49th Annual Taxation Conference
APPRAISAL for AD VALOREM TAXATION
of Communications, Energy and Transportation Properties
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You Can’t Get There From Here . . .
Challenges at the Intersection of Statutory Law and Appraisal of Complex Properties

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The challenges of getting there from...

Here....

Or Here . . .
Outline

▪ Valuation Challenges and Solutions - North Carolina

▪ Valuation Challenges and Solutions – Oregon
  ▪ State Perspective
  ▪ Taxpayer Perspective

▪ Valuation Challenges and Solutions – California
  ▪ Embedded/Bundled Software
  ▪ Cable Possessory Interests
  ▪ Intangibles
  ▪ Transfer Tax
Overview

▪ In many cases the language in state property tax statutes (particularly with regard to complex properties) does not provide a wholly adequate framework for assessment valuation. This often results in the path from statutory basis to the valuation process being difficult to navigate.

▪ The primary challenge presented is to state and local valuation officials and departments, but this effects the work of taxpayers and their representatives, counsel, policy makers, taxing jurisdictions and the public as well.

▪ The issue is often simply attributable to statutes that were written in an age when many current property types did not exist. But the issues are typically multiple and are likely to run deeper.
Overview, continued…

▪ Other contributing factors may include: overly broad language; general provisions written with special cases in mind; imprecision in application of technical terms; lack of sufficient related definitions, and mismatch with administrative rules.

▪ Conference participants have a mutual interest in developing a better understanding of how this issue manifests itself and how it can be addressed.
Communication Issues in North Carolina

- Who is and who isn’t a telephone company?
- Equal treatment of wireless and landline.
- Where do we go from here?
History of VoIP (Voice over Internet Protocol)
http://www.voipinsights.com/voip_history.html

- Actually was created in 1973 - Result of an experiment.
- 1995 was the first internet phone software called Vocaltec.
- During the 90’s, mostly hobbyist utilized VOIP.
- By 1998, VoIP represented 1% of all voice traffic in the US.
- 2004 was the beginning of VoIP calling plans.
- In 2013, the Wall Street Journal reported that 25% of all US household calls were made using VoIP.
NCGS 105-333 (19) Telephone company

- A company engaged in the business of transmitting telephone messages and conversations to, from, within, or through this State, except that the term does not include a mobile telecommunications company.
Communication Issues

▪ How do we define “messages and conversations”?
In theory, what is defined as a telephone company...

- Obviously a traditional POTS (Plain Old Telephone System)
- Wireless Providers …
- Cable Companies …
- Internet Providers …
- However, NCGS 105-333 (14) says ... Public service company.--A railroad company, a pipeline company, a gas company, an electric power company, an electric membership corporation, a telephone company … except that the term does not include a water company, a cable television company, or a radio or television broadcasting company.
Now Where Do We Go?

- If Local – Let the counties assess.
- If State Assessed – What is the Unit?
  - Can the income be broken out?
2015 State Law Changed to add Wireless & Tower Companies to be Centrally Assessed

- Prior to 2015 these companies were locally assessed.
  - Statutes clearly stated mobile communications companies were not to be considered a Public Service Company.

- This law change also removed telegraph companies as being a public service company.

- The intent from the legislators was no harm was to come to the local governments by making this change nor to the companies...
Equal treatment of landline and wireless companies?

NCGS 105-283 “All property, real and personal, shall as far as practicable be appraised or valued at its true value in money… the words “True Value” shall be interpreted as meaning market value…”

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<tr>
<th>Company Type</th>
<th>Appraiser</th>
<th>Appraisal Method</th>
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<tr>
<td>Traditional Landline</td>
<td>State Assessed</td>
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<tr>
<td>Wireless</td>
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<td>Trend schedules developed by DOR</td>
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<td>Tower</td>
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<tr>
<td>Cable</td>
<td>Locally Assessed</td>
<td>Trend schedules developed by DOR</td>
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Wireless Companies

▪ NC General Statutes state we are not to consider income when appraising these companies.
  ▪ So are we reaching fair market value when appraising them?

▪ Have to appraise them by location,
  ▪ Thus, the overall NC value is a summation.
  ▪ 5G potentially will be a nightmare.

▪ Huge win for the wireless. Same values, only file one return.
Tower Companies

▪ NC Statutes state we are to use a nationally recognized publication to appraise the wireless towers.

▪ Value is to be based on height and type of tower.
  ▪ Only pick up mobile towers only.

▪ Total NC value is a summation of all the county values.

