate that it was unfairly assessed in comparison to other similarly situated properties, explaining that its evidence failed to comport with any of the standards for ratio studies as set forth by both the Indiana Department of Local Government Finance and the International Association of Assessing Officers.

Accordingly, because neither party proved the property's correct assessed value, the Indiana Board ordered that each of Lexington Square's contested assessments to revert to the property's 2015 assessed value in accordance with Indiana Code § 6-1.1-15-17.2—the burden shifting statute.

The Assessor petitioned for a rehearing, claiming the Indiana Board erroneously applied the burden of proof. The Indiana Board denied the Assessor's petition for rehearing.

The Assessor appealed to the Indiana Tax Court.

The Court noted that the Indiana board concluded in its final determination that under Indiana Code § 6-1.1-15-17.2, the Assessor bore, but failed to meet, her burden of proving that her 2016 to 2018 assessments were correct, and she found that Lexington Square also failed to demonstrate what the correct assessment should be. As a result, the Indiana Board applied the reversionary clause and ordered Lexington Square's 2016 to 2018 assessments to revert to the property's 2015 assessed value of $3,490,500.

On appeal, the Assessor argued that the Indiana Board got it all wrong. Indeed, the Assessor asserted that Indiana Code § 6-1.1-15-17.2 no longer applied to this case because the statute had been repealed on March 21, 2022, three days before the Indiana Board issued its final determination.

In support of her position, the Assessor listed several Indiana cases stating that "'in the absence of a legislative enactment to the contrary, the repeal of a statute without a saving[s] clause, where no vested right is impaired, completely obliterates it, and renders the same as ineffective as if it had never existed.'" The Assessor's "analysis" failed to recognize, however, the line of Indiana cases that explain an express savings clause is not required to prevent the destruction of rights existing under a repealed statute if the legislature's intention to preserve and continue those rights is otherwise clearly apparent.

The Tax Court explained that if it were to declare the repeal of Indiana Code § 6-1.1-15-17.2 had retroactive effect, "the rules of play" would be unfairly changed mid-stream. Indeed, it would be necessary for every one of the cases still pending at the time of the repeal to be reheard to provide taxpayers an opportunity to develop and implement new litigation strategies aligned with the new allocation of the burden of proof. "Reworking all pending appeals is absurd because the amount of time needed to resolve them would be significantly prolonged, an undue strain would be placed on administrative level resources, and costs of litigation would greatly increase. This is surely not the result the Legislature, as a reasonable body, would have intended. Accordingly, the Court declines the Assessor's invitation to apply the repeal of Indiana Code § 6-1.1-15-17.2 retroactively."

Inland Insurance Company v. Lancaster County Board of Equalization, 20C 1040 (April 5, 2023), Submitted by Rob Hotz, Commissioner, Nebraska Tax Equalization Review Commission.

A commercial building owned by Inland Insurance Co. (Inland) was assessed for tax year 2020 as of the statutory effective date of January 1, 2020. On May 30, 2020, the building was destroyed by a fire set by an arsonist involved in rioting in downtown Lincoln, Nebraska. Inland subsequently filed a Report of Destroyed Real Property, which allows for a review of the assessment after January 1 and before July 15 if the property meets the statutory definition of "destroyed real property." The County Board denied Inland's protest and Inland appealed to the Tax Equalization & Review Commission (TERC). TERC affirmed the decision of the County Board based upon the express language of the statute (Act) which reads, in pertinent part:

1. The Legislature finds and declares that fires, earthquakes, floods, and tornadoes occur with enough frequency in this state that provision should be made to grant property tax relief to owners of real property adversely affected by such events.
2. For purposes of [this Act]:
    a. Calamity means a disastrous event, including, but not limited to, a fire, an earthquake, a flood, a tornado, or other natural event which significantly affects the assessed value of real property.
    b. Destroyed real property means real property that suffers significant property damage as a result of a calamity occurring on or after January 1, … and before July 1 of the current assessment year. …"
    c. Significant property damage means:
        i. Damage to an improvement exceeding twenty percent of the improvement's assessed value in the current tax year as determined by the county assessor…"

Inland argued the fire was a "calamity" and both parties stipulated the property suffered "significant property damage." Consequently, TERC's decision was based on following rules of statutory construction to determine whether the fire causing the destruction was a "calamity."

