

OHIO BOARD OF TAX APPEALS

American Fiber Systems, Inc.,)
)
 Appellant,) (PUBLIC UTILITY PERSONAL
) (PROPERTY TAX)
 vs.)
)
) DECISION AND ORDER
 William W. Wilkins, Tax Commissioner)
 of Ohio,)
)
)
 Appellee.)

APPEARANCES:

For the Appellant - Todd W. Sleggs & Associates
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For the Appellee - Jim Petro
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Entered September 16, 2005

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

Through its appeal filed with this board on November 8, 2004, appellant, American Fiber Systems, Inc., challenges a final determination issued by the Tax Commissioner on September 15, 2004. In his determination, the commissioner granted in part and denied in part appellant’s petition for reassessment in which it objected to a public utility personal property tax assessment issued for tax year 2003. We now consider this matter upon appellant’s notice of appeal, the statutory transcript (“S.T.”) certified by the Tax

Commissioner pursuant to R.C. 5717.02, the evidence presented at a hearing convened before this board, and the post-hearing briefs of counsel.

Following the filing of appellant's 2003 annual report as an interexchange telecommunications company, the Tax Commissioner issued an assessment which reflected an increase in the taxable value of appellant's property. Appellant subsequently filed a petition for reassessment, asserting that the total taxable value of its property should be reduced from \$1,323,740 to \$156,200. The commissioner granted a reduction, but only to the extent of \$943,000, which comported with that amount of fiber optic wire which was "unlit" and not used in appellant's business. In reaching this conclusion, the commissioner dispensed with the issues raised by appellant in the following manner:

"Within Ohio, the petitioner operates a communications network in Cuyahoga County. This network consists of a forty-one mile optic loop and other network equipment. The fiber loop contains 288 strands of fiber, bundled together. The bundle of fiber runs through one conduit throughout the forty-one mile loop. The petitioner states that only 36 of the 288 strands have ever been lit, and that the remaining 252 strands have never been lit.

"The petitioner contends that the assessed taxable value should be reduced from \$1,323,740 to \$156,200, a reduction of \$1,167,540, to compensate for the unused and unlit fiber optic cable on its books. This contention is well taken in part.

"In a telephone conversation, the petitioner stated that the total network cost of \$5,439,057 is comprised of approximately \$3,275,000 for installation of the one conduit pipe that traverses the entire 41 mile fiber loop, \$406,000 for poles for the above-ground part of the fiber loop, \$1,758,057 for fiber costs, and \$38,000 for monitoring equipment. The petitioner is requesting an 87.5% reduction in the value of all of its personal property due to its primarily unlit fiber optic cable system. While the petitioner can be granted a reduction in the value of its fiber cable due to the unlit fiber in its system, the fact that it has unlit

fiber does not reduce the value of all of its other equipment besides its fiber. The fiber that has been lit uses the conduit pipe, the above-ground poles, and the monitoring system. As the lit fiber uses these components, the components are considered used in business pursuant to R.C. 5701.08. However, the petitioner has shown that 252 of its 288 fibers, or 87.5%, have never been lit, are not used in business and therefore the value of the fiber assessed, \$1,758,057.00, shall be reduced by 87.5% to reflect this.”¹ S.T. 1-2.

Although appellant agrees with that aspect of the commissioner’s ruling that its unlit fibers are not “used in business” and, as a result, are not to subject to tax, through multiple specifications of error, appellant asserts that the taxable value of the remainder of its property, i.e., conduit pipe, above-ground poles, and computer monitoring system, should be reduced on a pro rata basis to correlate with the unlit, i.e., unused, fiber optic wire within its network. In addition, appellant claims the commissioner’s refusal to make such an adjustment results in a violation of rights guaranteed by the Ohio and United States Constitutions.

We first dispense with appellant’s constitutional challenges by pointing out that the Board of Tax Appeals is a statutorily created quasi-judicial administrative agency, which lacks jurisdiction to declare a statute unconstitutional. *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, paragraph one of the syllabus; *Herric v. Kosydar* (1975), 44 Ohio St. 2d 128, 130; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7, 8; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, paragraph one of the syllabus. As discussed in *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 197-198, the court

¹ In addition to the adjustment accorded the total taxable value of appellant’s fiber optic cable, the commissioner also redistributed appellant’s taxable property from the Berea taxing district, in which it was originally reported, to ten other districts on a prorated basis consistent with the fiber optic mileage located within each district.

agreed with this board's conclusion that we are equally without jurisdiction to consider whether a statute has been applied in an unconstitutional manner. See, also, *GTE North, Inc. v. Zaino*, 96 Ohio St.3d 9, 2002-Ohio-2984. Given our inability to grant the relief requested, we must decline to rule upon the constitutional arguments which appellant has advanced within its notice of appeal.

