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Telecommunications and Utility Cases

Book 2C

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TELECOMMUNICATIONS AND UTILITY CASES

Book 2C

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COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

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	ASSESSORS OF BOSTON
	ASSESSORS OF NEWTON
	ASSESSORS OF SPRINGFIELD
	ASSESSORS OF WESTBOROUGH

Docket Nos.	F292338, F292343, F292344, F288248	Promulgated: October 14, 2010

These are appeals filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the Boards of Assessors of the cities of Boston, Newton, Springfield, and the town of Westborough ("assessors") to abate taxes on certain personal property owned by and assessed to appellant for fiscal year 2007.

Commissioner Scharaffa heard these appeals and was joined by Chairman Hammond and Commissioners Egan, Rose, and Mulhern in the decision for the assessors.

These findings of fact and report are made on the Board's own motion pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

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FINDINGS OF FACT AND REPORT

The issue in these appeals is whether Bell Atlantic Mobile of Massachusetts Corporation, Ltd., d/b/a Verizon Wireless ("Bell Atlantic Mobile"), a provider of wireless cellular communications services, is entitled to the corporate utility exemption under G.L. c. 59, § 5, cl. 16(1)(d). This issue was fully tried, argued and briefed by the parties in a prior appeal involving fiscal year 2004. *See* ***Bell Atlantic Mobile v. Commissioner of Revenue, et al,*** Mass. ATB Findings of Fact and Reports 2007-121, *aff'd,* 451 Mass. 280 (2008) (***"Bell Atlantic Mobile I"***). However, as explained below, the Board's denial of the corporate utility exemption to Bell Atlantic Mobile has not been the subject of appellate review.

Bell Atlantic I involved appeals brought under two different statutes: (1) G.L. c. 59, § 39 concerning the Commissioner of Revenue's central valuation of certain personal

property owned by Bell Atlantic Mobile ("§ 39 appeals"); and (2) G.L. c. 59. § 64 and 65 ("§ 65 appeals") in which Bell Atlantic Mobile sought abatement of taxes paid to 220 cities and towns on its machinery[1] on the ground that its machinery was entitled to the corporate utility exemption under G.L. c. 59, § 5, cl. 16(1)(d) and was overvalued.

In ***Bell Atlantic Mobile I,*** the Board consolidated the § 39 appeals and the § 65 appeals. The Board then bifurcated the hearing of all consolidated appeals to first address all issues other than valuation: specifically, whether Bell Atlantic Mobile was a "telephone company" whose "machinery, poles, wires and underground conduits, wires and pipes" should have been centrally valued by the Commissioner under § 39 and whether Bell Atlantic Mobile was entitled to the corporate utility exemption under clause 16(1)(d). On May 15, 2006, the Board issued a Decision in the § 39 appeals for the 220 appellee cities and towns and the appellant City of Newton in which the Board determined that Bell Atlantic Mobile was not a telephone company subject to central valuation under § 39 and that, because the Board determined that § 39 did not apply to Bell Atlantic Mobile, the Commissioner did not have the authority to allow or deny the property tax exemption claimed by Bell Atlantic Mobile.

Consistent with its May 15, 2006 Decision in the § 39 appeals, the Board also issued on that same day an Order in the § 65 appeals, ruling that Bell Atlantic Mobile: 1) was not subject to central valuation under § 39; 2) was not entitled to the corporate utility exemption under clause 16(1)(d); and 3) was taxable on all personal property owned by it on January 1, 2003 in each of the appellee cities and towns.

The Board stayed further action on the § 65 appeals to allow the parties to seek appellate review of the Board's determination that Bell Atlantic Mobile was not subject to central valuation under § 39. The Board determined that final appellate resolution of this issue prior to a hearing on valuation was necessary because the determination of the proper parties and the valuation and tax assessment parameters in any further Board proceedings were affected by whether Bell Atlantic Mobile was subject to § 39.

The Supreme Judicial Court's affirmance of the Board in ***Bell Atlantic Mobile I*** concerned only the § 39 appeals and not the § 65 appeals. *See* 451 Mass. at 285, n. 11 ("The board's conclusion that Bell Atlantic Mobile is not a telephone company under G.L. c. 59, § 39, disposed of the § 39 appeals . . . . The board did decide, in the context of the §

[1] The personal property at issue in ***Bell Atlantic Mobile I*** and in the present appeals is machinery used in the conduct of Bell Atlantic Mobile's business including antennae, analogue and digital computer components, amplifiers, switching equipment, generators and power equipment. *See* ***Bell Atlantic Mobile I,*** Mass. ATB Findings of Fact and Reports at 2007-130.

65 appeals, that Bell Atlantic Mobile was not entitled to the [corporate utility] exemption. Those appeals, however, are not before us.").

After the Supreme Judicial Court's decision in ***Bell Atlantic Mobile I,*** the Board scheduled a hearing on the § 65 appeals. However, Bell Atlantic Mobile withdrew its § 65 appeals for fiscal year 2004 prior to the scheduled hearing. Bell Atlantic Mobile also withdrew its § 65 appeals for fiscal years 2005 and 2006 prior to a hearing.

For purposes of the present § 65 appeals for fiscal year 2007, the parties stipulated that the fair cash value of Bell Atlantic Mobile's personal property at issue was its assessed value for fiscal year 2007. Accordingly, there was no issue of valuation before the Board, and the only issue to be decided in these appeals was whether Bell Atlantic Mobile was entitled to the corporate utility exemption. For purposes of the present appeals, the parties also stipulated that, because the exemption issue was "fully tried, argued and briefed by the parties in [***Bell Atlantic Mobile I***] . . . the Board may adopt the record of trial of [***Bell Atlantic Mobile I***], including the arguments and briefs" in its determination of the exemption issue.

For the reasons detailed in the following Opinion, the Board ruled that Bell Atlantic Mobile was not entitled to the corporate utility exemption and was taxable under G.L. c. 59, § 18 on all personal property owned by it on January 1, 2006, the relevant assessment date for fiscal year 2007, and located in each of the cities and the town which are the appellees in these appeals.

OPINION

Under G.L. c. 59, § 5, cl. 16(1)(d), a foreign corporation subject to taxation under certain enumerated sections of G.L. c. 63, including § 52A,[2] is exempt from property tax on all of its property other than "real estate, poles, underground conduits, wires and pipes, and machinery used in manufacture or in supplying or distributing water." In contrast, under G.L. c. 59, cl. 16(2), business corporations are taxable on "machinery used in the conduct of the business."

Accordingly, if Bell Atlantic Mobile was taxable under § 52A and therefore entitled to the exemption under clause 16(1)(d), the only personal property it owned that would be subject to property tax would be its "machinery used in manufacture" – that is, its electrical generating equipment. However, if it was not taxable under § 52A and was

[2] Bell Atlantic Mobile relies solely on § 52A, which governs the taxation of utility corporations including telephone and telegraph companies, to support its argument that it qualifies for the exemption under G.L. c. 59, § 5, cl. 16(1)(d).

therefore not entitled to the exemption under clause 16(1)(d), all of its machinery and equipment, including its antennae, transmitters, receivers, amplifiers, and switching equipment, would be subject to local tax.

A. G.L. c. 63, § 52A

Section 52A provides that every "utility corporation" doing business in the commonwealth must pay an annual tax on its corporate franchise. A "utility corporation" is defined in § 52A(1)(a) to mean:

> (i) every incorporated electric company and gas company subject to chapter one hundred and sixty-four; (ii) every incorporated water company and aqueduct company subject to chapter one hundred and sixty-five; ***(iii) every incorporated telephone and telegraph company subject to chapter one hundred and sixty-six;*** (iv) every incorporated railroad and railway company subject to chapter one hundred and sixty; and every corporation qualified under section one hundred and thirty-one A of said chapter one hundred and sixty to acquire, own and operate terminal facilities for steam, electric or other types of railroad; (v) every incorporated street railway subject to chapter one hundred and sixty-one; (vi) every incorporated electric railroad subject to chapter one hundred and sixty-two; (vii) every incorporated trackless trolley company subject to chapter one hundred and sixty-three; (viii) every domestic or foreign pipe line corporation engaged in the transportation or sale of natural gas within the commonwealth; and (ix) every foreign corporation which is not subject to the above chapters but which does an electric, gas, water, aqueduct, telephone, telegraph, railroad, railway, street railway, electric railroad, trackless trolley or bus business within the commonwealth and has, prior to January first, nineteen hundred and fifty-two been subject to taxation under sections fifty-three to sixty, inclusive.[3]

(emphasis added). A review of the public utility corporations enumerated in § 52A reveals a common characteristic: an extensive physically interconnected distribution infrastructure, composed of wires, pipes, conduits or tracks strung over or laid in or under public ways or private property.

Unlike the physical interconnectivity of the distribution networks employed by the § 52A utilities, the network of cell sites and switching stations of Commercial Mobile Radio Service ("CMRS") providers such as Bell Atlantic Mobile are "connected" by radio signals, with a minimal amount of wiring connecting the switching station to the land lines of local telephone companies.[4] Accordingly, Bell Atlantic Mobile's lack of a significant physical distribution infrastructure suggests that it is not a utility corporation for purposes of § 52A.

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[3] Bell Atlantic Mobile, organized nearly half a century after 1952, makes no argument that it is a utility corporation under § 52A(1)(ix).

[4] This minimal amount of wiring is apparently owned by the land-line phone companies, given Bell Atlantic Mobile's position that its only personal property subject to tax is its electrical generating equipment.

A utility's extensive infrastructure and other economic, operational, and technical characteristics of its business make it unlikely, if not practically impossible, for a second provider to enter the utility's business, resulting in a "natural monopoly" for the utility, in the absence of governmental intervention requiring access to the utilities infrastructure by other providers. *See, e.g.,* 47 USC § 251 (requiring telecommunication carriers to allow other telecommunication carriers to interconnect with their infrastructure). For example, a gas company will incur a large initial capital outlay to purchase pipes, dig up streets, install pipes and other necessary distribution equipment, and connect to homes. It will also need to secure easements and government permits to install and access its distribution system. It would make little practical or economic sense for a competitor to enter the market and essentially dig up the same streets and private property to lay a set of pipes parallel to the utility's pipes and attempt to gain market share from the utility's customers.

As a result, the government typically allows utilities like those listed in § 52A to operate as monopolies, in return for which the government regulates many aspects of the utility, including: its ability to enter a market and construct and maintain its infrastructure; the rates it can charge its customers; and requiring access to its infrastructure by other providers. *See generally* JAMES C. BONBRIGHT, ET AL., PRINCIPLES OF PUBLIC UTILITY RATES, at 17-25 (2d ed. 1988); 47 USC § 251. Government regulation of utilities is evidenced by the fact that the definition of each utility mentioned in § 52A includes the statute by which that utility is regulated.

The specific definitional reference in § 52A to the regulatory authority by which each utility is governed indicates that entities providing services similar to those offered by the utility, but not subject to the same regulatory statute, are not § 52A utilities. For example, under § 52A(a)(1), electric and gas companies subject to chapter 164 are defined as utilities. Although both electricity and gas are used for home heating, that does not mean that companies selling other home-heating fuels, such as oil, coal, or wood, that have no extensive distribution infrastructure and are not regulated under § 164, would qualify as utilities for purposes of § 52A.

Similarly, there are a number of functional substitutes for rail and trolley transportation that do not have embedded physical infrastructures and are not subject to the regulatory statutes referenced in § 52A, including buses, taxis, trucks, airplanes, and boats. However, it is only the enumerated trains and trolleys, regulated under specific sections of the General Laws, which constitute utilities taxable under § 52A.

In an analogous situation, satellite television providers offer a service arguably

similar to cable television providers: multi-channel and pay-per-view television programming. While cable television providers have a physical distribution infrastructure similar to wired telephone companies, satellite television providers use waves transmitted through the air, transmitters and receivers to distribute their service. The Board is aware of no instance where satellite television providers have been held to be subject to the rate and entry regulation of cable television providers under G.L. c. 166A.

The specific section at issue in these appeals, § 52A(1)(a)(iii), requires that a telephone company be "subject to chapter one hundred and sixty-six." Accordingly, chapter 166 must be analyzed to determine whether Bell Atlantic Mobile was subject to its provisions and therefore taxable as a utility corporation under § 52A and entitled to the personal property tax exemption under clause 16(1)(d).

B. G.L. c. 166

Like G.L. c. 59, § 39 and G.L. c. 63, § 52A(1)(a)(iii), G.L. c. 166 contains no definition of the term "telephone company." G.L. c. 166, § 11, does define the term "company" to include "every person, partnership, association and corporation engaged in the business of transmission of intelligence by electricity." This definition provides only that all telephone and telegraph companies, regardless of the company's form of organization, must file the annual return required under § 11, but sheds no light on what constitutes a telephone company. Further, the evidence in these appeals established that cellular handsets do not transmit intelligence by electricity; the electricity used to power the handset does not leave the phone and the "intelligence" is transmitted by radio waves. Accordingly, G.L. c. 166 must be examined to determine whether CMRS providers are subject to its provisions.

Much of chapter 166 has nothing to do with CMRS providers in general or Bell Atlantic Mobile in particular. The first sentence of the first section of chapter 166 states that a telegraph or telephone company "shall not commence the construction of its line" until certain stock subscription and filing requirements are met. G.L. c. 166, § 1. *See also* G.L. c. 166, §§ 2-10 (relating to certain financial requirements referenced in § 1); § 15D (relating to excavation of underground wires or cables); §§ 16-20 (relating to the provision of telegraph services); §§ 21-42B (relating to poles and wires). Bell Atlantic Mobile has no line to construct, underground wires or cables to excavate, telegraph services to provide, or poles or wires.