The County Board argued the plain meaning of the statutory language did not allow an interpretation that a man-made fire (one, as in this case, that was directly caused by an arsonist) falls under the statutory definition of calamity. Inland argued the statutory definition of calamity includes some man-made disastrous events, like man-made fires. Particularly, Inland argued that destruction as a result of a man-made fire, like arson, should not be excluded as a "calamity."

TERC's Order was informed by rules of statutory construction as laid out by the Nebraska Supreme Court in prior decisions:

- In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
- When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language, understood in context. Our analysis begins with the text, because statutory language is to be given its plain and ordinary meaning, and the appellate court will not resort to

interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. Neither is it within the province of the Courts to read meaning into a statute that is not there or to read anything direct and plain out of a statute. When legal terms of art are used in statutes, they are to be construed and understood according to their term of art meaning.

- When interpreting a statute, effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.

In addition to construing the definitions within the [Act], TERC also noted the [Act's] specific findings regarding the statutory scheme, concluding that the express purpose of the statutory scheme is "to provide property tax relief to owners of real property adversely affected by such events" as "fires, earthquakes, floods, and tornadoes" that "occur with [certain] frequency in this state." TERC reasoned, "[i]n order to conclude that man-made fires should be included within the meaning of "calamity" in the [Act], as [Inland] asserts, we must conclude that the text of the statute contemplates man-made fires in the same context as all "disastrous events" that are "natural events."

TERC concluded, "Inland's construction [of the Act] would require [TERC] to read into the statute words that are not present in the text of the statute. It is clear natural events are included. It is not at all clear that man-made events should be included within the meaning of the statutory definition of calamity."

TERC's additional analysis included the following:

- The text of the statute expressly includes fire, earthquake, flood, and tornado. The comma after the word tornado signifies that in addition to these four events, other events may also be included as calamity where it states, "or other natural events." This prepositional phrase, "or other natural events," also relates back to the four events named just previous.
- We reject a construction that "other" here refers only to natural events, while fire, earthquake, flood, and tornado refer either to natural or man-made events. Such a construction would "read meaning into a statute that is not there."
- We also reject a construction that would read the text as though there is no comma after the word tornado, which would require us to interpret the text as though it said, "a tornado or other natural event," meaning that "or other natural event" refers only to tornado and not to fire, earthquake, or flood, which could then each be natural or man-made events. Again, this construction would require us to "read meaning into the statute that is not there." In fact, the statutory scheme makes reference only to "natural" events; no reference is expressly made to any "man-made" events.
- The interpretation of the statute also requires us to determine what effect the limiting language "but not limited to" has on the meaning of calamity. If we read this prepositional phrase as placing no limit at all to whether the event was natural or man-made, then the definition of calamity is reduced to "calamity means any disastrous event which significantly affects the assessed value of real property." Such a construction would treat many specific words within the definition of calamity as being superfluous. "When interpreting a statute, effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided." Such a construction would also read meaning that is direct and plain out of the statute. A sensible reading of this limiting language is that it makes room for natural disasters not expressly named in the statute that occur with frequency in this state other than fire, earthquake, flood, and tornado. As mentioned above, this might reasonably include wind, hail, rain, lightning, or snow.

TERC found the text of the statutory definition of calamity was plain, direct, and unambiguous, and concluded it did not include within its scope destruction caused by a fire started by an arsonist. Inland's appeal was denied. Inland's appeal of the TERC Order to the Nebraska Supreme Court is pending.

Verizon v. Hopewell Borough, A-2909-18 (June 14, 2023), Submitted by Mary Siobhan Brennan, Judge, Tax Court of New Jersey.

Appellate Division decision on appeal of two separate Tax Court decisions involving the constitutionality of the New Jerey franchise tax on certain telephonic local exchange carriers and the interpretation of the statutory term *local telephone exchange* for the purpose of determining if the tax was payable.

D. FEDERAL PRECLUSION OF LOCAL EXCISE TAX

LTC Jonathan L. Riggs v. Board of Assessors of the Town of Bedford, ATB 2023-120 (March 9, 2023), Submitted by Mark DeFrancisco, Chairman, Massachusetts Appellate Tax Board.

Taxpayer was an active duty servicemember domiciled in West Virginia temporarily residing in Bedford, Massachusetts due to his duty assignment. Taxpayer leased a vehicle and listed his Massachusetts address on the lease agreement. The Bedford assessors imposed an excise on the vehicle under a statute that provides that an excise is due to the municipality where a vehicle is "customarily kept." There is no dispute that the vehicle was customarily kept in Bedford for purposes of the statute. In its summary judgment motion, the taxpayer argued that a federal statute, the Servicemembers Civil Relief Act ("Relief Act"), precludes the imposition of the excise. In its cross-motion for summary judgment, the assessors maintained that only an owner, not a lessee, has standing to contest the excise.