▪ Again, huge win for the Tower Companies, only file one return.
Will these all result in the same value?
State Assessor’s Role

- In NC the counties budget is paid for by sales tax and the property tax base. (Predominantly by property tax).

- The average counties tax base is made up of 3% of PSC value.

- A few counties have tax bases over 15% of PSC value and one is 25%.

- State Assessor may be the only voice for the local governments.
Where do go from here...

- **Communication** is the key (no pun intended).
  - State must have open dialogue with the taxpayer/vendors.

- Legal changes may be required (General Assembly).
  - Even after legal changes – **Communication** is needed.

- Last resort – Let the courts decide.
Oregon’s Property Tax Administration Today

▪ Oregon is made up of 36 counties, each with their own assessors and tax collectors.

▪ The local jurisdictions have appraisal responsibility for residential properties, commercial properties, and industrial properties whose assessed value is less than $1 million.

▪ If a locally assessed taxpayer believes their value is too high, they appeal first to the Board of Property Tax Appeals (BOPTA).

▪ Either side can appeal the Board’s decision on to the Magistrate Division of the Oregon Tax Court.

▪ Magistrate decisions can be further appealed to the Regular Division of the Oregon Tax Court.

▪ Tax Court Judge’s decisions can be appealed to the Oregon Supreme Court.
Oregon’s Property Tax Administration Today

▪ The Oregon Department of Revenue’s Property Tax Division, Valuation Section has the appraisal responsibility for industrial manufacturing companies whose assessed value is $1 million and up. Although appraised by the Department, they are still considered “locally assessed” (as opposed to being “centrally assessed.”)

▪ The Valuation Section also has responsibility for central assessment of designated utilities and companies who are in the business of:
  ▪ Rail, water, air and private railcar transportation services;
  ▪ Communication;
  ▪ Heating, gas, and electric;
  ▪ Pipeline
  ▪ ORS 308.515.

▪ Oregon’s central assessment administration falls under Oregon Revised Statutes (ORS) 308.505 through 308.681.
Oregon’s Property Tax Administration Today

- For purposes of central assessment, “Property”:
  - Means all property of any kind, whether real, personal, tangible, or intangible, that is used or held by a company as owner, occupant, lessee or otherwise, for the performance or maintenance of a business or service or for the sale of a commodity, as described in ORS 308.515.
  - Includes but it not limited to, the lands and buildings, rights of way, roadbed, water powers, vehicles, car, rolling stock, tracks, office furniture, telephone and transmission lines, machinery, appliances, appurtenances, docks, watercraft, merchandise inventories, tools, equipment, machinery, franchises and special franchises, work in progress, and all other goods or chattels.
Oregon’s Property Tax Administration Today

- Although the central assessment process is similar to the local assessment process, there are some notable differences:
  - Under central assessment, a company is assessed for the property it uses (or holds for future use) in its business, whereas under local assessment, a company is assessed for the property it owns.
  - Only centrally assessed property may be subject to “unit valuation,” whereby the value of a business’s property “both within and without the state” is determined “as a unit,” and, based on the proportion of the business’s assets that are owned or used in Oregon.
  - While real property and “tangible personal property” are subject to both local and central assessment, only central assessment may also take “intangible personal property” into account.
Local assessment v. Central assessment

- Local assessment = no taxation of intangibles.
- Central assessment = taxation of intangibles.
- Consequences of central assessment can be significant.
Definitions of “Communications”

▪ Until 1973, ORS 308.515 specifically included “telegraph communication” and “telephone communication” together with other centrally assessed business and services such as railroad transportation, air transportation, heating, gas, and electricity.

▪ In 1973, legislature replaced the references to telegraph and telephone communication with the more general term “communication.”

▪ At the same time, the legislature amended the definition in ORS 308.505 to specify that the term “communication,” as used in the statutes governing central assessment, “includes telephone communication, telegraph communication, and data transmission services by whatever means provided.”
Who is subject to central assessment?

- In 2009, the decision was made to bring cable and DBS companies into central assessment without statutory change.

- “Communication” property is subject to central assessment. ORS 308.505(1)(h).

- “Communication” includes telephone communication and data transmission services by whatever means provided.” ORS 308.505(3).

- What is a “data transmission service”?
  - Words have been in the statute since 1973.
  - Never applied to cable until 2009.
Comcast v. DOR

- Until recent years, the Department did not consider Comcast’s internet and cable services to be subject to central assessment.

- Prior to 2009-10, the Department had assessment responsibility for Comcast IP Phone II LLP, but not the cable or internet segments of Comcast Corp.