In affirming the Board in ***Bell Atlantic Mobile I,*** the Supreme Judicial Court also recognized that:

> the majority of the provisions of G.L. c. 166 are simply inapplicable to a CMRS provider, and Bell Atlantic Mobile's assertion it might hypothetically be 'subject to' G.L. c. 166 in some way is too speculative to be convincing. Therefore, the language of the corporate utility exemption statutes reinforces the conclusion that Bell Atlantic Mobile is not a telephone company.

Bell Atlantic Mobile I, 451 Mass. at 286-87.

Bell Atlantic Mobile also relies on the annual return requirement under G.L. c. 166, § 11 as principal support for its argument that it is "subject to" chapter 166. Section 11 provides in pertinent part:

> Every telephone or telegraph company doing business in the commonwealth shall annually, on or before March thirty-first or such subsequent date as the department of telecommunications and energy, for good cause shown in any case, may fix, file with said department a report of its doings for the year ending December thirty-first preceding, which report shall be in such detail as the department prescribes, and shall be called the "Annual Return."

It is not disputed that prior to 1994, the Department of Public Utilities ("DPU"), the predecessor to the Department of Telecommunications and Energy ("DTE") referenced in § 11, required CMRS providers to file an annual return. There is also no dispute that prior to 1994, G.L. c. 159, §§ 12-12D, not Chapter 166, authorized DPU to regulate the rates charged by CMRS providers and required that CMRS providers obtain a certificate of public necessity from DPU prior to offering service in Massachusetts.

On August 10, 1993, the federal Omnibus Budget Reconciliation Act of 1993 was signed into law, amending the Communications Act of 1934 by preempting state and local regulation of commercial and private mobile radio services. In pertinent part, the amendment stated:

> No state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 USC 332(c)(3). The amendment allowed states to petition the FCC for authority to regulate the rates of CMRS providers if the state could demonstrate that market conditions failed to protect subscribers from unjust, unreasonable, or discriminatory rates or the CMRS is a replacement for a substantial portion of the land line services within the state.

In response to the federal amendment, DPU issued DPU Order 94-73. After

conducting an investigation and reviewing written comments from interested parties,[5] the DPU determined that:

> Market forces in the state are adequate to protect the public from unjust and unreasonable wireless service rates or from rates that are unjustly or unreasonably discriminatory. Also we find that wireless service in Massachusetts is not a replacement for land-line telephone exchange service for a substantial portion of the land-line exchange service within the Commonwealth. Therefore, the Department shall not petition the FCC for authority to continue rate regulation of [CMRS providers] in Massachusetts.

DPU Order 94-73 at 13. On the basis of its findings and conclusions, the DPU ordered that:

> As of August 10, 1994, the Department will no longer regulate the rates of [CMRS providers] in Massachusetts . . . and will no longer regulate the entry of [CMRS providers] into the market. We have found that market forces in the state are adequate to protect the public from unjust and unreasonable wireless service rates; these market forces also make it unnecessary for the Department to regulate other terms and conditions of [CMRS] in Massachusetts. Therefore, as of August 10, 1994, the Department will not regulate other terms and conditions of [CMRS] in Massachusetts.

DPU Order 94-73 at 14. In addition to determining that it would no longer regulate rates or entry of CMRS providers, the DPU also repealed its regulations at 220 CMR 35 et seq., promulgated pursuant to G.L. c. 159, § 12B, that governed the procedures by which DPU regulated CMRS providers. DPU Order 94-73 at 15-16.

There is no evidence that Bell Atlantic Mobile filed an annual return with DPU or DTE in any year since 1993. Bell Atlantic Mobile failed to produce such a return at the hearing of these appeals, during discovery despite this Board's Order allowing Newton's Motion to Compel Further Discovery, or through its own witnesses. Further, although G.L. c. 166, § 12 provides for penalties for failure to file the annual return required under § 11, there is no evidence that DPU or DTE took any enforcement action against Bell Atlantic Mobile or any CMRS providers for failure to file a return. In contrast, DTE initiated enforcement actions in 2003 against some forty land-line telecommunications companies for failure to file their annual returns; neither Bell Atlantic Mobile nor any CMRS provider was among those forty.

The fact that between 1988 and 1993 DPU sent Bell Atlantic Mobile's predecessors form returns and an undated and unsigned cover letter or "friendly reminder" that referenced the annual return requirement under chapter 166, and provided excerpts of both

[5] Thirteen CMRS providers provided written comments to the DPU, giving some indication of the level of competition among CMRS providers. DPU Order 94-73, at 2-3.

G.L. c. 166 and G.L. c. 159, does not establish that CMRS providers were subject to G.L. c. 166, § 11. At most, all this proves is that prior to the federal amendment and DPU Order 94-73, someone at DPU sent forms and a cover letter referencing § 11 to CMRS providers; it proves nothing about whether Bell Atlantic Mobile was at any time subject to Chapter 166. Further, the evidence of record established that the letter and forms were sent out as an administrative or ministerial function and did not constitute a binding determination that CMRS providers were subject to the reporting requirements of § 11 or any other provision of G.L. c. 166. Administrative "missteps" do not constitute an authoritative or persuasive interpretation of a relevant statute. *See* ***BankBoston Corporation v. Commissioner of Revenue***, 68 Mass. App. Ct. 156, 164 (2007) (ruling that Commissioner not bound by language in tax forms and instructions).

Accordingly, on the basis of the foregoing, the Board ruled that at no time relevant to these appeals was Bell Atlantic Mobile subject to the annual reporting requirement of G.L. c. 166, § 11 and related §§ 12 and 12A. In addition, Bell Atlantic Mobile has not shown that it was subject at any time to any provision of Chapter 166, which in context clearly refers and relates to wired telephone and telegraph companies. For example, G.L. c. 166, §§ 1-10 concern the financial structure and integrity of a telephone and telegraph company, issues which are important to DPU/DTE in the case of an entity that has a franchise to operate a natural monopoly in an area, but not in the case of a competitive provider where the financial failure of an entity is not a public concern. In addition, there is no evidence to show that DPU ever sought to regulate or enforce the provisions of §§ 1-10 against a CMRS provider.

Further, if CMRS providers were telephone and telegraph companies subject to chapter 166, DPU/DTE would have been obligated to impose utility assessments on CMRS providers pursuant to G.L. c. 25, § 18. Section 18 authorizes the DPU/DTE to assess:

> against each electric, gas, cable television, telephone and telegraph company under the jurisdictional control of the department and each generation company and supplier licensed by the department to do business in the commonwealth, based upon the intrastate operating revenues subject to the jurisdiction of the department of each of said companies derived from sales within the commonwealth of electric, gas, cable television, telephone and telegraph service, respectively, as shown in the annual report of each of said companies to the department.

Bell Atlantic Mobile was not included in the DPU/DTE utility assessment base for the relevant tax year because it did not file an annual return. There is no evidence that DPU/DTE pursued Bell Atlantic Mobile or any other CMRS provider for failure to file an

annual return or that it attempted to calculate Bell Atlantic Mobile's utility assessment by some alternative means. The most reasonable inference from the failure of DPU/DTE to enforce the return filing and utility assessment obligations is that DPU/DTE concluded that Bell Atlantic Mobile and other CMRS providers were not public utilities.

CMRS providers do not fit legally or technologically within the statutory rubric of Chapter 166, which applies to entities distinctly different from competitive telecommunications providers without a physically interconnected infrastructure distribution system. Like the other chapters referenced in § 52A, Chapter 166 is focused on the obligations of a traditional public utility, including: the construction and operation of its physical distribution system (e.g., §§ 21, 22, 22C through 22N, 25 through 27, 36-37, 39-40); its obligation to serve customers "without discrimination" throughout its franchise area (§§ 13, 14); and detailed financial oversight (§§ 1-10). Rather, CMRS providers are more appropriately, and are in fact explicitly, governed by the statutory obligations imposed on all common carriers under G.L. c. 159.

C. G.L. c. 159

DPU/DTE is also charged with regulating common carriers under G.L. c. 159, § 12, which includes regulating "the transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or ***any other method or system of communication***." G.L. c. 159, § 12(d) (emphasis added). It is not disputed that Bell Atlantic Mobile, as a provider of wireless cellular telecommunications services, constitutes a common carrier under G.L. c. 159, § 12(d).

In addition to its general supervisory authority over common carriers, DPU/DTE is specifically authorized to regulate mobile radio telephone utility companies under G.L. c. 159, §§ 12A-12D. A radio utility is defined in § 12A as "any person or organization which owns, controls, operates, or manages a mobile radio telephone utility system, except a land-line telephone utility or land-line telegraph utility regulated by" the FCC. Section 12A goes on to define a mobile radio telephone utility as:

> any facility within the commonwealth which provides mobile radio telephone service, including one-way mobile radio telephone service, on a for-hire basis to the public, whether or not such mobile radio telephone service is provided on frequencies allocated to the Domestic Public Land Mobile Radio Services and whether or not such facility is interconnected with a public land-line telephone exchange network.

Although the definition includes pagers, there is nothing to suggest that § 12A is limited to pagers; such a reading would render the rest of the provision superfluous. *See,*

e.g., ***Globe Newspapers Company v. Commissioner of Education,*** 439 Mass. 124, 129 (2003) ("In interpreting statutes, none of the words of a statute is to be regarded as superfluous"). If pagers were the only mobile radio telephone service that constituted a mobile radio telephone utility, the Legislature could clearly have so limited the definition. *See, e.g.*, ***Commissioner of Revenue v. Cargill, Inc.***, 429 Mass. 79, 82 (1999).

Sections 12A through 12D were added to the General Laws by Chapter 936 of the Acts of 1973, entitled "An Act Placing the Massachusetts Mobile Radio Telephone Utility Companies Under the Jurisdiction of the Department of Public Utilities." The 1973 legislation specifically differentiates between land-line telephone company utilities and mobile radio telephone service providers. For example, § 12A defines a "radio utility" as "any person or organization which owns, controls, operates or manages a mobile radio telephone utility system, ***except a land-line telephone utility or land-line telegraph utility*** regulated by the United States Federal Communications Commission." (emphasis added).

Further, the regulation of mobile radio telephone utility systems under the 1973 legislation was made expressly inapplicable to any telephone and telegraph utility already regulated by the DPU. *See* § 12D ("The provisions of sections twelve A to twelve C, inclusive, are not applicable to any telephone or telegraph utility regulated by the department or to the facilities, systems or services of such utilities."). Such telephone and telegraph utilities included New England Telephone Company ("NET"), the major land-line telephone company in Massachusetts at the time the 1973 legislation was enacted. *See* ***Wolf v. Department of Public Utilities,*** 407 Mass. 363, 368 (1990).

In ***Wolf***, the Court clearly distinguished between "telephone utilities" under the 1973 amendment, which it equated with land-line telephone companies, and the mobile radio telephone service providers which the amendment sought to bring within the regulatory authority of the DPU: "Wolf correctly notes that ***telephone utilities such as NET*** are excluded from the application of § 12B, *see* G.L. c. 159, § 12D, and that ***telephone utilities are excluded from the definition of "radio utility" in both G.L. c. 159, § 12A,*** and the transfer regulation, 220 Code Mass. Regs. § 35.02." ***Wolf,*** 407 Mass. at 368-69 (emphasis added). The "telephone utilities" excluded from the definition of "radio utility" under § 12A are "land-line" telephone or telegraph utilities.

Moreover, DPU/DTE uniformly cites chapter 159, and not 166, as the source of its regulatory authority in its decisions and regulations concerning CMRS providers. In DPU Order 94-73 discussed above, which terminated state rate and entry regulation of CMRS providers based on the 1993 federal act preempting such regulation, the DPU states clearly

that "G.L. c. 159, §§ 12, 12A-12D, provides the Department jurisdiction over [CMRS] in Massachusetts." *See also* DPU Order 93-98 (deciding that CMRS providers "still would be required to file an annual return with the Department pursuant to General Laws Chapter 159, Section 32.").

In DPU Order 95-59-B, the DPU explicitly refers to Chapter 159, not Chapter 166, in describing its residual regulatory authority over CMRS providers after federal preemption. "Rather, the Budget Reconciliation Act did not completely preempt state regulation of CMRS carriers, and the Commonwealth retains meaningful authority under G.L. c. 159 to regulate CMRS carriers." DPU Order 95-59-B at 2. In all DPU decisions entered into evidence by the parties, DPU explicitly refers to Chapter 159, not Chapter 166, as the statutory authority for its regulatory power over CMRS providers.

Similarly, Chapter 159 is the enabling statute by which DPU derives its authority to promulgate regulations governing CMRS providers. G.L. c. 159, § 12B provides that DPU "shall issue rules and regulations governing the issuance of certificates." Similarly, G.L. c. 159, § 12C provides that the DPU "may establish rules and regulations necessary to carry out the provisions of this section." Each and every one of the regulations found in 220 CMR § 35.00 *et seq.* specifically refers to G.L. c. 159, § 12B under the heading "Regulatory Authority." None of the regulations found at 220 CMR § 35.00 *et seq.* reference Chapter 166.