The ATB ruled that the Relief Act precludes the imposition of the excise on the taxpayer and granted summary judgment in his favor.

The Relief Act provides that the personal property of a servicemember "shall not be deemed to be located or present in, or to have a situs for taxation in, the tax jurisdiction in which the servicemember is serving in compliance with military orders." The ATB ruled that, although only a "person aggrieved" by the imposition of a tax has standing to appeal an assessment, where a federal statute precludes the imposition of a tax, the party on whom the "incidence of the tax" falls has standing to prosecute the appeal. The ATB relied on *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339 (1968), where the Court reversed a Massachusetts Supreme Judicial Court decision that held a national bank, immune from state taxation, had no standing to contest a sales tax imposed on it as a purchaser because the vendor is assessed the sales tax and is the only "person aggrieved." The Court held that it "would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser."

Because the *legal incidence* of the motor vehicle excise fell on the taxpayer/servicemember who paid the excise, the ATB ruled in his favor.

SECTION TWO: STATE TAX CASES

A. CORPORATE BUSINESS TAX

***ADP, LLC v. Arizona Department of Revenue**,* 1 CA-TX 21-0009 (January 31, 2023), Submitted by Elena Cottam, Staff Attorney, Arizona Tax Court.

The Arizona Court of Appeals held that ADP's eTime software is tangible personal property (TPP) and subject to the transaction privilege tax (TPT). The Arizona Department of Revenue (ADOR) and the City of Phoenix assessed and collected TPT from ADP on revenues received from leasing eTime under a contract with Maricopa County. Employees use eTime to enter their time and other employment data which is then used to generate the employees' paychecks.

In Arizona, TPT applies to the lease or rental of TPP (A.R.S. § 42-5071(A)). TPP is defined as "personal property that may be seen, weighed, measured, felt or touched or that is in any other manner perceptible to the senses" (A.R.S. § 42-5001(21)). The Court of Appeals relied on *State v. Jones*, 60 Ariz. 412 (1943). In *Jones*, the Arizona Supreme Court found that the playing of a record when a coin was placed in a jukebox was perceptible to the sense of hearing and therefore TPP (60 Ariz. at 415-16). Here, the Court of Appeals found that eTime is similarly perceptible to the senses because it can be viewed by employees when accessing and using the program. Relying on *State Tax Commission v. Peck*, 106 Ariz. 394 (1970) (holding that coin-operated laundromats and car-washing machines were subject to TPT), the Court of Appeals also found that ADP's business is renting the eTime software rather than paying for human resources services and therefore subject to TPT.

Appeal of Southern Minnesota Beet Sugar Cooperative and Subsidiary, 2023-OTA-342P (August 7, 2023), Submitted by Myriam Bouaziz, California Office of Tax Appeals.

The three issues were whether, for the 2008 through 2011 tax years: 1) Appellant properly included in the combined reporting group's California apportionment percentage its property, payroll, and sales related to business activities that permitted it to deduct certain agricultural cooperative income under Revenue and Taxation Code (R&TC) section 24404; 2) Appellant may deduct interest expense—incurred to acquire Spreckels Sugar Company (Spreckels), a unitary entity—against its taxable nonmember income; and 3) Appellant may deduct depreciation expense—incurred from assets used to produce deductible income under R&TC section 24404—against its taxable nonmember income.

Appellant is an agricultural cooperative corporation headquartered in Minnesota. During the tax years at issue, most of Appellant's income arose from deductible member income under R&TC section 24404. When computing the group's California apportionment percentage, Appellant included all of its property, payroll, and sales attributable to its deductible member income, which increased the group's apportionment factor denominators (keeping the numerators the same), thus lowering its overall apportionment percentages and California source income and resulting taxes reported as due. Appellant also deducted against its taxable nonmember income interest expenses from its acquisition of Spreckels and depreciation expenses. The Franchise Tax Board (FTB) proposed additional taxes by excluding all of Appellant's property, payroll, and sales attributable to its deductible member income from the group's California apportionment percentage, and disallowed Appellant's interest expense and depreciation deductions because they were related to producing deductible member income under R&TC section 24404.