- Leading up to 2005, centrally assessed communication companies, who believed they were direct competitors of Comcast, informed DOR they were going to sue for discrimination as they felt disadvantaged because Comcast, for the most part, was being locally assessed.
Comcast v. DOR

- In part because of changes in the industry, the department revisited its interpretation of "communications."

- In 2006 DOR went to the legislature and asked for guidance regarding the assessments of cable and internet communication companies. Informed legislators that the Department would be bringing those companies into central assessment if no guidance was given.

- 2009-10 tax year, Department brought approximately 125 companies into central assessment. This included Comcast.

- Comcast filed an appeal in the Oregon Tax Court every tax year 2009-10 through 2017-18.
Comcast v. DOR

- Comcast made the following claims in Oregon Tax Court;
  - They were not subject to central assessment as a communication company;
  - The Department violated the federal Internet Tax Freedom Act (ITFA);
  - The Department violated the uniformity and equalization clauses of the Oregon Constitution;
  - The Department violated the Equal Protection Clause of the US Constitution;
  - The Department violated Measure 50 of the Oregon Constitution (This was a ballot measure passed in 1997 as a cut and cap on Oregon property values).
Comcast v. DOR

▪ In August 2011, the Oregon Tax Court determined that Comcast’s property was not subject to central assessment because the primary use of the property, cable television, was not a communication service offering data transmission services within the meaning of ORS 308.505 (the definition of “communication” for central assessment purposes.

▪ Because the court ruled that Comcast’s property was not subject to central assessment, the court determined that it was “unnecessary to address the other challenges made by Comcast to the actions of the department.”
Comcast v. DOR

- The Department appealed the decision of the Oregon Tax Court to the Oregon Supreme Court.

- Comcast also cross-appealed portions of the court’s judgment.

- Both courts focused on defining the phrase “data transmission services,” which is part of the definition of a “communications” business that must be centrally assessed.

- The Tax Court emphasized that the test involved whether the business was providing “data transmission services” for others, and the court concluded there was no “service” if the business merely transmitted its own content.
Comcast v. DOR

- Applying this test, the Tax Court decided that Comcast’s property used in cable TV should not be centrally assessed because the cable TV business involved content in which Comcast had substantial property rights.

- The Tax Court held that Comcast’s internet and VOIP service property should be centrally assessed because in that line of business Comcast transmitted content, including phone conversations, in which Comcast had no ownership rights.
Comcast v. DOR

- A decision of the Oregon Supreme Court was rendered in October 2014.

- In reversing the Tax Court decision, the Supreme Court focused on the entire phrase “data transmission services.” Based on their analysis of the text, context, legislative history, and technical meaning of “data transmission service,” the court interpreted that phrase to extend to any service that provides the means for the transmission of electronically coded information between computers or computer-like devices. If the service does that, it is a data transmission service regardless of the original nature of the content that is converted into digital form for transmission.
Comcast v. DOR

- The Supreme Court held that it does not matter if the data has been converted from voice to bits, video to bits, text to bits, or even atoms to bits. For their purposes bits are bits.

- It does not matter if the means of transmission is fiber optic cable, coaxial cable, microwave or other wireless conduit, the wired network traditionally used for telephone communications, or a means of transmission not yet in use or conceived.

- What matters is that the information or other content being transmitted is in the form of data.
Comcast v. DOR

- The Department argued two additional issues to the Court.
  - ORS 308.510 provides that property used in both a centrally assessed business and a non-centrally assessed business is subject to central assessment if its primary use is in the centrally assessed business. Comcast uses the same basic infrastructure for both its cable television and internet access and phone services. Because the Tax Court concluded that Comcast’s internet access service is a data transmission service and its cable television service is not, the Court had to decide which service was the primary use of Comcast’s property. The Tax Court concluded that the property’s primary use was for Comcast’s cable television service and, therefore, the entire property was not subject to central assessment.
Comcast v. DOR

- Because the Supreme Court determined that both Comcast’s cable TV and internet access services are data transmission services, the primary use of Comcast’s property was no longer an issue in the case.

- The Department’s other issue asked the Supreme Court to decide the calculation of Comcast’s Maximum Assessed Value (MAV). Since this issue is specific to Oregon, and the Supreme Court decided not to address it but rather remanded the issue back to the Oregon Supreme Court along with the other issues raised by Comcast.
Comcast v. DOR

- On remand, the Tax Court sided with Comcast on the issue of the calculation of the MAV.
  - The Tax Court made the same determination in the DISH Network v. the Department. The Department appealed the decision regarding the calculation of Dish’s MAV on to the Oregon Supreme Court. In January of this year, the Supreme Court overturned the Tax Court determination on this issue and ruled in favor of the Department.