The DPU decisions and the regulations promulgated by DPU recognize that Chapter 159 is the source of DPU's regulatory authority over CMRS providers. As the agency charged with regulating CMRS providers, DPU's interpretation of their own regulatory authority is entitled to weight. *See* ***Greater Media, Inc. v. Department of Public Utilities***, 415 Mass. 409, 414 (1993).

Bell Atlantic Mobile argued that the Board should give weight to the determination of the Department of Revenue, embodied in an April 9, 1999 letter from the Department's General Counsel to representatives of the wireless industry and an April 13, 1999 internal memorandum, and implemented by the Department since that time, that CMRS providers may "reasonably be viewed" as utility corporations subject to Chapter 166 and therefore entitled to the utility exemption.[6] The 1999 determination, however, represented a change of direction by the Department, which in previous communications with the wireless industry had indicated that based on "changes in both federal and Massachusetts

[6] The Commissioner's denial of the corporate utility exemption in these appeals is based on Bell Atlantic Mobile's status as an LLC, not because it is a CMRS provider.

regulation," wireless providers were "not currently subject to Chapter 166." In addition, internal memoranda dated August 21, 1997 ("SAM 97-13") and November 13, 1998 ("SAM 98-17") analyzed the relevant statutes and determined that CMRS providers: were not subject to Chapter 166; were not "utility corporations" under G.L. c. 63, § 52A; and, did not qualify for the utility exemption under G.L. c. 59, § 5, cl. 16(1)(d).

It is clear that the Department's April, 1999 determination that CMRS providers were entitled to the utility exemption was a policy decision to extend the property tax exemption to CMRS providers. Unlike the previous internal memoranda, which thoroughly analyzed the relevant statutory provisions to conclude that CMRS providers were not subject to Chapter 166, both the April 9, 1999 letter and the April 13, 1999 internal memorandum view the issue of whether CMRS providers were regulated under Chapter 159 or Chapter 166 as "not entirely clear" and concluded that it was "reasonable" to view CMRS providers as being subject to Chapter 166.

Departmental pronouncements based on policy determinations rather than statutory analysis are not entitled to weight. *See* ***Bloomingdale's Inc. v. Commissioner of Revenue*** Mass. ATB Findings of Fact and Reports 2003-163, 189, *aff'd,* 63 Mass. App. Ct. 1100 (2005). In addition, regulation of CMRS providers is not an area in which primary statutory interpretation is left to the Department of Revenue. Administrative interpretations of the agency charged with interpreting a statute, if reasonable and adopted contemporaneously with the enactment or amendment of that statute, are accorded weight in interpreting that statute. ***Lowell Gas Co. v. Commissioner of Corps. & Tax'n***, 377 Mass. 255, 262 (1979); ***Ace Heating Service, Inc. v. State Tax Comm'n***, 371 Mass. 254, 256 (1976); ***Assessors of Holyoke v. State Tax Comm'n,*** 355 Mass. 223, 243-44 (1960). It is DPU/DTE, not the Department of Revenue, which is charged with interpreting the statutes regulating telecommunications companies; therefore, DPU/DTE's interpretation, and not that of the Department of Revenue, is to be given weight.

Finally, administrative interpretations which are not consistent with the underlying statute are not accorded weight. *See* ***Bell Atlantic I,*** 451 Mass. at 289, n. 14 (affirming Board's rejection of the Commissioner of Revenue's prior administrative determination that Bell Atlantic Mobile was a telephone company and ruling that the Board "correctly gave no weight to the Commissioner's prior position, concluding that it was inconsistent with the underlying statutes."); ***Massachusetts Hospital Association, Inc. v. Department of Medical Security***, 412 Mass. 340, 346 (1992) ("an incorrect interpretation of a statute . . . is not entitled to deference"); ***Bloomingdale's,*** Mass. ATB Findings of Fact and Reports at

2003-196-97 (ruling that Commissioner's incorrect interpretation of statutory exemption was not entitled to deference); ***First National Bank of Boston, et al v. Commissioner of Revenue,*** Mass. ATB Findings of Fact and Reports 1993-181, 220-21 (rejecting Commissioner's ruling interpreting bank excise because interpretation was contrary to governing statute).

For all of the foregoing reasons, the Board ruled that CMRS providers are regulated as common carriers, *i.e.* mobile radio telephone utilities, under Chapter 159, and not as telephone company utilities under Chapter 166. Because Bell Atlantic Mobile is not subject to Chapter 166 and not taxable under G.L. c. 63, § 52A, it is not entitled to the corporate utility exemption under G.L. c. 59, § 5, cl. 16(1)(d); rather, it is taxable under G.L. c. 59, cl. 16(2) on its "machinery used in the conduct of the business," which includes the antennae, transmitters, receivers, amplifiers, and switching equipment at issue in these appeals. Accordingly, the Board issued decisions for the appellees in these appeals.

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board

BOSTON GAS COMPANY[1] v. BOARD OF ASSESSORS OF BOSTON

1 Doing business as Keyspan Energy Delivery New England.

SJC-10691

SUPREME JUDICIAL COURT OF MASSACHUSETTS

458 Mass. 715; 941 N.E.2d 595; 2011 Mass. LEXIS 10

October 5, 2010, Argued
January 20, 2011, Decided

PRIOR HISTORY: [*1]**

Suffolk. Appeal from a decision of the Appellate Tax Board. The Supreme Judicial Court granted an application for direct appellate review.

HEADNOTES

Taxation, Gas company; Personal property tax: value, abatement; Appellate Tax Board: appeal to Supreme Judicial Court, findings; Real estate tax: value, abatement. Gas Company. *Administrative Law*, Substantial evidence, Judicial review. *Public Utilities*, Value. *Evidence*, Value, Presumptions and burden of proof, Expert opinion. *Words*, "Net book value," "Reproduction cost new less depreciation," "Income capitalization analysis."

COUNSEL: Stephen W. DeCourcey (John M. Lynch with him) for the plaintiff.

David L. Klebanoff for the defendant.

JUDGES: Present: Marshall, C.J., Ireland, Spina, Cowin, Cordy, Botsford, & Gants, JJ. [2]

2 Chief Justice Marshall, participated in the deliberation on this case prior to her retirement.

OPINION BY: COWIN

OPINION

[*716] [600]** COWIN, J. Boston Gas Company, doing business as Keyspan Energy Delivery New England (company), made timely application to the board of assessors of Boston (assessors) for abatement of the tax imposed on its rate-regulated [3] utility property in the city of Boston (city) in fiscal year 2004. [4] At issue are separate assessments of the company's personal property and real property. After being denied abatements by the assessors, the company appealed to the Appellate Tax Board (board). With respect to the personal property, the board determined that a valuation methodology according equal weight to the property's net book value and its reproduction cost new less depreciation (RCNLD) provided a reliable estimate of the fair cash value of the property. As that value was in excess **[***2]** of the assessed value, the board denied the company relief. With respect to the real property, the board concluded that neither the company nor the assessors had provided a sufficient basis for valuing the property, and so left the assessed value undisturbed.

3 As will be discussed in further detail, the Department of Public Utilities (DPU) regulates the rates that gas utilities charge to their consumers. See *G. L. c. 164, § 94*.

4 Boston Gas Company, doing business as Keyspan Energy Delivery New England (company), also sought abatements with respect to fiscal years 2005-2009. By agreement between the parties and the Appellate Tax Board (board), the fiscal year 2004 appeals were tried as a "test year" for adjudicating the relevant issues. The adjudication will provide guidance for the disposition of the remaining appeals.

The plaintiff filed a notice of appeal from the decision of the board, and we granted direct appellate review. On appeal, the plaintiff claims (1) the board lacked substantial evidence in support of its determination that a valuation method other than net book value was permissible, and that the board therefore erred in according equal weight to net book value and RCNLD; **[***3]** (2) the board lacked substantial evidence to support the analysis of earnings before interest, taxes, depreciation, and amortization (EBITDA) in the income capitalization approach for valuing the personal property; (3) the board erred in failing to use a tax factor to account for property taxes in the income capitalization **[*717]** approach; (4) the board erred in its weighing of certain evidence and in its assessment of the credibility of a key witness; and (5) the board erred in concluding that there was insufficient evidence to determine the value of the real property. We remand to the board for further consideration of the use of a tax factor in the income capitalization approach, and of certain subsidiary conclusions related to the EBITDA analysis in that approach. On all other issues, we affirm the board's decision.

1. Background. a. *The legal framework.* City assessors are charged with making a "fair cash valuation" of property that is subject to taxation. *G. L. c. 59, § 38*. We have determined "fair cash value" to mean "fair market value," or "the price an owner willing but not under compulsion to sell ought to receive from one willing but

not under compulsion to buy." *Boston Gas Co. v. Assessors of Boston, 334 Mass. 549, 566, 137 N.E.2d 462 (1956).* [***4] When challenging an assessment before the board, the taxpayer bears the burden of establishing its right to an abatement of the assessed tax. See *Schlaiker v. Assessors of Great Barrington, 365 Mass. 243, 245, 310 N.E.2d 602 (1974)*, quoting *Judson Freight Forwarding Co. v. Commonwealth, 242 Mass. 47, 55, 136 N.E. 375 (1922).* The assessment is valid unless the taxpayer sustains its [**601] burden of proving otherwise. See *Schlaiker v. Assessors of Great Barrington, supra at 245.*

Various methods are used to value taxable utility property. These include (1) a determination of the property's net book value, (2) an income capitalization valuation, (3) a sales comparison valuation, and (4) a determination of RCNLD. [5] See *Tennessee Gas Pipeline Co. v. Assessors of Agawam, 428 Mass. 261, 263, 700 N.E.2d 818 (1998)*, citing *Montaup Elec. Co. v. Assessors of Whitman, 390 Mass. 847, 850, 460 N.E.2d 583 (1984).*

> 5 The latter three methods are common methods of appraisal used beyond the context of regulated utility property. See *Correia v. New Bedford Redevelopment Auth., 375 Mass. 360, 362, 377 N.E.2d 909 (1978)*, quoting *State v. Wilson, 6 Wash. App. 443, 447-448, 493 P.2d 1252 (1972)*; see also Appraisal Institute, The Appraisal of Real Estate 141 (13th ed. 2008) (Appraisal of Real Estate).

The Department [***5] of Public Utilities (DPU) regulates the rates that gas companies charge to consumers. See *G. L. c. 164, § 94.* The net book value of regulated utility property, also known as the "rate base" value, plays an important role in the DPU's calculation of the revenue that a regulated gas utility is permitted [*718] to earn. See *Tennessee Gas Pipeline Co. v. Assessors of Agawam, supra at 263.* The DPU allows a utility to recover, through the rates charged to consumers, its reasonable operating expenses, taxes, depreciation and amortization, and other costs. *Boston Gas Co. v. Department of Telecomms. & Energy, 436 Mass. 233, 234, 763 N.E.2d 1045 (2002)*, quoting *Theory and Implementation of Incentive Regulation*, D.P.U. 94-158 at 3 (1995); *Boston Gas Co.*, D.T.E. 03-40-B at 13-20 (2004) (breaking out the components of Boston Gas's revenue requirements). A utility is also permitted to earn a reasonable return on investment, which is calculated as a percentage return on the utility's rate base. See *Boston Gas Co. v. Department of Telecomms. & Energy, supra at 234*; *Boston Gas Co.*, supra at 16 (calculating return on rate base for company). The cost of utility property may be included in the utility's rate base if the property [***6] is "used and useful to customers" and if the costs were "prudently incurred." See *Hingham v. Department of Telecomm. & Energy, 433 Mass. 198, 202, 740 N.E.2d 984 (2001).* For ratemaking purposes, the value of property included in the rate base is its net book value, which has been defined as "the original cost of the property at the time it was originally devoted to public use, less accrued depreciation." *Tennessee Gas Pipeline Co. v. Assessors of Agawam, supra at 263.*

In the context of a sale of utility assets, the DPU has maintained a general policy of limiting the net book value of the assets in the hands of the buyer to the existing net book value in the hands of the seller. See id. In this way, any acquisition premium paid for the assets -- that is, an amount paid above net book value [6] -- would be excluded from the buyer's rate base, and the buyer would thus not earn the DPU-specified rate of return on the premium; as of 2003, the DPU stated that such exclusion remains the norm. See *Boston Gas Co.*, D.T.E. 03-40 at 323 (2003). This policy has been referred to as the "carry-over rate base principle." [**602] *Montaup Elec. Co. vs. Assessors of Whitman, supra at 852-853.*

> 6 The DPU has defined an acquisition [***7] premium in this context as "the difference between the purchase price paid by a utility to acquire plant that previously had been placed into service and the net depreciated cost of the acquired plant to the previous owner." *Guidelines & Standards for Acquisitions & Mergers*, D.P.U. 93-167-A at 9 (1994).

