

Comcast Corporation

v.

City of Lebanon

Docket No.: 23979-08PT

ORDER

On February 14, 2012, the “Taxpayer” filed a “Motion in Limine. . .” (“Motion,” at pp. 1 and 3) claiming 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. In response, the City on February 24, 2012 filed an “Objection” to the Motion, along with a supporting “Memorandum.” (On March 9, 2012, the board issued an Interim Order granting the City’s request (stated in the Objection) for “30 days to respond” further to the Motion, but the City chose not to file an additional response.) Upon review of the evidence and arguments presented, the board denies the Motion for the following reasons.

First, the board finds the Taxpayer’s reliance on RSA 72:23, I(b) (see Motion, pp. 3-4) is misplaced. This statute requires all “leases and other agreements” for publicly owned property (such as the public rights-of-way in this appeal) to “provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property no later than the due date.” 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 but emphasized by the City in the Objection (see p. 2).

By its own admission (Motion, pp. 1-2), the Taxpayer’s agreement with the City “to use the public right-of-ways occupied by public utilities” stems entirely from the City’s December 29, 1955 letter. (Exhibit A to the Motion.) This letter was issued by the selectmen 24 years before this paragraph of the statute was enacted. The parties do not dispute this 1955 letter has never been modified or rescinded in writing, either before or after July 1, 1979. Consequently, RSA 72:23, I(b) cannot be applied to bootstrap an exemption based on a provision that had no operative effect before that date.

Along with requiring leases and other agreements “entered into after July 1, 1979” to contain *language* requiring a private user of public property (“owned by the state or a municipality”) to acknowledge an obligation to pay taxes, RSA 72:23, I(b) also provides that nonpayment of taxes “shall be cause to terminate said lease or agreement by the lessor.” The intent of this provision is clear: acknowledgment of the obligation to pay taxes and termination of the lease or other agreement as a consequence for breach of this covenant. This statute should not be interpreted to mean a user of public property (under a letter entered 24 years before this provision was enacted) is exempt from its obligation to pay taxes on the value of such property rights used for private benefit.

The Taxpayer acknowledges (on p. 2 of the Motion) that “New Hampshire law provides that all real estate shall be taxed unless otherwise exempted. RSA 72:6.” This principle has been consistently applied. See, e.g., King Ridge, Inc. v. Sutton, 115 N.H. 294, 299 (1975)

(affirming the taxability of ski lifts under this statute because “[t]his result comports with the apparent legislative policy behind RSA 72:6 to provide local government units with broad power to tax real property within their boundaries. (Citation omitted.)”). It is also clear no tax exemption can be obtained unless the legislature explicitly manifests a specific intention to provide one. Cf. North Country Env'tl. Servs. v. State of N.H., 157 N.H. 15, 28 (2008):

It is elemental that determination of the rights of plaintiff to an exemption from taxation is statutory. The existence and extent of exemptions depends on legislative edict. [Quotation marks and citation omitted.] . . . As of the effective date of the amendment, the exemption provided [in the statute] by its plain terms does not apply . . .

For these reasons, the Motion’s primary argument that the City does not have the authority to make the assessment because of RSA 72:23, I(b) is without merit.

A secondary argument presented in the Motion (on p. 4) references the law pertaining to permits and licenses for utility lines over public highways (see RSA 231:159 et seq.) and contends the City could have amended the 1955 letter (by following the procedures set forth in RSA 231:163) to require the payment of taxes, but has thus far failed to do so. This statute authorizes a municipality, after notice and a public hearing is provided, to “revoke or change the terms of any such license, whenever the public good requires.” The City rejects the Taxpayer’s ‘presumption’ that the 1955 letter “constitutes a valid ‘license’ pursuant to RSA 231:161.” (Memorandum, p. 5.)

Consistent with this belief, the City went through a notice and public hearing process in March, 2005 to “amend[] its pole licenses” (Memorandum, p. 3) and gave specific notice to four telephone and electric utilities (but not the Taxpayer, a cable television company) that “all existing and outstanding pole and conduit licenses” issued by the City (or its predecessor, the

Town of Lebanon) “are hereby amended” to require the payment of taxes. (See attached Exhibit 1 to the City’s Memorandum.) While there is no evidence the City provided the same or a similar written notice to the Taxpayer, it is not clear whether the Taxpayer received actual or constructive notice of what the City intended to do at that time.