In considering the remainder of appellant's arguments, we refer to the court's decision in *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215, in which it held that "when an assessment is contested, the taxpayer has the burden *** to show in what manner and to what extent *** the commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect." *Id.* Subsequently, in *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, the court succinctly set forth the standard which this board is to use in conducting our review:

"Absent a demonstration that the commissioner's findings are clearly unreasonable or unlawful, they are presumptively valid. Furthermore, it is error for the BTA to reverse the commissioner's determination when no competent and probative evidence is presented to show that the commissioner's determination is factually incorrect. ***" *Id.* at 124. (Citation omitted.)

See, also, *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, paragraph one of the syllabus; *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 499, 2003-Ohio-2149, ¶26.

Appellant asserts that the taxable value of its property should be reduced by a percentage commensurate with the amount of unlit fiber optic wire which was removed from the assessment. However, the property to which such claim is directed, i.e., poles, conduits, computer systems equipment, etc., unlike its unlit fibers, is indeed used by appellant in

conducting its business. Whether such equipment supports a single fiber optic wire or multiple wires, it is used in appellant's business and is therefore subject to taxation. R.C. 5701.08. See, generally, *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369.

At hearing before this board, appellant also presented evidence in support of an argument that it should not be liable for personal property tax involving certain "make ready" costs incurred as part of the development of its network. For example, appellant's director of project management testified that as a condition for obtaining a permit to install fiber optic wire through the city of Shaker Heights, it was required to install two additional circuit lines which were unnecessary to its system. The commissioner questions this board's ability to consider this claim as it was neither raised when the matter was pending before him or in appellant's notice of appeal. We agree.

R.C. 5727.47 provides the manner by which a public utility may challenge an assessment issued to it:

"If a public utility objects to any assessment certified to it pursuant to such sections, it may file with the commissioner *** a written petition for reassessment . *** The petition shall indicate the utility's objections, but additional objections may be raised in writing if received by the commissioner prior to the date shown on the final determination."

Consistent with case law interpreting similar statutory mandates, see, e.g., *CNG Dev. Co. v. Limbach* (1992), 63 Ohio St.3d 28, a taxpayer has an obligation to raise issues justifying the relief requested at the earliest stage of proceedings, and a failure to do so precludes it from amplifying its claims on appeal. See *Ohio Edison Co. v. Tracy* (Interim Order, May 21, 1999), BTA No. 1997-K-322, unreported. Cf. *DeWeese v. Zaino*, 100 Ohio St.3d 324, 2003-Ohio-6502. A review of the documents filed by appellant with the

commissioner fails to reveal that the aforementioned claim was asserted by appellant during the proceedings before the commissioner.

Further, these issues were not specified as error by appellant in its notice of appeal. R.C. 5717.02, which sets forth the statutory prerequisites for pursuing an appeal to this board, provides that “[s]uch appeals shall be taken by filing a notice of appeal with the board ***. *** The notice of appeal shall have attached thereto *** a true copy of the notice sent by the commissioner *** and shall also specify the errors complained of ***.” Appellant’s failure to specify error in its notice of appeal precludes this board from considering it. See, e.g., *Ellwood Engineered Castings Co. v. Zaino*, 98 Ohio St.3d424, 2003-Ohio-1812; *Kern v. Tracy* (1995), 72 Ohio St.3d 347, 349; *Moraine Hts. Baptist Church v. Kinney* (1984), 12 Ohio St.3d 134.

Nevertheless, even if we were to find we have jurisdiction over these late-raised claims, we would be unable to conclude that appellant has sufficiently supported the costs attributable to such claims. For example, rather than delineating the costs incurred in deploying the specific aspects of its fiber optic network to which it now objects, appellant’s witness testified:

“Q. Okay. We talked about your having to run these two extra conduit lines through the Shaker Heights portion of the loop. Did that increase the cost of construction of the loop in that particular section.

“A. Yes, it did.

“Q. Okay. And is there any way for you to calculate what that additional cost was?

“A. Well, just based on experience, I’m figuring about 30 percent. We have to still bore pits, we had to increase the size

of the cutter head and we had to do another process, which would be the reaming. So I'm figuring about 30 percent. That's our general rule of thumb." H.R. at 29-30.

Such generalities, incapable of independent verification, are simply an insufficient basis for this board to find error and order modification. *Alcan Aluminum Corp.*, supra.

Based upon the foregoing, to the extent they are within this board's jurisdiction, appellant's specifications of error are not well taken and they are therefore overruled. It is therefore the order of this board that the final determination of the Tax Commissioner must be, and hereby is, affirmed.

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