As a result of this regulation, we have stated that the net [*719] book value of utility assets is the proper value for assessment purposes, absent "special circumstances" that would induce a buyer to pay more than net book value. *Tennessee Gas Pipeline Co. v. Assessors of Agawam, supra at 263-264.* Such circumstances may include (1) that "the utility company's net earnings actually may exceed the rate of return approved by the regulatory agency"; (2) that "the profit available from this transaction may exceed that which an investment of comparable risk could bring in the open market"; (3) that "the applicable regulatory agency may change its policies and abandon the carry-over rate base principle, thereby making an investment in the company more attractive," [7] *Montaup Elec. Co. v. Assessors of Whitman, supra at 852-853*; or (4) "[t]he potential for growth in a utility's business." *Boston Edison Co. v. Assessors of Watertown, 387 Mass. 298, 305-306, 439 N.E.2d 763 (1982).* [***8] The special circumstances that could induce a buyer to pay more than net book value are not limited to the examples enumerated above. See *id. at 306.*

> 7 The reasoning behind the regulatory change circumstance is that if a buyer were allowed to

earn a return on the premium paid, it would be willing to pay such a premium.

b. *Facts.* With this understanding of the legal framework for valuing regulated utility property, we turn to the facts of the present case. We recite the basic facts here, reserving a more detailed discussion of some of the facts for our subsequent analysis. ,

The personal property at issue consists primarily of the pipes, lines and meters used to transport and monitor the distribution of natural gas to the company's customers within the city. The pipes, or "mains," represent about eighty percent of the value of the personal property. Approximately two-thirds of the mains are made of cast iron -- a material used between 1850 and 1950 -- and the remainder consists of steel, which was introduced in the 1930's, and plastic, which was introduced by 1970.

The real property at issue is a parcel known as Commercial Point. The majority of the parcel is used as a liquid natural gas storage **[***9]** and distribution facility, and is improved with a 1.13 billion cubic foot storage tank, a cooling tower, a containment dike, and a monitoring and control building.

For fiscal year 2004, the assessors valued the personal property **[*720]** at $223.2 million and the real property at $28 million. The net book value of the personal property was approximately $159.2 million, and the net book value of the real property was approximately $1.8 million. The plaintiff paid the assessed taxes and, as stated, timely filed applications for abatement with the assessors for both the real and personal property. The assessors denied the applications, and the plaintiff appealed both matters to the board.

At the hearing before the board, the assessors' expert, George Sansoucy, presented his appraisal report for the personal property. He derived a value for the property based on three valuation methodologies: an income capitalization approach, [8] a sales comparison approach, [9] **[**603]** and a RCNLD approach. [10] The board ultimately concluded that an equal weighting of the RCNLD value (once adjusted for a discovered error) and the net book value provided a reliable estimate of the fair cash value of the property. That weighting **[***10]** yielded a value of $248 million, exceeding the assessed value of the personal property of $223.2 million. The board accordingly concluded that the plaintiff had not met its burden of showing that the property was assessed at a value above its fair cash value.

8 The income capitalization approach measures the present value of the future benefits of the property. See Appraisal of Real Estate, supra at 142. The specific method of income capitalization used in this case by the expert for the board of assessors of Boston (assessors) in this case, called direct capitalization, uses one year of the property's income and converts it into a valuation of the property using a market-derived capitalization rate or income multiplier. See id.

9 The sales comparison approach "produces a value indication by comparing the subject property with similar (i.e., comparable) properties." Appraisal of Real Estate, supra at 141.

10 The reproduction cost new less depreciation (RCNLD) approach is a type of "cost approach" in which, as applied here, one estimates the current cost of constructing a reproduction of the subject matter and then "subtract[s] the amount of depreciation (i.e., deterioration and obsolescence) **[***11]** in the structures from all causes." Appraisal of Real Estate, supra at 142.

The board concluded that a number of factors justified the use of a valuation methodology other than net book value. Specifically, the board determined that (1) there has been a trend in Massachusetts regulatory policy away from a strict carry-over rate base valuation model; (2) the useful life of gas utility pipeline vastly exceeds its depreciable life, [11] so that the **[*721]** personal property has residual value well in excess of net book value; and (3) sales activity in the marketplace indicates that, in practice, purchasers of utility property have paid substantially more than net book value.

11 The "useful life" is "[t]he period of time over which a structure or a component of a property may reasonably be expected to perform the function for which it was designed." Appraisal of Real Estate, supra at 413. The depreciable life to which the board refers is the period of time over which the property is "depreciat[ed] for rate purposes."

Finally, with respect to the real property, the board determined that the appraisal evidence offered at the hearing was substantially flawed, and thus did not establish a sufficient basis **[***12]** on which to determine a value for the parcel that differed from the assessed value. As a result, the board concluded that the plaintiff had not met its burden of proof in challenging the assessment. As neither of the experts who testified on the matter provided a sufficient basis for valuing the parcel, the board did not address a dispute between the experts as to the size of the parcel or the portion of it that was "upland acreage."

2. Discussion. A decision of the board will not be reversed or modified if it is based on substantial evidence and a correct application of the law. *Koch v. Commissioner of Revenue, 416 Mass. 540, 555, 624 N.E.2d 91 (1993)*, citing *Commissioner of Revenue v. Wells Yachts*

S., Inc., 406 Mass. 661, 663, 549 N.E.2d 1131 (1990). Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Tennessee Gas Pipeline Co. v. Assessors of Agawam, 428 Mass. 261, 262, 700 N.E.2d 818 (1998)*, quoting *New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466, 420 N.E.2d 298 (1981).* Our consideration of the substantiality of the evidence "must take into account whatever in the record fairly detracts from its weight." *New Boston Garden Corp. v. Assessors of Boston, supra at 466,* **[***13]** quoting *Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 253, 214 N.E.2d* **[**604]** *63 (1966).* "Where there is substantial evidence to support the board's decision, we defer to the board's judgment as to what evidence to accept and which method or methods of valuation to rely on." *General Electric Co. v. Assessors of Lynn, 393 Mass. 591, 608, 472 N.E.2d 1329 (1984)*, quoting *Boston Edison Co. v. Assessors of Watertown, 387 Mass. 298, 302, 439 N.E.2d 763 (1982).* However, we must set aside a finding of the board if "the evidence points to no felt or appreciable probability of **[*722]** the conclusion or points to an overwhelming probability of the contrary." *Tennessee Gas Pipeline Co. v. Assessors of Agawam, supra at 262*, quoting *New Boston Garden Corp. v. Assessors of Boston, supra at 466.*

a. *Valuation of the personal property.* i. *Use of a valuation methodology other than net book value.* The company asserts that the board erred in using an equal weighting of RCNLD and net book value in valuing the personal property, arguing that the board should have been limited to using net book value. To support this contention, the company maintains that the board's stated reasons for departing from strict adherence to net book value were flawed. [12]

> 12 The **[***14]** board's finding that special circumstances argued against using net book value as the sole determinant of fair cash value applies to both the personal and real property appeals. Our review here of the board's findings in that respect applies also to the real property.

First, the company claims that substantial evidence does not support the board's findings that changes in the regulatory environment for utilities justified the use of a valuation method other than net book value. We do not agree.

In *Boston Edison Co. v. Assessors of Boston, 402 Mass. 1, 13, 520 N.E.2d 483 (1988)*, we affirmed the board's decision to value utility property by equally weighting net book value and depreciated reproduction cost. There, we held that the board reasonably saw, based on a prior decision of the DPU upheld by this court, "the possibility that the department might allow adjustments in a purchaser's rate base to reflect a prudent purchase price above the plant's net book cost." *Id. at 15*, citing *Attorney Gen. v. Department of Pub. Utils., 390 Mass. 208, 210-211 & n.3, 217, 455 N.E.2d 414 (1983)* (affirming DPU decision to allow company to recover, through amortization expenses, its prudent investment in power plant reasonably abandoned **[***15]** before completion, and to receive carrying charge to compensate it for delay in recovery).

The DPU formalized a shift in its policy with respect to the carry-over rate base principle in a 1994 order regarding mergers and acquisitions of utilities. See *Guidelines & Standards for Acquisitions & Mergers*, D.P.U. 93-167-A (1994) (Mergers & Acquisitions). There, the DPU stated that it would "no longer follow the practice of denying acquisition premium recovery on a per se basis," *id. at 18*, concluding that "[m]erger proposals **[*723]** that include an acquisition premium will henceforth be judged on a case-by-case basis." *Id. at 7.* The DPU discussed proposals regarding the precise treatment of the premium, such as including the premium in rate base, but concluded only that "the [DPU] will consider [the] appropriate level of a recoverable acquisition premium on a case-by-[case]basis." *Id. at 19.* The ruling appeared to contemplate the possibility both of a return of the acquisition premium -- for example, as a recoverable cost to the company -- and a return on the **[**605]** acquisition premium by including it in the acquirer's rate base.

This court acknowledged the DPU's regulatory change in *Stow Mun. Elec. Dep't v. Department of Pub. Utils., 426 Mass. 341, 347, 688 N.E.2d 1337 (1997).* **[***16]** In that case, the town of Stow was purchasing the electricity distribution system of Hudson Light and Power Department, and Stow petitioned the DPU [13] for a determination of a purchase price. See *id. at 342-343.* The DPU used an equal weighting of RCNLD and original cost less depreciation, [14] and we upheld that determination. See *id. at 343, 345.* Although Stow argued that the DPU had "impermissibly speculated" in discussing possible regulatory change, we acknowledged the DPU's shift from a mandatory carry-over rate base policy to a case-by-case approach, and concluded that the board had not erred in considering the effect of that change on value of the utility. *Id. at 347.*

> 13 The petition was authorized by *G. L. c. 164, § 43.* See *Stow Mun. Elec. Dep't v. Department of Pub. Utils., 426 Mass. 341, 343, 688 N.E.2d 1337 (1997).*
>
> 14 This measure is evidently very similar to net book value. The court did not discuss whether the measures are in fact identical.

Finally, in *Attorney Gen. v. Department of Telecomms. & Energy, 438 Mass. 256, 258, 780 N.E.2d 33 (2002)*, we reviewed a decision by the DPU [15] to approve a rate plan proposed by a group of utility companies. Those companies planned to merge, but made the merger contingent [***17] upon approval of the rate plan by the DPU. See *id. at 258-259*. The rate plan allowed the companies to recover the acquisition premium paid to consummate the merger. See *id. at 259-260*. We again acknowledged the regulatory policy [*724] change announced in the *Mergers & Acquisitions* order, and affirmed the DPU's decision and order. [16] See *id. at 259, 263*.

15 At the time, and for the period between November, 1997, and April, 2007, the DPU was known as the Department of Telecommunications and Energy. See St. 1997, c. 164, § 186; St. 2007, c. 19, § 21.

16 In another DPU order, the department concluded that it would allow an acquiring company to seek recovery of its acquisition premium after a proposed merger. See *Bay State Gas Co.*, D.T.E. 98-31 at 45 (1998). Recovery of the premium would be allowed if the company could show that the merger-related benefits were equal to or greater than the share of the premium proposed "to be included in base rates." Id.

These cases and DPU orders amply demonstrate the type of regulatory change anticipated in *Boston Edison Co. v. Assessors of Watertown, supra at 305-306*, justifying the use of a valuation methodology other than net book value. The DPU has declared [***18] its abandonment of a strict carry-over rate base policy, this court has repeatedly and recently acknowledged that policy change, and the DPU has, in practice, allowed the recovery of a premium in a utility merger. [17]

17 We also agree with the board that the DPU's adoption of "performance-based rates" (PBR) could contribute to a buyer's willingness to pay more than net book value for rate-regulated utility property. Under the PBR regime, a "cast off" rate of return is set in a given year, and the DPU sets a fixed annual upward inflation adjustment and a downward productivity adjustment to encourage more efficient operation. See *Boston Gas Co. v. Department of Telecomms. & Energy, 436 Mass. 233, 235, 763 N.E.2d 1045 (2002)*. A buyer who anticipates being able to perform more efficiently than is contemplated by the productivity adjustment could thus earn a higher return than otherwise would be available under existing rate regulation.

[**606] The company contends that developments since the 1994 change in DPU policy in the *Mergers & Acquisitions* order have made it "less . . . likely" that a step-up in rate base would be allowed. The company acknowledges that the DPU has allowed recovery of an acquisition premium in [***19] a merger context but claims that the DPU has not allowed an increase in rate base value following an acquisition since the *Mergers & Acquisitions* order. Such an argument may speak to a diminished probability of a buyer earning a return on an acquisition premium, but factors bearing on valuation need not be certainties before the board may consider how they would manifest in a hypothetical sale. The company's evidence does not rebut evidence of the DPU's current practice of considering inclusion of premiums in the buyer's rate base on a case-by-case basis. The evidence in the record warrants a finding that a potential buyer of the subject property could reasonably conclude that the DPU no longer follows [*725] a policy of "denying acquisition premium recovery on a per se basis," and that the buyer may be able to earn a return on the premium. As the board cited substantial evidence for its conclusion that regulatory change had called into question the exclusive use of net book value, we affirm the board's decision in this regard.

The company also disputes the board's second reason for concluding that it was proper to rely on a valuation method other than net book value: evidence from prior transactions [***20] that utility assets in fact sold for more than net book value. The validity of the sales comparisons are relevant to the resolution of this case in two ways. First, as noted, they serve as a second reason cited by the board for departing from a strict adherence to net book value as the value of the subject property. Second, the assessors' expert relied on such sales in each of his three valuation approaches, and the board ultimately credited the expert's use of those sales in determining the value of the property. The company argues that the sales comparisons were flawed and, as a result, that they did not justify the use of a valuation method other than net book value. The company likewise maintains that the sales should not have been relied upon in estimating the value of the subject property.