- In a separate proceeding, the Tax Court held that Comcast had failed to prove discrimination under the Oregon or US Constitutions for reasons including that the Department had not added local television and radio stations to the central assessment roll at the same time as Comcast.

- The Tax Court determined that Comcast had failed to prove the Department’s assessment of Comcast’s property violated the Internet Tax Freedom Act (ITFA).
Comcast v. DOR

- In 2015, the Oregon Legislature passed Senate Bill 611 which did the following:
  - Made data centers locally assessed (some exceptions);
  - It put a “cap” on intangible property value to 130% of historic or original cost of the tangible property;
  - Added franchises and satellites to an already existing statute exempting FCC licenses;
  - Created an exemption for property of a company that builds and operates qualified communication services of at least one gigabit per second symmetrical service, to a majority of the residential customers of the company’s broadband services. (Note- the 2019 Legislature repealed this portion of SB611.)
Comcast v. DOR

- During the Supreme Court appeal, Comcast asked to have settlement discussions with the Department about the pending litigation.
- The Department practices a policy of discussing valuation issues with our taxpayers.
- Settlement discussions began in mid-January 2018 and a settlement, focused on the gigabit issue, was reached in late May/early June 2018.
DOR v. Comcast

- Some important issues were resolved in this and related litigation:
  - The definition of “data transmission services by whatever means” was clarified by the Supreme Court;
  - Cable and Internet companies are “communication” companies for central assessment purposes;
  - The Department’s method of calculating the Maximum Assessed Value (MAV) was upheld (through the Dish decision in Jan 2019).
Consequence

- 10 plus years of litigation.
  - Lawsuits filed in 2009
  - Comcast and Oregon DOR settled in 2018.
  - Other taxpayer lawsuits continue.

- Legislation following 2014 Oregon Supreme Court decision.
  - Led to additional litigation.

- Lessons Learned
  - In a regime where changes in administrative policy can lead to dramatic tax consequences, get interest parties together before the decision is made.
  - Allow parties to work together towards a legislative solution.
CALIFORNIA
Embedded Software: The Problem

- Software generally is not taxable. R&TC §§ 995, 995.2; Property Tax Rule 152.
  - Exception: Basic operational programs/control programs ("fundamental and necessary to the functioning of a computer").
- Statutory definitions outdated.
- Embedded/bundled software often purchased at a single price.
- Taxpayer obligated to:
  1. Identify the nontaxable property; and
  2. Provide sales prices, costs, or other information to enable the assessor to ascribe the property value to the taxable and nontaxable property. Property Tax Rule 152(f).
- Discrepancies between valuation proof accepted by the BOE vs. county assessors.
Embedded Software: Attempted & Potential Solutions

- California Assessors Association (CAA) has made various attempts to update the statutes.
- BOE has publicized guidance as to the type of valuation proof accepted for state assessees.
- BOE has attempted to encourage uniformity in the type of valuation proof accepted for local assessees.
- Taxpayers have adjusted annual property statements to carve out embedded software costs.
- Some taxpayers and assessor have adopted the “work around approach” to resolve audit issues and appeals.
Cable Possessory Interests (PIs): The Problem

- Technology enables cable television, broadband, and VoIP to be provided over the same cable right-of-way (“mixed-use cable network”).

- Preferred method of valuing cable PIs is to capitalize the annual rent. R&TC § 107.7(b)(1).
  - “Annual rent shall be that portion of that franchise fee received that is determined to be payment for the cable possessory interest or video service possessory interest for the actual remaining term or the reasonably anticipated term of the franchise or license or the appropriate economic rent.” R&TC § 107.7(b)(2).
  - Federal law limits annual franchise fee to 5% of revenue from cable services (i.e., television and related video; not, broadband or VoIP). 47 U.S.C. § 542(b), 522(6).
  - Federal law also severely limits denial of franchise renewals. E.g., 47 U.S.C. § 546(d).

