Comcast Corporation

v.

City of Lebanon

Docket No.: 23979-08PT

ORDER

The board has reviewed the "Taxpayer's" June 29, 2012 Motion for Reconsideration ("Motion") of the board's June 5, 2012 Order (the "June Order") and the ""Objection" filed by the "City" on July 9, 2012. The June Order (see pp. 1, 7 and 8) denied the Taxpayer's motion in limine, which claimed the City, "because of certain language in RSA 72;23, I (b), 'did not have the authority' to tax the use or occupancy of public rights-of-way by the Taxpayer in tax year 2008."

The Motion challenges this ruling and seeks to have the motion in limine "allowed" (granted). The Objection (¶2) correctly notes the Motion fails to state or apply the standards governing reconsideration motions. These standards are set forth in RSA 541:3 and Tax 201.37. The Objection cites Tax 201.37(b) (requiring specificity regarding all points of law or fact the movant contends were overlooked or misapprehended). More generally, the board's rules make it essential for a party to "present all arguments" in a timely manner and not for the first time

through a "reconsideration" motion. Cf. Tax 201.37(g) ("rehearing motions shall not be granted to consider . . . new arguments that could have been raised . . ."). The board finds the Motion fails to establish any reasonable basis for reconsideration or that the board erred in the June Order when it denied the motion in limine. The board therefore dissolves the suspension order entered on July 3, 2012 and denies the Motion.

Two key premises in the motion in limine were:

> (1) the Taxpayer has a right to use and occupy the public rights-of-way as the result of a December 29, 1955 letter from the City to the Taxpayer's predecessor (Twin States Television, Inc. [1]); and
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> (2) the Taxpayer is entitled to a tax abatement, based on RSA 72:23, I (b), because the 1955 letter does not mention any tax payment obligation.

RSA 72:23, I(b) does contain language requiring "leases and other agreements" for publicly owned property to "provide for the payment" of taxes; this provision, however, is "expressly limited to those leases and other agreements 'entered into after July 1, 1979,' a key qualification entirely ignored by the Taxpayer" in the motion in limine. (June Order, pp. 1-2.) The Taxpayer now concedes these points, stating in the Motion (p. 3) that "[t]he board is correct that RSA 72:23, I(b) governs only those agreements 'entered into after July 1, 1979.'"

To try to overcome this date limitation, the Motion (pp. 3-4) makes an entirely new argument, hypothesizing a "new agreement" arose between the Taxpayer and the City when the Taxpayer acquired Adelphia Communications in 2006. This hypothesis lacks evidentiary support and is also illogical. There is nothing in the record to indicate the Taxpayer ever sought the City's consent prior to or even after the acquisition of Adelphia (or any predecessor company dating back to Twin States). In the same vein, there is nothing in the record to indicate the

[1] "Twin States," the company mentioned in the 1955 letter, no longer exists: Twin States was acquired in 1981 by TCI-Taft Cablevision Associates," which, in turn, was acquired by Adelphia Communications in 1999, which was then acquired by the Taxpayer in 2006. (Motion, p. 2.)

parties entered into a "new agreement" in 2006, either in writing (which the Taxpayer does not even claim occurred) or "otherwise," whether the Taxpayer characterizes such an alleged occurrence as an "implied agreement" or a "harmonious understanding" not reflected in a writing. (Id.) There is simply no evidence of any implied agreement or harmonious understanding of any kind to the effect the City could not, or would not, assess and tax the use and occupancy of the public rights-of-way by anyone, including the Taxpayer.

Positing a new agreement began in 2006 is also inconsistent with, if not contradictory to, the sole affidavit submitted by the Taxpayer (attached to the motion in limine). The Taxpayer's Property Tax Manager (Christian Altenburger) signed his affidavit under oath and states in paragraphs 7 and 8 ("[u]pon information and belief") that the City "gave" the Taxpayer's predecessor (Twin States) "the right to use the public right-of-ways occupied by public utilities" as a result of the 1955 letter (referred to as the "1955 Authorization") and that this authorization "has been in place, continuously and without interruption, for 57 years." The Altenburger affidavit goes on to state (in paragraph 14) that "the 1955 Authorization has not been amended in writing or otherwise by any party." (Emphasis added.)