At the hearing, the assessors' expert, George Sansoucy, testified that he reviewed twenty-two sales of gas utility property in the United States over the preceding decade, and chose from among them six sales he thought most comparable to the utility property in the present case. [18] Each of the six sales was part of an acquisition or merger transaction that included more than the regulated utility [***21] assets alone. As a result, for each sale, the expert endeavored to isolate the portion of the sale price that was paid for the regulated utility assets, and described his procedure for removing various value ele-

ments not related to that property. The expert's analyses indicated that utility assets were sold for prices well in excess of net book value.

18 One of those sales was the company's acquisition of Eastern Enterprises, the prior owner of the utility assets at issue in this case.

The company takes the position that the assessors' expert had not in fact isolated the price paid for the utility assets. It alleges that in merely subtracting unrelated assets from the price paid for entire utility enterprises, the expert had attributed to the **[*726]** remaining tangible utility property a portion of the purchase price that had actually been paid for intangible sources of value, and that such intangible **[**607]** value is not taxable. See *G. L. c. 59, §§ 2, 18* (authorizing taxation of tangible personal property). See also *G. L. c. 59, § 5*, Twenty-fourth (exempting intangible personal property from taxation). The company sought to support its view with evidence showing (1) that no buyer would pay more for **[***22]** the subject utility assets than their net book value, and (2) that sales of utility enterprises include intangible value that the assessors' expert failed to deduct from the purchase price when analyzing prior transactions. The company asserts that, in overstating the price paid for tangible assets in its analysis of prior comparable transactions, the board in turn overstated the price that would be paid for the company's tangible assets.

To that end, the company presented evidence and testimony from Susan Tierney, an economic and regulatory consultant and former DPU commissioner. She described how the value of a utility enterprise as a whole may include sources of value other than the regulated utility assets. Sources of value beyond the utility assets could include, inter alia, intellectual property, brand name, management acumen, customer base, business relationships, and economies of scale. She also opined that, because utilities earn a return only on their rate base, a buyer of regulated utility property would not pay more for the property than the expected net book value, and that the "norm" of the carry-over rate base principle would restrict the willingness of a buyer to pay **[***23]** more than the seller's existing net book value. Thus, she reasoned, the portion of the price paid that was in excess of net book value was for sources of value in the enterprise other than the regulated utility assets.

The company's other relevant evidence came primarily in the testimony of Joseph Bodanza, who was the chief accounting officer and head of regulatory affairs for Keyspan Corporation in 2003, and who had been an executive with the company prior to Keyspan Corporation's acquisition of the company's parent, Eastern Enterprises. He testified that, with respect to the Eastern Enterprises acquisition of utility company Colonial Gas Company (Colonial Gas) (one of the six transactions analyzed by the assessors' expert), the premium paid was projected to be offset by synergies from elimination of redundant staff and facilities, and **[*727]** acquisition of management expertise. [1920] In testimony pre-filed with the DPU regarding the rate plan for Colonial Gas after the merger, Bodanza also projected a reduction in gas prices as a result of operational efficiencies and synergies in the merger, as well as savings on avoided technology investments. The company claims that those synergies and **[***24]** other intangibles are among the sources of value that account for the premium paid in prior transactions.

19 The assessors sought to undermine these assertions in part by evidence that few in management were in fact retained.

20 Rhode Island was characterized as being less liberal than Massachusetts in the allowance of recovery of acquisition premiums.

To counter the assertion by the company that any premium was necessarily paid for value other than the tangible assets, and thus to reinforce the analysis of its own expert, Sansoucy, the assessors presented evidence from an expert witness in public utilities. This expert discussed a prior series of utility transactions in Rhode Island, a State that he described as having a regulatory regime somewhat similar to that of Massachusetts. In the described transactions, a company had acquired two utility enterprises through mergers, and had paid substantial premiums in the transactions. Upon consummation of the **[**608]** transactions, the utility operations of the acquired companies became an unincorporated division of the acquiring company. Approximately six years later, the acquiring company sold nearly the same group of assets it had acquired in the mergers **[***25]** for approximately the same price and premium it had paid for the two utility enterprises. The assessors contended that such evidence demonstrates that the premiums paid in acquiring utility enterprises are for the underlying utility assets rather than for the other sources of value described by the company's witnesses.

In its decision, the board credited Tierney's distinction between the value of rate-regulated utility property and the value of a broader business enterprise. The board found unsubstantiated, however, her insistence that any amount paid in excess of net book value was necessarily for enterprise value other than the utility assets. With respect to the potential intangible sources of value that Tierney had raised, the board noted that she could not recall an instance of a utility company owning intellectual **[*728]** property; that brand name was not shown to hold discernable value in the present case, as evidenced by the change of the name on the company's Commercial Point tank after changes in ownership; and, consistent

with evidence introduced at the hearing, that there was no discernable value in the customer base of a gas company whose customers are essentially captive.

The board [***26] concluded that the company had not shown that the hypothetical sources of intangible value that Tierney had discussed were in fact present in the sales analyzed by the assessors' expert, and noted also that the company did not present any expert testimony from a qualified appraiser of utility property who might have offered such evidence. With respect to Bodanza's testimony, the board found that he had not broken out the components of value in the Eastern Enterprises acquisition, or the contribution of intangible value to the purchase price. The board also emphasized that Bodanza was neither presented nor qualified as an expert on the valuation of utility property, and that his testimony was accordingly of limited worth in determining the value of the subject assets.

By contrast, the board credited the assessors' expert's testimony as to the portions of prior sale premiums attributable to regulated utility assets, and credited the evidence from the Rhode Island transactions as to the minimal intangible value involved in regulated utility sales. The board accordingly found that a valuation method other than net book value was warranted in the present case, and that the methods of the [***27] assessors' expert -- including implicitly the sales comparisons upon which they rely -- were sound.

In the present appeal, the company restates its contention that the analysis of prior sales failed to account for intangible assets, and argues that the board's findings were thus unsupported and amounted to impermissible taxation of intangible value. As such, the company claims, the analysis of prior sales does not provide a legitimate justification for using a valuation methodology other than net book value. We disagree.

"Although the burden of establishing overvaluation is on the [company], . . . until there is some evidence offered by the assessors to show that, because of [special] circumstances, the relevance of rate base value is put in question," the company is [*729] not required to show the absence of such circumstances. *Montaup Elec. Co. v. Assessors of Whitman, 390 Mass. 847, 855, 460 N.E.2d 583 (1984)*, citing *Foxboro Assocs. v. Assessors of Foxborough, 385 Mass. 679, 691, 433 N.E.2d 890 (1982)*. [**609] Thus, net book value remains the appropriate method until the assessors introduce evidence of such special circumstances. Evidence in the record supports the board's conclusion that the assessors did so, including the assessors' [***28] detailed evidence of prior utility sales that featured acquisition premiums, and the evidence introduced relating to the Rhode Island transactions.

Once the assessors put the exclusive use of net book value in question, the company could have prevented the use of methods other than net book value by rebutting the assessors' evidence. See *Tennessee Gas Pipeline Co. v. Assessors of Agawam, 428 Mass. 261, 264, 700 N.E.2d 818 (1998)*. As the company acknowledges, the board adopted the testimony of the company's expert that the value of a utility enterprise may well include value beyond that of its regulated utility assets. The board found, however, that the company did not offer evidence that would allow the board to deduct the value of such intangibles from the prices paid for the utility enterprises examined in this case, if those intangibles were indeed present. While Bodanza's pre-filed testimony in particular presented figures for expected savings based on his projection of synergies, the board provided cogent reasons for making little use of his testimony. We do not think Bodanza's evidence so detracts from the substantiality of the evidence that there is no longer a "felt or appreciable probability" [***29] of the board's conclusion. See *id. at 262*. In sum, we conclude that the board relied on sufficient evidence in determining that special circumstances warranted the use of a valuation method other than net book value. [21]

> 21 The company did not dispute specifically a third reason given by the board for concluding that a valuation method other than net book value was warranted, namely, that the useful life of gas utility pipeline exceeds its depreciable life, so that the property has residual value in excess of net book value. As the board's decision is supported by the reasons discussed, we do not address this third justification.

ii. *Substantiality of the evidence supporting the EBITDA analysis in the income capitalization approach.* Although the board rested its final valuation on an equal weighting of net [*730] book value and the RCNLD approach, the RCNLD approach relied on the outcome of the assessors' expert's separate income capitalization approach. Specifically, after estimating the cost of reproducing the property in the RCNLD approach, and after accounting for physical depreciation and functional obsolescence, the expert took the further step in the RCNLD analysis of accounting for the [***30] external, or economic, obsolescence of the property as hypothetically reproduced. External obsolescence is a type of depreciation that takes account of market factors external to the property that have an impact on its fair market value, such as an economic recession that decreases demand for the property. See Appraisal Institute, The Appraisal of Real Estate, 442 (13th ed. 2008) (Appraisal of Real Estate).

To account for external obsolescence in the RCNLD approach, the expert simply decreased the RCNLD value to the value derived from the income capitalization approach. He reasoned that the income approach accounts for the effect of regulation and other external factors on the value of the property in a way that the RCNLD approach, before an external obsolescence adjustment, does not. He opined that the difference between the higher RCNLD value (before accounting for external obsolescence) and the lower income approach value was thus itself a measure of external obsolescence. Subtracting this difference **[**610]** from the RCNLD approach, of course, renders the value from the RCNLD approach equivalent to that of the income approach. It was this final RCNLD value that the board weighted equally **[***31]** with net book value to reach its final valuation. [2223] In this regard, the company argues that the board's valuation, despite purporting to rely on the RCNLD approach, effectively reduces to reliance on the income capitalization approach.

22 A stated reason given by the board for not relying on the income capitalization approach more directly was that it "is not typically used to estimate the value of special purpose property." The board concluded that while the approach was "generally reliable," it was "better suited as support for the value derived under the [RCNLD] approach rather than as the primary valuation methodology."

23 In the direct capitalization method used by the assessors' expert, one capitalizes the earnings estimate by either dividing it by an appropriate capitalization rate, or multiplying it by an income factor. Appraisal of Real Estate, supra at 499. The expert's EBITDA multiplier approach is presented as a form of the latter.

We accord deference to the expertise of the board in its choice of an appropriate methodology for valuing the subject property. Here, the board gave weight to the assessors' expert's income capitalization approach for the purpose of estimating **[***32]** economic **[*731]** obsolescence in the board's RCNLD valuation. Given the importance of the income capitalization approach to the board's final valuation, we conclude that the income approach must itself be sound. The company alleges that there are errors in the estimation and capitalization of earnings in the income capitalization analysis, and we partially remand these issues to the board for further consideration.

In his analysis, the assessors' expert first estimated the annual EBITDA attributable to the company's subject property. He then capitalized this figure, using an "EBITDA multiplier," to arrive at a valuation of the property. The EBITDA multiplier was derived by looking at six comparable sales of regulated utility property, and calculating the ratio of sales price to annual EBITDA for each. The approximate average of these figures was the expert's EBITDA multiplier. Multiplying the EBITDA of the company's property by the EBITDA multiplier, the expert derived an estimated sales price of the company's property.

Rather than capitalizing a single year of the company's EBITDA from the subject property, the expert chose to "smooth" the EBITDA estimate by taking a seven-year sample of the **[***33]** company's annual EBITDA figures. Those years were calendar years 1997 through 2003. The expert eliminated year 2000, the year for which there was the lowest EBITDA, for reasons that are not challenged by the company. He also eliminated year 2001, the year for which there was the second-lowest EBITDA, on account of the abnormal amounts of deferred income taxes and amortization expenses that were taken that year.

Because neither income taxes nor amortization expenses enter into EBITDA, the company alleges that the board provided no evidence upon which to exclude the 2001 figure. The board's decision states only that the expert "removed 2001 because of discrepancies relating to depreciation and amortization." [24]

24 The board also states that the 2001 EBITDA figure was $24,556,000, while the range of values of the other five years included in the average was $31,323,000 to $40,432,000. The board does not state that this is why the figure was excluded.

[*732] Even according substantial deference to the board, we can discern no reason **[**611]** from the evidence in the record why abnormal depreciation and amortization expenses -- or a Federal income tax issue discussed in the expert's testimony -- should result **[***34]** in the exclusion of the 2001 EBITDA figure, and the board's statement on the issue does not clarify its decision in that regard. The document on which the expert relied shows the components of EBITDA, none of which are among the figures he identifies as anomalous. As this change would have the potential to decrease the assessed value, contingent upon the outcome of other issues remanded in this opinion, we remand this issue for further consideration by the board.

The company also objects to the inclusion of EBITDA from calendar year 2003, because those earnings were generated after the relevant assessment date of January 1, 2003. See *G. L. c. 59, § 18* (establishing January 1 assessment date for personal property). The fact that the data arise after the relevant assessment date, standing alone, does not mean that they are per se ex-

cluded from the board's consideration. Cf. *Teele v. Boston, 165 Mass. 88, 91-92, 42 N.E. 506 (1896)* (allowing consideration of comparable sale that took place after date of eminent domain taking); *Roberts v. Boston, 149 Mass. 346, 354, 21 N.E. 668 (1889)* (holding that "[t]he mere lapse of time after [a] taking did not render the evidence of . . . sales incompetent," and that "the discretion **[***35]** of the court seems to have been rightly exercised in admitting the evidence"). Such evidence can be used, where its probative value is not outweighed by the risk of hindsight bias or other factors, for the limited purpose of determining the value of the property as of the assessment date. In so doing, the relevant inquiry is whether the evidence reflects information that would be knowable to a hypothetical buyer and seller of the subject property as of the assessment date.