- 2 key issues –
  1. Is the valuation of the PI limited to the annual rent paid based on just the cable services revenue?
  2. Is the assessor required to use the actual remaining term given the likely renewal of the franchise?
Cable Possessory Interests (PIs): Resolution


1. Is the valuation of the PI limited to the annual rent paid based on just the cable services revenue, or can the assessor consider the broadband and VoIP revenue?
   - **AAB:** Yes, broadband and VoIP revenue included.
   - **Trial Court:** No, broadband and VoIP revenue excluded.
   - **Court of Appeals:** Yes, broadband and VoIP revenue included.
   - **Remanded to AAB to value PI with respect to broadband and VoIP services.**

2. Is the assessor required to use the actual remaining term given the likely renewal of the franchise?
   - **AAB:** No, 10-year anticipated term permitted.
   - **Trial Court:** No, 10-year anticipated term permitted.
   - **Court of Appeals:** No, 10-year anticipated term permitted.
# Intangibles: The Problem

- Intangibles are not directly taxable. R&TC §§ 107.7(d), 110(d), 212.
  - Goodwill
  - Going concern
  - Covenants not compete
  - Work force in place
  - Franchise agreements
  - Licenses
  - Right to do business
  - Management & operating systems
  - Trade name
  - Nonreal property leases
  - Patents & copyrights
  - Customer/subscriber lists

- However,
  1. Value taxable property assuming the presence of necessary intangibles. R&TC § 107.7(d), 110(e), 212(c).
  2. Intangible attributes of real property are taxable (e.g., zoning, location). R&TC § 110(f).

- Case law consistently makes clear that direct taxation of intangibles is unlawful. But at times, the courts seem to allow the presumption of the presence of intangibles to swallow the exemption by permitting them to be indirectly taxed.
Intangibles: Attempted & Potential Solutions

- Avoid the problem by using the cost approach.
  - *Elk Hills Power, LLC v. BOE*: Addition of emission reduction credits (ERCs) to replacement cost held to be unlawful direct taxation of intangible assets.

- Leverage case law.
  - *Time Warner v. LA, supra*.: Trial and appellate courts ruled AAB erred in permitting the assessor to capitalize the entire franchise fee without allocating a portion to the non-taxable right to do business.

- Agree to disagree and adjust the valuation elsewhere.
Transfer Tax: The Problem

- CA transfer tax administered at two levels— (1) county and (2) city.
  - Counties and general law cities must work within the R&TC.
  - Chartered cities permitted to pass ordinances that reach beyond the R&TC.
- Transfer tax generally due on “realty sold.”
- Certain localities began to demand transfer tax on legal entity changes in ownership under Proposition 13.
  - Upheld in 926 North Ardmore Avenue, LLC v. County of LA, 3 Cal. 5th 319 (2017).
- Created a flurry of technical and practical problems.
- Some localities seeking to apply this to centrally assessed property.
Transfer Tax: Attempted & Potential Solutions

▪ Some localities have posted guidance on their websites.
▪ Many parties are folding indemnity clauses into their transaction documents.
▪ Some companies have opted for protective payments to avoid penalties, interest, and an open-ended statute of limitations.
▪ Follow on litigation to clarify application of *Ardmore*’s holding possible.
Transfer Tax: Yet Another Problem

- Technical partnership terminations under IRC § 708 trigger a transfer tax.

- Prior to recent tax reform, technical partnership terminations included the “sale or exchange” of 50% or more of the partnership interests within a 12-month period.

- Recent tax reform deleted the above provision.

- Open question as to whether the new or old IRC § 708 applies in certain localities.
  - R&TC § 11925 incorporates the meaning of “Section 708 of the Internal Revenue Code of 1986”.
  - Local charter city ordinances have varying references to the IRC § 708.
    - San Francisco Transfer Tax Code § 1108(b) incorporates the meaning of “IRC section 708 of the Revenue Code of 1986, as amended.”
    - Alameda County Transfer Tax Code § 2.04.90 and Berkeley Transfer Tax Code § 7.28.80 incorporate the meaning of IRC § 708 of the “Internal Revenue Code of 1954.”
Transfer Tax: Attempted & Potential Solutions

▪ Careful review of the applicable ordinance may provide the answer.

▪ Review localities’ guidelines, if any.

▪ Anonymously seek the localities’ input to determine their interpretation and enforcement practices.

▪ Many parties are folding indemnity clauses into their transaction documents.

▪ Some companies have opted for protective payments to avoid penalties, interest, and an open-ended statute of limitations.

▪ Litigation possible.
Common Themes in the Problems

- Matters of proof are largely subjective regardless of statutory framework.
- Antiquated statutes are difficult to apply to today’s technology.
- Exceptions and carve outs erode the general rule and complicate the analysis.
- Activist courts complicate statutory and legal interpretation and embolden the parties.
Summary of Solutions

1. Administrative: Clarify the law.
2. Judicial: Settle the law.
3. Legislative: Fix the law.
4. Practical: Work around the problem.
QUESTIONS?
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- **BREANN ROBOWSKI** focuses on state and local tax controversy with an emphasis on property tax and transfer tax.

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