The documents presented do indicate, however, that the City advised the Taxpayer of its intention to tax the “use of city rights-of-way” (by letter dated April 20, 2007 to the Taxpayer from the City’s Chief Assessor; see Exhibit C to the Motion). This document indicates the City made a \$3,600,000 assessment for such use in tax year 2007. The board has no evidence the Taxpayer appealed that assessment (as it has done for tax year 2008 in this docket).

The City also includes documentation with its Memorandum that prior efforts were made, without ultimate success, to negotiate and enter into a “cable television franchising agreement” with the Taxpayer in 1990. (See the March 12, 1990 letter to the Taxpayer’s predecessor in Exhibit 2 to the Memorandum.) From a subsequent December 13, 1999 letter (also in Exhibit 2), it appears negotiations proceeded to a “draft prepared on November 20, 1990” presented to the Taxpayer, which the City’s attorney considered to be a “final draft,” but apparently was never signed by either party. The City therefore concludes: “no cable television provider (including Comcast (the Taxpayer)) has agreed to enter into such a franchise agreement with the City.” (Memorandum, p. 3.)

The March 12, 1990 letter makes reference to RSA ch. 53-C (Franchising and Regulation of Cable Television Systems by Cities and Towns), adopted by the legislature in 1974 (sixteen years earlier). RSA 53-C:2, I prohibits any company from constructing or ‘operating’ a “cable

television system in any municipality without first obtaining a written franchise from the franchising authority of each municipality in which such system is installed or to be installed.”¹

This “legal requirement” helps explain the City’s motivation for wanting to enter a written cable television franchise agreement (see Memorandum, p. 3), if not its inability to do so (from the time of passage of this statute in 1974 to the present).

In support of their respective positions stated in the Motion and the Objection, each party cites the “Rochester” cases decided by the supreme court. The board will therefore discuss the holdings and applicability of these cases to the question presented in the Motion.

In “Rochester I” (N. E. Tel. & Tel. Co. v. City of Rochester, 144 N.H. 118 (1999)), the supreme court considered the use of public rights-of-way by a telephone company (Verizon), a regulated utility which had “pole licenses” expressly subject to the provisions of RSA 231:159 et seq. (referenced above) rather than a “lease” with the municipality. Examining this statutory framework for regulating “pole licenses consistent with the public good” (see RSA 231:161), the court held “[t]he terms of RSA 72:23, I (b) are applicable to the plaintiff’s pole licenses.” Id. at 121. In doing so, the court rejected Verizon’s argument that pole licenses “are not the product of an ‘agreement,’” finding the “plain and ordinary meaning” of the phrase “other agreement” (in RSA 72:23, I (b)) includes “a ‘harmonious understanding’ or ‘the act of agreeing or coming to a

¹ The City contends “[t]he enactment of RSA 53-C served to void any prior authorizations” and “any permission, by the 1955 letter, was preempted by this statutory scheme.” (Objection, p. 3.) This contention is problematic, at best. If the contention is true, the board is unclear what “harmonious understanding” existed between the City and the Taxpayer that would allow the Taxpayer to provide cable television services and whether such an understanding, if it existed, can take the place of the “written franchise” required to satisfy the specific provisions in RSA ch. 53-C. Cf. RSA 53-C:5 (Existing Operations), which states any “existing contract . . . or other accepted authorization for a cable television system which is in operation as of April 2, 1974 . . . shall be deemed to be a franchise under the provisions of this chapter.” The board, however, does not need to resolve these questions to decide the Motion.

mutual arrangement.” Id. The court therefore found the ‘land utilized and occupied’ by Verizon “pursuant to its pole licenses” is “taxable . . . through RSA 72:6.” Id. at 122.