In the present case, the 2003 figure was one of five data points used for the purpose of "smoothing" an annual EBITDA figure, so that evidence from before the assessment date formed the principal basis of valuation. [25] The evidence from after the assessment date was limited to the immediately subsequent **[*733]** year, and the earnings were generated from property that was largely unchanged. We conclude that, in the circumstances, the board did not err in allowing the 2003 figures to be included in the averaged EBITDA value.

25 It is notable also that the average EBITDA value with 2003 excluded -- approximately $35.78 million -- is very similar to the approximate EBITDA in 2003 of $35.76 million. The values of the four pre-assessment **[***36]** years ranged from $31.3 million to $40.4 million.

Finally, the company argues that the board erred in failing to adjust the expert's EBITDA multiplier for an alleged error in his analysis. For the reasons outlined below, we remand this issue for consideration by the board.

As discussed, the EBITDA multiplier was calculated as an approximate average of the ratio of sale price to EBITDA in six prior sales. One of the six sales used was Keyspan Corporation's acquisition of Eastern Enterprises in 2000. The expert's report indicates that at the time of that sale, Colonial Gas was a subsidiary of Eastern Enterprises, and the expert testified that Colonial Gas had become a subsidiary of Eastern Enterprises in August of 1999. The company maintains that the expert erred in calculating the sales price to EBITDA ratio for that sale by using a sale price from 2000, which included the amount paid for Colonial Gas, while using an EBITDA from the end of 1998, which did not include Colonial Gas's contribution **[**612]** to EBITDA. As a result, the company asserts that the expert's sales price to EBITDA ratio was inflated.

The company cross-examined the expert in detail on the issue, introduced an exhibit showing **[***37]** the proposed recalculation, and noted the error in the post-hearing brief it submitted to the board. While the board recognized that the expert had made a similar error in his exclusion of Colonial Gas's net book value from his ratio of sales to net book value -- and made a correction for that error -- the board made no findings with respect to the sales to EBITDA ratio, and indeed did not discuss the issue.

While the board is specifically exempted from the Massachusetts Administrative Procedure Act, *G. L. c. 30A §§ 1, 11 (8)*, the board is nonetheless bound by "general principles affecting administrative decisions and judicial review of them." *Schlaiker v. Assessors of Great Barrington, 365 Mass. 243, 245 n.2, 310 N.E.2d 602 (1974)*, quoting *Assessors of New Braintree v. Pioneer Valley Academy, Inc., 355 Mass. 610, 612 n.1, 246 N.E.2d 792 (1969)*. Accordingly, we have held **[*734]** that "[t]he board's decision must state adequate reasons in support of its decision so as to permit meaningful appellate review." *Blakeley v. Assessors of Boston, 391 Mass. 473, 476, 462 N.E.2d 278 (1984)*, citing *New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 467, 420 N.E.2d 298 (1981)*. Because this issue was adequately raised before the board, and because we have **[***38]** no findings of the board to review, we remand this issue to the board for consideration.

iii. *Use of a tax factor in income capitalization.* The company next claims that the board erred in adopting an income capitalization approach that did not utilize a "tax factor." We remand the matter to the board for further findings and rulings.

As noted, the assessors' expert's income capitalization method took an average annual EBITDA figure for the company's utility property, and capitalized that figure using an EBITDA multiplier to arrive at a valuation of the property. In calculating the company's EBITDA figure for each of the years that were included in the average, the expert deducted the property tax expense actually incurred by the company.

The company asserts that the proper method to account for property taxes is not to deduct the tax expense from EBITDA, but to include a tax factor in the capitalization rate -- or, in the present case, in the EBITDA multiplier. [26] The included tax factor would be the relevant fiscal year's tax rate. [27] "The purpose of a tax factor, in a formula for capitalizing earnings, is to reflect the tax [that] will be payable on the assessed valuation produced by **[***39]** the formula." *Assessors of Lynn v. Shop-Lease Co., 364 Mass. 569, 573, 307 N.E.2d 310 (1974)*, citing *Assessors of Lynnfield v. New England Oyster House, Inc., 362 Mass. 696, 700 n.2, 290 N.E.2d 520*

(1972). We have recognized that, in using a tax factor rather than the tax expense actually incurred, one avoids including **[**613]** the very tax assessment in dispute in the valuation of the property for the **[*735]** purpose of resolving that dispute. [28] See *Assessors of Lynnfield v. New England Oyster House, Inc., supra*, quoting *New Brunswick v. New Jersey Div. of Tax Appeals, 39 N.J. 537, 546, 189 A.2d 702 (1963)* ("The expense of local taxation turns on the very point in dispute, the fair cash value of the property. Logically, therefore, income should be capitalized before taxes 'with the capitalization rate increased to yield the return the investor expects plus the amount of local taxes payable.'").

26 Rates used in capitalization are the reciprocals of multipliers. Dividing annual income by a capitalization rate yields a valuation; multiplying annual income by an income multiplier achieves the same result. See Appraisal of Real Estate, supra at 516; id. at 499.

27 For example, a tax rate of $33.08 per $1,000 would first be expressed as a decimal (0.03308) **[***40]** and then added to the capitalization rate. The annual income would then be divided by this sum to determine the value of the property. See, e.g., *Assessors of Brookline v. Buehler, 396 Mass. 520, 523-524, 487 N.E.2d 493 (1986)*. An equivalent adjustment can be made to an income multiplier.

28 This problem may become more acute when the 2004 "test year" is applied to more recent years. The average EBITDA calculated by the assessors' expert considered the six years prior to the assessment date. If he were to look to the six years prior to fiscal year 2009, for example, nearly all of the tax expenses that would be deducted from EBITDA in those years would be a result of the assessments challenged in this case.

We have discussed the use of a tax factor on a number of occasions. While we have never held that a tax factor is required in income capitalization analyses -- and we do not so hold today -- we have noted the board's preference for the use of a tax factor in accounting for local real estate taxes, *Assessors of Lynnfield v. New England Oyster House, Inc., supra at 700 n.2*; we have discussed the logic underlying its use, id.; and we have addressed the appropriateness of the tax rate used in its application, **[***41]** *Assessors of Lynn v. Shop-Lease Co., supra at 573*. A tax factor is often used in income capitalization analyses before the board. See, e.g., *Black Rock Golf Club, LLC vs. Assessors of the Town of Hingham, Mass. App. Tax Bd. Rep., Nos. F284357, F288545, 2010 Mass. Tax LEXIS 11 (Mar. 1, 2010)*.

The company appropriately raised this issue, together with a proposed recalculation of the income capitalization valuation, [29] in its reply brief before the board. The board did not discuss the issue in its decision. Given the board's expressed preference for the use of a tax factor, the frequent use of a tax factor in income capitalization analyses, the consideration of its use by this court, and its potential importance in this case, we conclude that the board should have addressed this issue.

29 Should the board utilize a tax factor on remand, the question whether the company's specific figures and calculations should be adopted is a matter for the board.

There may well be facts or methodological considerations in the present case that would justify the method used to account for property taxes in the income capitalization analysis. If so, **[*736]** we would accord our usual deference to the board's findings. See *General Elec. Co. v. Assessors of Lynn, 393 Mass. 591, 608, 472 N.E.2d 1329 (1984)*. **[***42]** However, as we are unable to review meaningfully the board's decision in the absence of findings or rulings on the matter, we remand this issue to the board for further consideration.

iv. *Weight of the evidence and credibility of the witnesses*. The company also asserts that the board made a number of errors in its weighing of the evidence introduced at trial. We conclude that these claims are without merit.

The company first claims that the board erred in finding that evidence of the assessed valuation of comparable utility property was not probative of the proper valuation of the company's property. The evidence in question included the assessment of other gas utility property in the city at 1.07 times its net book value and evidence that the company's utility property in other Massachusetts communities had only rarely been assessed at a value **[**614]** above its net book value. The board admitted this evidence at the hearing.

To support its claim, the company cites *G. L. c. 58A, § 12B*, which states that "[a]t any hearing relative to the assessed fair cash valuation or classification of property, evidence as to the fair cash valuation or classification of property at which assessors have assessed **[***43]** other property of a comparable nature or class shall be admissible." As that statute speaks to the admissibility of evidence, rather than the board's assessment of its weight, the statute is not a basis for relief here.

With respect to the evidence of assessments in other Massachusetts communities, the board described that evidence and noted in its decision that the testimony on that matter had been brief. Indeed, the testimony did not discuss any of the individual circumstances or other de-

tails of those assessments, or provide any other evidence in that regard. The board did not comment specifically on the evidence of Boston utility property valued at 1.07 times net book value, but indicated that the testimony was not helpful in valuation. We conclude that it was within the discretion of the board to determine the weight given to such evidence.

The company next argues that the board failed to address the impact on the income capitalization approach of a regulation mandating replacement of cast-iron mains. See *220 Code Mass. Regs. §§ 113.00 et seq.* **[*737]** (1993). The company asserts that the costs to the company of such regulations should have been accounted for "through the adoption of a reserve **[***44]** or other means within the income approach." In support of its contention, the company cites prior decisions of the board in which a reserve for replacements was adopted in an income approach. In those instances, the reserve was adopted in the form of an addition to expenses to account for the projected replacements. See *Olympia & York State Street Co. v. Assessors of Boston, 23 Mass. App. Tax Bd. Rep. 96, 103, 1997 Mass. Tax LEXIS 81, *14 (1997)*, aff'd on other grounds, *428 Mass. 236, 237, 700 N.E.2d 533 (1998)* (setting reserve for replacements of one per cent of effective gross income from subject property); *Saunders v. Assessors of Boston, 15 Mass. App. Tax Bd. Rep. 1, 7, 1993 Mass. Tax LEXIS 14, *14 (1993)* (adding sum to operating expenses per square foot per year). See also Appraisal of Real Estate, supra at 490 (discussing inclusion of replacement allowance in estimates of income).

In its findings of fact, the board recounted testimony regarding the regulatory requirement that cast-iron mains be replaced, and noted other expenses associated with the use of cast-iron mains. In its later assessment of excess operating expenses, [30] the board found it appropriate to increase the company's expenses from $2,100 to $3,600 per mile of pipe, because the assessors' **[***45]** expert had inadvertently used the company's system-wide expenses instead of those specific to Boston. [31] In so doing, the board noted that the higher sum "accounted for the disproportionately high amount of cast iron pipe in Boston." While the board did not break out the specific factors contributing to the higher **[**615]** expenses associated with such pipe in the city, or the value contribution of each, [32] it is apparent that the board had considered the evidence related to the regulatory requirements, **[*738]** together with other costs inherent in a system that uses such pipe, and made an adjustment accordingly. In the circumstances, greater specificity was not required of the board. Cf. *Jordan Marsh Co. v. Assessors of Malden, 359 Mass. 106, 110, 267 N.E.2d 912 (1971)* (board is "not required to specify the exact manner in which [a valuation figure] was arrived at" where its decision "[made] reasonably clear what it was deciding as to each element of value").

30 Part of the assessors' expert's RCNLD approach accounts for the fact that, if reconstructed new today, the system would be composed of plastic pipe rather than cast iron or steel pipe. The excess operating costs are those associated with the operation and maintenance **[***46]** of a system composed of these older materials.

31 The board also decided to average the final RCNLD figure with net book value, in part, to account for the "contemporaneous regulatory environment," although the board's primary focus in that respect appears to have been on changes to the carry-over rate base principle.

32 The board noted that the record did not reflect the precise excess operating costs incurred by the company in the city of Boston.

Finally, the company alleges that the board did not sufficiently take account of the fact that the expert had prepared a prior appraisal report that differed significantly in its valuation from the appraisal presented at the hearing. The specific redress requested by the company in this respect is somewhat unclear, but the company implies that the board should have found that the expert's credibility had been undermined.

The board admitted the expert's prior report as evidence, acknowledged the report in its decision, and ultimately decided that the appraisal presented by the expert at trial was credible. Where the board has reviewed such evidence in the record, we will not second-guess the board's conclusions as to witness credibility. See *Cummington School of the Arts, Inc. v. Assessors of Cummington, 373 Mass. 597, 605, 369 N.E.2d 457 (1977)*, **[***47]** citing *Fisher School v. Assessors of Boston, 325 Mass. 529, 534, 91 N.E.2d 657 (1950)* ("[t]he credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are matters for the board").

b. *Valuation of the real property.* The company maintains that the board erred in ruling that there was insufficient evidence to determine the value of the real property. In this respect, the company cites several valuations proposed during the hearing on which the board could have drawn, and concludes that, given the board's conclusions as to the personal property, consistency dictates that the real property "should be weighted at an appropriate ratio with [net book value]." We do not agree.

In an appeal before the board, the assessment is presumed valid until the taxpayer demonstrates its right to an abatement. *Schlaiker v. Assessors of Great Barring-*

ton, 365 Mass. 243, 245, 310 N.E.2d 602 (1974). The board heard testimony and received evidence from several witnesses as to the proper method of estimating the value of the real property. Tierney posited, on the basis of **[*739]** detailed evidence in her report, that the property's highest and best use [33] was its current use as rate-regulated utility property. **[***48]** The board credited her testimony in that regard. Relying on her prior assertion that no buyer would pay more than net book value for rate-regulated utility property, she concluded that the value of the real property was its net book value. As noted previously, the board found unsubstantiated Tierney's broad assertion that the value of rate-regulated utility property is its net book value, and accordingly concluded that her **[**616]** testimony did not provide credible evidence of the value of the property.