The Office of Tax Appeals (OTA) found in favor of Appellant on the first issue. OTA concluded the Uniform Division of Income for Tax Purposes Act (UDITPA), which California statutorily adopts, does not exclude factors related to deductible member income under R&TC section 24404. OTA noted that net income is determined by adding the taxpayer's gross income from all sources and subtracting all allowable deductions from all sources, and that computation directly implicates R&TC sections 24401 and 24404, which allow Appellant to deduct member income, and is performed before allocation and apportionment. OTA disagreed with various arguments that FTB advanced, including FTB's intercompany dividend analogy, which OTA found was distinguishable, and FTB's overall position, which OTA found was not entitled to deference because it was not supported by applicable California statutes, regulations, and case law.

OTA found in favor of FTB on the second and third issues. For the second issue, OTA, in following precedent established by the Board of Equalization, concluded that since it was unable to discern Appellant's dominant purpose for the Spreckels acquisition, and the acquisition produced both taxable and nontaxable income for the combined group, OTA was required to use an interest expense allocation formula. However, Appellant, which carried the general burden of proof, did not clearly set forth a reasonable allocation formula supported by evidence and therefore was not entitled to deduct its interest expense under R&TC section 24425(a). Lastly, on the third issue, OTA concluded that under R&TC section 24425(a), Appellant could not deduct its depreciation expenses because it was undisputed, they were incurred from assets used to produce deductible income under R&TC section 24404 and Appellant had not shown the standard method of accounting does not clearly reflect income, or proposed an alternative computation that in the opinion of FTB clearly does so.

B. CONSTITUTIONAL OBJECTION TO ASSESSMENT/JURISDICTION

RockAuto, LLC v. Arizona Department of Revenue, TX2020-000778 (April 11, 2023), Submitted by Sara Agne, Judge, Arizona Tax Court.

The case arrived at the Arizona Tax Court on dueling motions for summary judgment. RockAuto, LLC, an online auto parts dealer in Madison, Wisconsin, sought summary judgment that a roughly $8 million transaction privilege tax assessment imposed after an April 2013 to April 2019 audit period violated the nexus requirement of the Commerce Clause (U.S. Const. art. I, sec. 8, cl. 3). The Department of Revenue sought judgment in its favor that it had established a substantial nexus, making its assessment constitutional.

Nexus is one part of the four-part Commerce Clause analysis set forth in Supreme Court precedent, and in 2018, the *South Dakota v. Wayfair*, 138 S.Ct. 2080 (2018) case overruled a longtime, bright-line rule requiring either actual physical presence or in-state representatives engaged in activities "significantly associated with the taxpayer's ability to establish and maintain a market" in the taxing state.

Given the audit period, the Parties' dispute was narrowed to the sole issue of whether Arizona had nexus (taxing jurisdiction) under pre-*Wayfair* case law. The Tax Court found that RockAuto's half dozen in-state suppliers did not generally or significantly direct their activities for RockAuto at establishing an Arizona market.

Indeed, 89 percent of orders RockAuto placed with Arizona suppliers shipped to customers outside of Arizona, while 83 percent of RockAuto's sales to Arizona customers came from suppliers outside Arizona. And RockAuto did not at all control whether an Arizona customer is served by one of its independent-contractor Arizona suppliers. Instead, the customer decides, and even where the customer allows RockAuto to "Choose for Me to Minimize Cost,"' the algorithm prioritizes cost, speed, and efficiency over same-state sales.

The Tax Court declined to adopt the Department's *volume requirement* to find a nexus, and instead found that RockAuto lacked the requisite physical presence to generate a substantial nexus between its activity and the taxing jurisdiction. The case is on appeal to the Arizona Court of Appeals.

Pacificorp v. Department of Revenue, 5411 (July 17, 2023), Submitted by Robert Manicke, Judge, Oregon Tax Court.

Taxpayer PacifiCorp is one of two major regulated electric utilities in Oregon, with operations in multiple states. The court held a one-week trial to determine the value of the taxpayer's property, both system-wide and as allocated to Oregon by formula under Oregon's central assessment law.

The court initially resolved three legal issues:.