In the Motion (pp. 4-5), the Taxpayer presents an entirely new "estoppel" argument (not mentioned in the motion in limine), based on City of Concord v. Tompkins, 124 N.H. 463, 468 (1984), arguing "[i]f RSA 72:23, I (b) is not applicable, then" the Taxpayer has a license which the City is estopped or precluded from denying. (Emphasis added.) The board does not agree the inapplicability of the statute gives rise to a license which would have entitled the Taxpayer to use and occupy the public rights-of-ways free of any assessment in tax year 2008.

As stated in Tompkins, 124 N.H. at 467-68, the party asserting estoppel has the burden of establishing each of four elements. (See Objection, ¶7, for a restatement of these elements.) The

Motion fails to do so. For example, Taxpayer fails to allege, let alone establish by a preponderance of the evidence, the City made any "representation or concealment of material facts" on which the Taxpayer was induced to rely or that the Taxpayer was "ignorant of the truth" regarding an unwritten "license."[2]

In this respect, the Taxpayer is a large and experienced cable television provider with knowledge of the comprehensive system of state as well as federal regulation that governs their industry. See, e.g., RSA ch. 53-C (Franchising and Regulation of Cable Television Systems), enacted in 1974 and discussed in the June Order (pp. 4-5), which requires a "written franchise agreement" to provide cable services. The Taxpayer does not claim either the 1955 letter or any alleged unwritten license for which it wishes to assert estoppel against the City satisfies this statutory requirement.

Similarly, the Taxpayer's statutory "due process" argument (that notice and a hearing are required under RSA 231:163) must fail since it is tied to the claim of estoppel regarding the existence of a "license." The Taxpayer has not met its burden of proving it held a license from the City (of the type prescribed in RSA 231:161 that would make RSA 231:163 applicable) and, if it existed, that the terms of such a license would prevent the City from assessing the Taxpayer's use and occupancy of the public rights-of-way for a cable television system. Even assuming such a license could be deemed to exist, RSA 231:163, by its terms, would not prevent the City unilaterally (without the Taxpayer's consent) from revoking or changing the terms of the license "whenever the public good requires." Thus, the Taxpayer has established no actual harm resulting from the alleged lack of notice and a hearing.

[2] Any broad claim of estoppel is further weakened by the fact the City assessed the same property in the prior year (2007) without objection or appeal by the Taxpayer. (June Order, p. 4.)

Finally, the board finds no merit in the Taxpayer's "equal protection" argument. (Motion, p. 7.) There is nothing in the record to support a claim the City singled the Taxpayer out from any other user of the public rights-of-way for assessment and taxation or that it engaged in "discrimination" rather than an equal application of tax assessment principles. In fact, the undisputed evidence indicates the City assessed other users of this public property, including four telephone and electric utilities. (June Order, pp. 3-4.) Finding the City has the authority to make the assessment does not 'penalize' the Taxpayer (Motion, p. 7), but rather comports with equity and common sense.

For all of these reasons, the board denies the Motion.

Pursuant to RSA 541:6, any appeal of the June Order must be by petition to the supreme court filed within thirty (30) days of the Clerk's date shown below, with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Michele E. LeBrun, Chair

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Albert F. Shamash, Esq., Member

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Theresa M. Walker, Member

Certification

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: Christopher Maffucci, Esq., Casner & Edwards, LLP, 303 Congress Street, Boston, MA 02210, counsel for the Taxpayer; Shawn M. Tanguay, Esq., Gardner, Fulton & Waugh, PLLC, 78 Bank Street, Lebanon, NH 03766, counsel for the City; and Chairman, Board of Assessors, 51 North Park Street, Lebanon, NH 03766.

Date: 7/30/12

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Anne M. Stelmach, Clerk