> 33 In an appraisal, the "highest and best use" of property is "the reasonably probable and legal use of vacant land or an improved property that is legally permissible, physically possible, appropriately supported, financially feasible, and that results in the highest value." Appraisal of Real Estate, supra at 278.

The board also heard testimony from two real estate appraisal experts -- one offered by the company, the other by the assessors. The board found that the testimony of the company's expert was of limited probative value because he appraised the land under the assumption that it was not rate-regulated utility property. He did so despite credited evidence from Tierney, and indeed despite **[***49]** his own determination, that the property's highest and best use was its current use. The board similarly concluded that the assessors' appraisal expert's valuation "did not provide sufficient probative evidence" to establish the value of the real property. He valued the land on the assumption that it was vacant and available for development, an assumption that the board found at odds with the evidence that under no foreseeable circumstances would the property be used in any capacity other than its current use.

It was well within the discretion of the board to determine, on the basis of the evidence in the record, that the company had failed to demonstrate its right to an abatement. Having found no credible evidence on which to appraise the real property, the board also left undisturbed the parcel size used by the assessors, which had been a subject of disagreement between the parties' experts. The board noted in this regard that neither of the parties had offered evidence from a registered land surveyor. This conclusion was likewise within the board's discretion.

3. Conclusion. The board did not err in using a valuation method that equally weighted net book value and RCNLD. **[*740]** Further, **[***50]** the board did not err in taking account of evidence from after the assessment date, or in its weighing of evidence related to the assessors' expert's credibility, the impact of cast-iron replacement regulations, or the assessments of other utility properties in Massachusetts. With respect to the real property, we affirm the board's decision to leave the assessed value undisturbed.

We remand the matter to the board for further consideration, consistent with this opinion, of (1) its decision not to use a tax factor to account for property taxes in the income capitalization analysis; (2) its exclusion of 2001 EBITDA from the average EBITDA generated by the company's personal property; and (3) the assessors' expert's alleged failure to account for Colonial Gas's EBITDA in Keyspan Corporation's acquisition of Eastern Enterprises.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

BOSTON GAS COMPANY d/b/a KEYSPAN ENERGY DELIVERY NEW ENGLAND v.	**THE BOARD OF ASSESSORS OF THE CITY OF BOSTON**
Docket Nos. F275055, F275056	Promulgated: April 21, 2011

These Findings of Fact and Report are promulgated simultaneously with the reinstated decision of the Appellate Tax Board ("Board") on remand pursuant to G.L. c. 58A, §13 and 831 CMR 1.32. These appeals were originally filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the City of Boston ("assessors" or "appellee") to abate taxes on certain real estate and personal property in the City of Boston owned by and assessed to Boston Gas Company d/b/a Keyspan Energy Delivery New England ("appellant") under G.L. c. 59, §§ 11, 18 and 38, for fiscal year 2004.

Chairman Hammond heard the appeals and was joined in the original decisions for the appellee by Commissioners Scharaffa, Egan, Rose and Mulhern. The appellant appealed the decisions and the Supreme Judicial Court granted an application for direct appellate review. Following the Court's remand in part, Chairman Hammond and Commissioners Scharaffa, Egan, Rose and Mulhern join in the reinstated decision for the appellee.

John M. Lynch, Esq. and *Stephen W. DeCourcey*, Esq. for the appellant.
David L. Klebanoff, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

Background

The subject of these appeals is virtually all of the appellant's personal and real property comprising its natural gas storage and distribution system located within the City of Boston as of January 1, 2003. On December 16, 2009, simultaneously with the issuance of decisions for the assessors, the Board promulgated its initial Findings of Fact and Report relating to the appeals ("Initial Findings"), which are incorporated herein by reference. In so doing, the Board found and ruled that:

> the appellant failed to demonstrate that the fair cash value of the property considered in [the] appeals was limited to its net book value, or to sustain its burden of establishing that the property's value was less than its assessed value for fiscal year 2004; the assessors presented substantial evidence demonstrating that a potential buyer would pay more than net book value for the personal property at issue in [the] appeals; [assessors'] adjusted RCNLD[1] valuation methodology and net book value, at a one-to-one ratio, provided an appropriate method to value the personal property; based on the combination of RCNLD and net book value, the fair cash value of the personal property as of January 1, 2003 . . . exceeded its assessed value; and the evidence of record did not provide a sufficient basis to estimate the fair cash value of the [real] property.

Boston Gas Company d/b/a Keyspan Energy Delivery New England v. Assessors of Boston, Mass. ATB Findings of Fact and Reports, 2009-1195, 1273.

The Supreme Judicial Court affirmed the Board's findings and rulings relating to the real property at issue and the Board's consequent "decision to leave the assessed value undisturbed."[2] ***Boston Gas Company v. Board of Assessors of Boston,*** 458 Mass. 715, 740 (2011). The Court also rejected the appellant's central assertion that the fair cash value of the property at issue was less than or equal to its net book value, and affirmed, in substantial measure, the Board's findings and rulings relating to the personal property. Finally, the Court, rejecting several other arguments presented by the appellant, held that:

> [t]he board did not err in using a valuation method that equally weighted net book value and RCNLD. Further, the board did not err in taking account of evidence from after the assessment date, or in its weighing of evidence related to the assessors' expert's credibility, the impact of cast-iron replacement regulations, or the assessments of other utility properties in Massachusetts.

Id.

The Court remanded the personal property appeal with respect to three discrete elements of the assessors' income-capitalization methodology, which the Board had adopted for the limited purpose of deriving the economic obsolescence component of the RCLND methodology. In particular, the matter was remanded for further consideration, consistent with the Court's opinion, of the Board's:

> (1) . . . decision not to use a tax factor to account for property taxes in the income capitalization analysis; (2) . . . exclusion of 2001 EBITDA[3] from the average EBITDA generated by the company's personal property; and

[1] The acronym RCNLD stands for "reproduction cost new less depreciation."
[2] That appeal, represented by Docket No. 275055, is therefore no longer at issue.
[3] The acronym EBITDA stands for "earnings before interest, taxes, depreciation, and amortization."

(3) the assessors' expert's alleged failure to account for Colonial Gas's EBITDA in Keyspan Corporation's acquisition of Eastern Enterprises.

Id.

OPINION

Use of a Tax Factor

Having observed that the Board made no reference in the Initial Findings to the absence of a tax factor in the income-capitalization analysis presented by George Sansoucy, the assessors' valuation expert, the Court noted its prior discussions regarding incorporation of a tax factor in an income-capitalization analysis and made specific reference to "the logic underlying its use." *Id.* at 735. While the Court declined to hold that a tax factor must be employed in income-capitalization analyses, the Court concluded that "[g]iven the board's expressed preference for the use of a tax factor, the frequent use of a tax factor in income capitalization analyses, the consideration of its use by this court, and its potential importance in this case, we conclude that the board should have addressed this issue." *Id.*

Although not discussed in the Initial Findings, the Board eschewed the use of a tax factor for several reasons. As a threshold matter, and consistent with its decisions in recent utility company appeals, the Board recognizes here "the inherent difficulty in quantifying economic obsolescence" when estimating the value of utility property using an RCNLD approach. ***Verizon New England, Inc., Consolidated Central Valuation Appeals,*** Mass. ATB Findings of Fact and Reports, 2009-851,937; *see also* ***MCI Consolidated Central Valuation Appeals,*** Mass. ATB Findings of Fact and Reports, 2008-855; *aff'd in relevant part,* 454 Mass. 635 (2009). Over the years, appellants and appellees alike have presented numerous and frequently disparate methodologies in their attempts to quantify this elusive measure. *See* ***Verizon New England, Inc.,*** Mass. ATB Findings of Fact and Reports at 2009-882,883, 885-887; ***MCI,*** Mass. ATB Findings of Fact and Reports at 2008-301-303, 308-310; ***Tennessee Gas Pipeline Company v. Assessors of Agawam,*** Mass. ATB Findings of Fact and Reports, 2000-859, 867.

In the present appeal, to arrive at an estimate of economic obsolescence, the Board adopted the approach used by Mr. Sansoucy, in which he derived an "EBITDA multiplier" from six market sales, which he then applied to an "average" EBITDA associated with the subject property. Mr. Sansoucy then used the product of that calculation, which represented his value under the income-capitalization approach, to

determine the percentage difference between his income value and his higher RCNLD value (before economic obsolescence). The difference quantified the amount of external obsolescence that he applied in his RCNLD methodology. For each of the years used to arrive at the average EBITDA, Mr. Sansoucy accounted for the appellant's property tax expense as a deduction, and his multiplier did not include a tax factor.

When using an income approach to value property for *ad valorem* tax purposes, it is ordinarily desirable to load the cap rate or multiplier with a tax factor instead of "expensing" the *ad valorem* tax. This practice is based on the premise that *ad valorem* taxes are determined by the value of the property at issue. Therefore, it would not be proper to include the disputed tax assessment in the expenses leading to the net income or earnings that are used to estimate the subject property's value. *See* ***Boston Gas Company***, 458 Mass at 734, 735 (citations omitted).

In its methodology, the Board did not use an income-capitalization approach to directly value the subject property. Rather, the Board adopted the income method to attempt to quantify one category in its RCNLD methodology – economic obsolescence. Because the Board did not directly value the subject property using an income approach, expensing the personal property taxes was appropriate, particularly where the Board utilized a range of varying EBITDAs over several years, which were coupled with varying personal property *ad valorem* tax expenses over those same years.

Because the rates that regulated utilities are entitled to charge include reimbursements for previously paid *ad valorem* personal property taxes, the rate-payers reimburse the appellant for prior years' taxes. Reducing EBITDA by the *ad valorem* tax more recently paid adequately accounts for these taxes in a methodology that is intended to quantify economic obsolescence in a RCNLD approach.

Moreover, the economic obsolescence associated with the property's highly regulated earnings is taken into account by blending the subject property's net book value with the value derived from the RCNLD approach. Accordingly, if anything, the Board underestimated the value of the subject property by adopting Mr. Sansoucy's approach to economic obsolescence because Mr. Sansoucy did not use a blended approach, as did the Board, to value the property. Mr. Sansoucy's sole measure of economic obsolescence was in his RCNLD methodology. The Board used two measures. Consequently, the Board's estimate of the subject property's value constitutes a floor.

Exclusion of 2001 EBIDTA

As part of its discussion relating to the development of Mr. Sansoucy's EBITDA

multiplier, the Court observed that:

> [r]ather than capitalizing a single year of the company's EBITDA from the subject property, [Mr. Sansoucy] chose to "smooth" the EBITDA estimate by taking a seven-year sample of the company's annual EBITDA figures. Those years were calendar years 1997 through 2003. [Mr. Sansoucy] eliminated year 2000, the year for which there was the lowest EBITDA, for reasons that are not challenged by the company. He also eliminated year 2001, the year for which there was the second-lowest EBITDA, on account of the abnormal amounts of deferred income taxes and amortization expenses that were taken that year.

Noting that "neither income taxes nor amortization expenses enter into EBITDA," a fact that Mr. Sansoucy acknowledged in his testimony, the Court stated that it could "discern no reason from the evidence in the record why abnormal depreciation and amortization expenses [] or a Federal income tax issue . . . should result in the exclusion of the 2001 EBITDA figure, and the board's statement on the issue does not clarify its decision in that regard."

While not discussed in the Initial Findings, the Board's determination was not based on the presence of the anomalous amounts of deferred income taxes and amortization expenses, but by its own observations relating to the company's figures for 2001, as well as Mr. Sansoucy's inference that the cited anomalies were indicative of other significant issues which, on balance, rendered the 2001 EBIDTA of no utility in developing the EBITDA multiplier. In particular, the Board was influenced by 2001's atypical expense ratio, its substantially negative sum relating to income taxes, and perhaps most significantly, the fact that the average EBITDA as a percentage of total operating revenue for the years presented was more than 50% higher than the percentage for 2001. In addition, the Board found that many of the anomalies appeared to be tied to the prior year's acquisition of Eastern Enterprises. Absent countervailing evidence in the record indicating that the 2001 EBITDA should have been included in the sample, the Board therefore agreed with Mr. Sansoucy's decision to remove it from his calculation as part of his smoothing process.

Notwithstanding the foregoing, even if the Board had not excluded the 2001 EBITDA from the sample, the subject property's valuation would still have exceeded its assessed value, as indicated, *infra*, at p. 278.[4]

[4] Incorporation of the 2001 EBITDA would reduce the Board's original adjusted EBIDTA of $28,791,500 to a revised adjusted EBITDA of $26,996,500. This sum is arrived at by adding together the EBITDAs for 1997, 1998, 1999, 2001, 2002, and 2003, and finding their average, which is $33,905,000. This average is then adjusted by $6,908,500 to account for the appellant's excess operating costs.

EBITDA Ratio

After having discussed the derivation and use of the EBITDA multiplier in Mr. Sansoucy's income-capitalization analysis, the Court focused on Keyspan Corporation's acquisition of Eastern Enterprises, one of the six sales used by Mr. Sansoucy to derive the multiplier. Specifically, the Court reiterated the appellant's assertion that the transaction's sale price from the year 2000 included the amount paid for Colonial Gas, an entity previously acquired by Eastern Enterprises, but the EBITDA employed by Mr. Sansoucy improperly failed to include the contribution to EBITDA made by Colonial Gas.