1. The Department of Revenue argued that state statute requires the court, when determining fair market value in central assessment cases, to apply only methods and procedures set forth in the *Western States Association of Tax Administrators Appraisal Handbook* (*WSATA Handbook*). See ORS 308.205(2) ("Real market value in all cases shall be determined by methods and procedures in accordance with rules adopted by the Department of Revenue ***.") The Department adopted the 2009 edition of the *WSATA Handbook* as an administrative rule (OAR 150-308-0690). After considering the Oregon Supreme Court's recent administrative law cases governing deference to agency rules, the court rejected the Department's argument, concluding that longstanding Oregon case law specifically under ORS 308.205(2) allows the court to reject a value determined under Department methods and procedures if the court finds that a value determined otherwise is correct. See also ORS 305.412 (Tax Court has jurisdiction to determine "correct" value without regard to values pleaded by the parties).

2. PacifiCorp claimed that Oregon's allocation formula unfairly assigned an excessive share of its overall system value to Oregon because the formula in the Department's administrative rule (OAR 150-308-0590) fails to account for the fact that the taxpayer's property in Oregon is older and more depreciated than in other states. The court applied Oregon case law that equated the statutory standard for formulary allocation of value to Oregon (*fair proportion*) with the federal Due Process and Commerce Clause constitutional standards. The court determined that PacifiCorp had failed to show a "gross distortion" in the value allocated to Oregon pursuant to the formula. For that reason, the court upheld the Department's allocation of value to the taxpayer's Oregon-situs property (16.4995 percent, as opposed to PacifiCorp's requested 15.0257 percent).

3. The Department argued that the taxpayer bears the burden of proof in a Tax Court proceeding in all circumstances. The burden is set by statute: "The burden of proof shall fall upon the party seeking affirmative relief ***" (ORS 305.427). The Tax Court construed the statute to mean that, as to changes to the roll that a taxpayer requests for its benefit, including a valuation lower than that shown on the roll, the taxpayer seeks affirmative relief and therefore bears the burden of proof. As to a valuation higher than that shown on the roll, the Department seeks affirmative relief and bears the burden of proof.

The court then determined the fair market value (known in Oregon as *real market value*) of PacifiCorp's property, concluding that neither party carried its burden of proving the real market value for which it advocated. The court did not accept either party's complete analysis. The court assigned no weight to the cost indicator of value or to the stock and debt approach. Relying on portions of the evidence the parties presented under the income approach, the court determined that the value of PacifiCorp's multistate valuation unit was $17,241,379,310 as of January 1, 2020. (PacifiCorp's appraisal report concluded a system value of $15,838,880,747. The Department initially determined a system value of $19,500,000,000; at trial, the Department's appraiser concluded a system value of $22,500,000,000.)

Applying the allocation formula, in its opinion of July 17, 2023, the court determined a real market value for PacfiCorp's Oregon-situs property of $2,844,741,379.

In conjunction with Delta Air Lines (see below), PacifiCorp also challenged the constitutionality of the legislature's taxation of its intangible property, given that all locally assessed intangible property is exempt from property tax. In a separate decision on August 23, 2023, the court held that the taxation of PacifiCorp's intangible property does not violate Oregon's uniformity clauses because the legislature conceivably could have had a rational purpose of taxing the value of intangible property of utilities as a complement to the overall regulatory scheme of setting ratepayer prices and managing the return to investor-owners.

Delta Air Lines v. Department of Revenue, 5409 (August 23, 2023), Submitted by Robert Manicke, Judge, Oregon Tax Court.

Delta, a centrally assessed airline, challenged its property valuation by the Department of Revenue. Property is centrally assessed if it is used in one of 14 businesses listed in ORS 308.515(1) (generally, railroad, air, and water transportation; communication; and the sale of electricity, gas, and water). Property that is centrally assessed is valued *centrally* by Department personnel, not local county appraisers, and the Department is permitted to value all property used in the same business (within and without Oregon) as a unit, in which case the value of the Oregon property is determined by an allocation formula. Intangible property used in the business is included in the valuation unit.

On a motion for partial summary judgment, Delta argued that Oregon violated the uniformity clauses of the Oregon constitution and the federal equal protection clause by taxing intangible property only when used in one of the 14 listed businesses. Another centrally assessed company, PacifiCorp, an electric utility, added a similar claim to its own pending valuation case and participated with Delta in a combined oral argument and briefing. The Department cross-moved for partial summary judgment in both cases, and the court addressed all arguments together in a primary opinion filed in Delta.