In “Rochester II” (151 N.H. 263, 267 (2004), the supreme court analyzed RSA 72:23, I (b) further, as follows:

We hold that the language of RSA 72:23, I(b) is unambiguous. According to the plain language of the statute, leases and other agreements which permit the use or occupation of public property must provide for the payment of properly assessed real estate taxes. The statute does not include an exemption for private companies that use or occupy public property to provide a public service. Therefore, we conclude that, irrespective of the type of service to be provided, the legislature intended for leases and other agreements that permit the use or occupation of public property to include a provision requiring payment of properly assessed real estate taxes.

The court in Rochester II then considered whether the municipality could “unilaterally amend its pole licenses” (without the utility’s consent) pursuant to RSA 231:163 and concluded that it could. Id. at 269-70.

In “Rochester III” (156 N.H. 624, 626-31 (2007), the supreme court found a violation of the constitutional guarantee of equal protection for a municipality to tax Verizon’s use of the public rights of way without also taxing the “the gas, cable and electric companies that similarly use and occupy the public ways” because such uses are “indistinguishable” in a constitutional analysis: “we can conceive of no rational reason for selectively imposing this tax upon Verizon, and not upon other utilities that use and occupy public property in the same manner as Verizon.” Id. at 631.

As noted in the Objection (pp. 3-4), the board addressed this aspect of Rochester III in a prior appeal involving the Taxpayer and another municipality: Comcast Corporation v. City of Claremont, BTLA Docket Nos. 23337-06PT and 23976-08PT (August 7, 2009; appeal to

supreme court withdrawn by the Taxpayer on June 22, 2010) (hereinafter “Comcast I”).² In that appeal, the board found “no valid reason to distinguish Comcast’s use of the public rights of way and its obligation for tax assessments from that of common utilities, whether or not cable companies should be considered ‘utilities’ for any other purpose(s) under federal and state law.” (See Comcast I, p. 11.)

To find in the Taxpayer’s favor (denying the City’s authority to make the assessment) would require such an invalid distinction and would confer a disparate and unwarranted benefit of a tax exemption. In the City’s words, this “escape” from taxation, if recognized by the board, would provide an unintended benefit to the Taxpayer not afforded to other private users of the public rights-of-way and constitutes a violation of the constitutional guarantee of equal protection as well as being inequitable. (See Memorandum, p. 7.) Notwithstanding the language in RSA 72:23, I (b) examined in detail by the supreme court, “[t]he statute does not include an exemption for private companies that use or occupy public property to provide a public service.” Rochester II, 151 N.H. at 267. Accord, Comcast I (p. 12), where the board further noted:

[M]ere silence regarding taxation [in an agreement between a municipality and a cable television company] cannot be interpreted to mean a blanket exemption from property taxation and no case law or other authority has been cited to support this argument. In New Hampshire, it has long been established that taxation is the rule and exemption is the exception [Citations omitted]

In summary, both the three Rochester cases and Comcast I support the denial of the Motion. The board finds the Taxpayer’s claim that the City did not have the authority to assess

² Unlike in this appeal, the Taxpayer in Comcast I (see pp. 2-3) had a written “Cable Television Franchise Agreement” with the City of Claremont, but argued that municipality was preempted by federal law from amending that franchise agreement to provide for payment of a tax on its use of the public right of ways to provide cable television services. (The board rejected this argument in Comcast I, pp. 5-7.)

the value of the Taxpayer's use or occupancy of public rights-of-way in tax year 2008 is without merit. The Motion is therefore denied and the board will proceed to reschedule a hearing on the merits of this appeal in due course.

Any party seeking a rehearing, reconsideration or clarification of this order must file a motion (collectively "rehearing motion") within thirty (30) days of the clerk's date below, not the date this order is received. RSA 541:3; Tax 201.37. The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; Tax 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the order needs clarification; or 2) based on the evidence and arguments submitted to the board, the order was erroneous in fact or in law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule Tax 201.37(g). Filing a rehearing motion is a prerequisite for a supreme court appeal and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Michele E. LeBrun, Chair

Albert F. Shamash, Esq., Member

Theresa M. Walker, Member

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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: June 5, 2012

Anne M. Stelmach, Clerk