The court determined that Oregon's case law sets a two-part *rational basis* test to determine whether a classification will survive Oregon uniformity and federal equal protection scrutiny. The classification must 1) be based on "genuine differences;" and 2) be reasonably related to a conceivable government purpose. See *Knapp v. City of Jacksonville*, 342 Or 268, 276, 151 P3d 143 (2007). The court concluded from case law that "genuine differences" are objectively determinable features relevant to the purpose of the classification, including physical, economic, or political features of the kind or use of the property. The court applied this framework to the parties' arguments:

- The Department argued that the legislature rationally could have chosen to tax the intangible property used in a business listed for central assessment because that property already is subject to unit valuation. The court rejected this argument because case law indicates that unit valuation is a means to an end: capturing the value of intangible property. The court concluded that the means cannot serve as the rational basis for the end.
- Similarly, the Department argued that requiring only the small number of Department central assessment personnel to value and tax intangible property—as opposed to burdening all local county assessors with that task for all taxpayers—supplied a rational basis for restricting the taxation of intangibles to the 14 listed businesses. The court rejected this argument because it failed to identify any genuine difference in the property or its use.
- The court found no difference in kind between taxable and exempt intangible property because all intangible property was either taxable or exempt.

- The court rejected the taxpayers’ argument that the classification invalidly depends merely on who owns the property. The central assessment law, including the provisions taxing intangibles, depends on the use of property in a listed business. Longstanding case law establishes that ownership is not determinative.
- The Department argued that the use of centrally assessed property is distinct because the types of property used in the listed business have value only when used in a “network,” typically over a large geographic area. The court rejected that argument based on case law showing that the property merely has greater value when used as a network, a characteristic of virtually all property.

The court next concluded that, because the legislature chose to simply list the businesses that are subject to central assessment and whose intangible property is taxed, rather than prescribe criteria, the court was required to consider the possibility that the legislature had different purposes for including particular businesses. As to those listed businesses that are rate-regulated public utilities, including PacifiCorp’s electricity business, the court found a genuine difference in use (public service) compared to other uses, and the court found that the legislature conceivably could have taxed the intangibles of those businesses as a complement to the regulatory scheme. However, as to Delta’s transportation business, the court found no genuine differences between intangible property used in an airline or a railroad (taxable) and intangible property used in a bus or trucking company (exempt). The court held that taxation of intangibles violated Oregon’s uniformity clauses and federal equal protection as to Delta, but not as to PacifiCorp.

C. VALUATION

Mesquite Power, LLC v. Arizona Department of Revenue, 1 CA-TX 22-0002 (December 20, 2022), Submitted by Elena Cottam, Staff Attorney, Arizona Tax Court.

The Arizona Court of Appeals held that a competent appraisal must consider the effect intangible assets have on the taxable property’s value when intangible assets enhance the real and tangible property’s value. *Mesquite* involved the valuation of a power plant and the effect of a power purchase agreement on the valuation. The Court found that the valuation of the property should reflect the effect of the purchase agreement because of the influence the purchase agreement would have on the purchase of the property. The Court found that the purchase agreement contributes to the plant’s cash flows and current usage and therefore enhances the value of the taxable property.

Cases and Presenters For 2023 National Conference of State Tax Judges

AZ – Sara Agne
- *Rock Auto LLC v. Arizona Dept of Revenue*

AZ – Elena Cottam
- *Machu Pichu Holdings, LLC v. Pinal County*
- *ADP, LLC v. Arizona Dept of Revenue*
- *Mesquite Power, LLC v. Arizona Department of Revenue*

CA – Myriam Bouaziz
- *Appeal of Southern Minnesota Beet Sugar Cooperative*

IN – Martha Blood Wentworth
- *Elkhart County Assessor v. Lexington Square*

MA – Mark DeFrancisco
- *Outfront Media v. Board of Assessors of Boston*
- *LTC Jonathon Riggs v. Board of Assessors of Bedford*

MI – Marcus Abood
- *Walmart Real Estate Business Trust v. City of Bad Axe*

MN – Jane Bowman
- *1300 Nicollet v. County of Hennepin*

NE – Rob Hotz
- *Inland Insurance Company v. Lancaster County Board of Equalization*

NJ – Mary Siobhan Brennan
- *Verizon v. Hopewell*

OR – Richard Davis
- *Eichorn v. Yamhill County Assessor*

OR – Robert Manicke
- *Pacificorp v. Department of Revenue*
- *Delta Air Lines. v. Department of Revenue*

WY – Martin Hardsocg
- *In the Matter of the Appeal of Alpenhof Lodge Associates*
- *In the Matter of the Appeal of Contango Resources*