The Board agrees with the appellant with respect to this issue. Mr. Sansoucy used an EBITDA of $175,926,000, which related to the year ended 12/31/98. Eastern Enterprises acquired Colonial Gas in August of 1999. Thus, Mr. Sansoucy's chosen EBITDA failed to appropriately reflect the contribution to earnings of Colonial Gas. The record, however, contains an EBITDA figure for the year ended 12/31/99, which not only reflects the contribution made by Colonial Gas but is proximate in time to the Keyspan/Eastern Enterprises acquisition. The Board thus finds that this sum, $194,812,000, should be employed to calculate the Eastern Enterprises sale price to EBITDA ratio, which reduces the ratio for this transaction from 12.8 to 11.55.[5] In turn, the average of the six ratios used to derive the EBITDA multiplier is reduced from 11.7, which had been adopted by the Board in the Initial Findings, to 11.57.[6]

Incorporation of Adjustment

The product of the EBIDTA multiplier and the adjusted EBITDA yields an indicated value under the income-capitalization approach. In the Initial Findings, as previously noted, the Board adopted $28,791,500 as the adjusted EBITDA and 11.7 as the EBITDA multiplier, the product of which is $336,860,550. The revised EBITDA multiplier of 11.57 multiplied by the adjusted EBITDA of $28,791,500 yields a value of $333,117,655 under the income-capitalization approach. This reduction in value increases the economic obsolescence allowance from 10.2%, as adopted in the Initial Findings, to 11.2%.[7] In turn, the indicated value under the RCNLD approach is reduced from $336,848,000 to the rounded sum of $333,097,000.

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[5] The initial ratio of 12.8 represented Eastern Enterprises' sale price of $2,251,000,000 divided by Mr. Sansoucy's chosen EBITDA of $175,926,000. The revised ratio represents this same sale price divided by the 1999 EBITDA of $194,812,000.

[6] The six ratios used to calculate the revised average ratio are: 10.56; 13.32; 9.46; 15.15; 9.38; and the revised Eastern Enterprises ratio of 11.55.

[7] These percentages reflect the proportional difference between $375,109,000, the RCNLD value before incorporating an allowance for economic obsolescence, and the indicated values derived under the income analysis.

The final valuation of the subject property, which affords equal weight to RCNLD and net book value, is $246,127,000,[8] a sum which is slightly less than the $248,000,000 valuation adopted by the Board in the Initial Findings, but which exceeds the subject property's assessed value of $223,200,000 for fiscal year 2004.[9]

Effect of Blended Valuation Methodology

Lastly, the Board considered the remand an opportunity to review the record anew, as well as its findings relating to its use of economic obsolescence in its RCNLD method. Having done so, the Board now finds that economic obsolescence is likely fully accounted for by including net book value as a 50% component in a blended approach to value, thereby obviating the need to incorporate a category of economic obsolescence in its RCNLD methodology. In fact, on more than one occasion when valuing a regulated utility property using a blended approach that incorporates net book value along with another valuation method which has an economic obsolescence component, the Board has removed the economic obsolescence element from the other valuation method on the theory that the blending of the net book value otherwise and adequately accounts for any economic obsolescence. *See, e.g.,* ***Tennessee Gas Pipeline Company,*** Mass. ATB Findings of Facts and Reports at 2000-870-871 & 883; *see also* ***Boston Edison Co. v. Board of Assessors of Everett***, Mass. ATB Findings of Facts and Reports 1996-759, 808, 810-811 & 849. Had the Board similarly removed the economic obsolescence component in this appeal, the rounded indicated value of the subject property would have been $267,133,000, representing an equal weighting of net book value and $375,109,000, the RCNLD value before incorporation of an allowance for economic obsolescence.

Based on the foregoing, the Board decided this appeal for the appellee.

THE APPELLATE TAX BOARD

By:_____

Thomas W. Hammond, Jr. Chairman

A true copy,
Attest:_____
Clerk of the Board

[8] The net book value of the property is $159,157,892. When added together with the RCNLD value of $333,097,000 and divided by two to comport with the Board's 50%/50% weighting, these sums yield an indicated value of $246,127,446, which the Board rounded to $246,127,000.

[9] As noted, *supra*, had the Board included 2001 in the sample used to derive the adjusted EBITDA employed in the income-capitalization analysis, the revised adjusted EBITDA would have been $26,996,500. This sum, multiplied by the revised EBITDA multiplier of 11.57, would yield a value of $312,349,505 under the income-capitalization approach. The economic obsolescence allowance, in turn, would rise to 16.73%, and the rounded indicated value under the RCNLD approach would be $312,353,000. The final rounded valuation of the subject property under the blended RCNLD/net book value approach would be $235,755,000, which is greater than the property's 2004 assessed value.

Massachusetts Department of Revenue *Division of Local Services*
Navjeet K. Bal, Commissioner Robert G. Nunes, Deputy Commissioner & Director of Municipal Affairs

July 29, 2011

Board of Assessors

Dear Board Members:

The New Cingular Wireless Appellate Tax Board (ATB) cases are scheduled for a pretrial conference next week on Thursday, August 4, 2011.

When the Department of Revenue (DOR) had initially treated the New Cingular entities as telephone companies subject to central valuation, the Commissioner had valued the New Cingular entities for the years at issue using DOR's mass appraisal system designed to value telephone company personal property. As wireless carriers have now been determined not to qualify as telephone companies, the fair cash value of the subject wireless property may not have the benefit of prior cases in which the ATB upheld the Commissioner's telephone company personal property mass appraisal system. In determining whether your city or town presents affirmative evidence in any of the subject appeals, you should consider that the Commissioner does not currently intend to present valuation opinion evidence in these appeals. As a convenience to the parties, the Commissioner will present the property lists previously filed with the Commissioner and the actual valuations issued. As assessors are currently responsible for defending valuations and assessments for wireless properties, assessors should consider any need for their own valuation evidence.

Assessors who wish to present evidence at trial, once it is scheduled, must notify the ATB by letter before the 8/4 pretrial conference.

Further, it has been brought to our attention by assessors that a depreciation schedule is being presented to assessors by New Cingular as part of a settlement offer and it may have been suggested that it was developed in consultation with the Department of Revenue. That is not the case; the DOR did not consult with the company. We review schedules submitted to us for certification to determine if they meet our minimum standards, but we do not endorse any particular schedule. In addition, no FY2012 depreciation schedules for wireless personalty have been reviewed by the Bureau of Local Assessment to date for any company in any community. The decision to resolve pending appeals is for each Board of Assessors. (See attached Order.)

Sincerely yours,

Marilyn H. Browne

Marilyn H. Browne, Chief
Bureau of Local Assessment

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JUN 2 8 2011

Nancy M. Reimer, Esq.
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Re: NEW CINGULAR WIRELESS PCS, LLC
v. COMMISSIONER OF REVENUE & VARIOUS CITIES AND TOWNS &

VARIOUS CITIES AND TOWNS
v. COMMISSIONER OF REVENUE & NEW CINGULAR WIRELESS PCS, LLC
Docket No. C269631 (consolidated appeals)

Dear Ms. Reimer:

Enclosed please find copy of Order issued by the Board this day in the above-entitled appeal.

Very truly yours,

Michelle Callard

Clerk of the Board

/wjd
Enclosure

Copy to:
Daniel A. Shapiro
DOR Litigation Bureau
100 Cambridge Street
Boston, MA 02114

Gregory G. Fletcher
Baker, Donelson, Bearman, Caldwell & Berkowitz
165 Madison Avenue
Memphis, TN 38103

Various Cities and Towns
Various Counsels for Cities and Towns

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

IN RE NEW CINGULAR WIRELESS PCS, LLC CONSOLIDATED CENTRAL VALUATION APPEALS	)	C269631 and Various Docket Nos. (See appendix)

ORDER

On its own motion, the Appellate Tax Board ("Board") hereby vacates its Decision which was issued on December 30, 2008 ("Decision") and which dismissed the instant appeals filed under G.L. c. 59, § 39 by New Cingular Wireless PCS, LLC and its predecessors in interest (collectively "New Cingular") against the Commissioner of Revenue ("Commissioner") and various cities and towns and by the boards of assessors of various cities and towns ("assessors") against New Cingular and the Commissioner. All of the instant appeals challenge the central valuation by the Commissioner of certain personal property owned by New Cingular. A complete list of the docket numbers, parties and fiscal years at issue is included in the attached Appendix.

Commissioner Scharaffa heard New Cingular's motion to "convert" its appeals into appeals under G.L. c. 59, §§ 64 and 65 ("Motion to Convert") and was joined by Chairman

Hammond and Commissioners, Egan, Rose and Mulhern in the Decision denying the Motion to Convert and dismissing all the instant § 39 appeals filed by New Cingular and the assessors.

The Decision was based on the Board's reading of ***Bell Atlantic Mobile of Massachusetts Corporation, LTD v. Commissioner of Revenue and others (and a companion case)***, 451 Mass. 280, 281 (2008) (***"Bell Atlantic I"***), which involved fiscal year 2004, and which affirmed the Board's determination that § 39 does not apply to providers of wireless cellular telecommunications services because they are not "telephone companies" for purposes of § 39. In particular, the Board relied on the Court's recognition, in two instances in its Opinion, that the Board's determination that § 39 did not apply to wireless providers disposed of the § 39 appeals before it: (1) "the board's conclusion that Bell Atlantic Mobile is not a telephone company under G. L. c. 59, § 39, disposed of the § 39 appeals" ***id.*** at 285, n. 11; and (2) "[the Board] did finally resolve the § 39 appeals by concluding that Bell Atlantic Mobile is not a telephone company or eligible for central valuation by the commissioner." ***Id.*** at 283, n. 7.[1]

[1] The Court also recognized that the Board's decision in ***Bell Atlantic I*** concerned only the taxpayer's § 39 appeals and did not resolve its parallel appeals under G.L. c. 59, §§ 64 and 65 for fiscal year 2004,

After the Board issued its Decision dismissing all of the instant appeals, the Supreme Judicial Court decided ***In the Matter of the Valuation of Bell Atlantic Mobile of Massachusetts Corporation, Ltd.*** 456 Mass. 728 (2010). (***"Bell Atlantic II"***), which involved fiscal years 2003 through 2008. In ***Bell Atlantic II***, the Board, as it did in the instant appeals, dismissed all § 39 appeals filed by the wireless provider and the assessors. In reversing the Board, the Court held that:

> where the commissioner classifies a company as a "telephone or telegraph company" and certifies a central valuation of the company's property under § 39, and timely appeals from that central valuation have been filed by the assessors, the company, or both, the board has jurisdiction to hear and decide all the issues raised in such appeals, even if it concludes that the company did not qualify as a telephone or telegraph company. The board's contrary interpretation, supported by Bell Atlantic Mobile, ignores § 39's express provisions establishing the rights of the affected assessors and taxpaying company to appeal from the commissioner's central valuation.

Id. at 736-37. The Court reasoned that "[a]s a remedial measure," § 39 "must be construed and applied expansively in order to achieve the Legislature's goals." ***Id.*** at 735. The Court further explained that its interpretation of § 39

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which also raised the issues of valuation and qualification for the corporate utility exemption. In a subsequent decision, the Board ruled in the §§ 64 and 65 appeals that the corporate utility exemption was not available to the taxpayer because it was not a "telephone company." *See, **Bell Atlantic Mobile** v. **Assessors of Boston, et al,*** Mass. A.T.B. Findings of Fact and Report 2010-897

in ***Bell Atlantic II*** was not "precluded" by its decision in ***Bell Atlantic I*** because "[t]he question whether the board retained jurisdiction to decide the valuation issues raised in the assessors' (and the taxpayer's) § 39 appeals once the board made this determination [that Bell Atlantic Mobile was not a telephone company for purposes of § 39] was not raised, and we did not decide it [in ***Bell Atlantic I***]." ***Bell Atlantic II,*** 456 Mass. at 738.

In accordance with ***Bell Atlantic II,*** the Board on its own motion vacates its Decision dismissing the § 39 appeals filed by New Cingular and the assessors. However, because New Cingular failed to comply with the jurisdictional requirements for filing an appeal under G.L. .c. 59, §§ 64 and 65 ("§ 65 appeal"), including its failure to timely file abatement applications under G.L. c. 59, § 59, the Board's denial of New Cingular's Motion to Convert these appeals into appeals under G.L. c. 59, §§ 64 and 65 is not affected by this Order.

The Board has no jurisdiction to "entertain proceedings for relief by abatement begun at a later time or prosecuted in a different manner than is prescribed by statute." ***Assessors of Boston v. Suffolk Law School,*** 295 Mass. 489, 492 (1936). A timely filed § 59 application on a form approved by the Commissioner of Revenue is a

jurisdictional prerequisite to maintaining a § 65 appeal to the Board. *See, e.g.*, ***Cohen v. Assessors of Boston***, 344 Mass. 268, 271 (1962); ***Assessors of Brookline v. Prudential Insurance Co. of America***, 310 Mass. 300, 303 (1941). Strict adherence to the statutory requirement of a timely abatement application is an "essential prerequisite" to the prosecution of a § 65 appeal: "[m]anifestly, there can be no appeal to the board on the merits after the right to apply to the assessors for abatement has been lost through failure to follow statutory procedures." ***New Bedford Gas & Edison Light Co. v. Assessors of Dartmouth***, 368 Mass. 745, 747-48 (1975).

Because New Cingular did not file § 59 abatement applications with the assessors for fiscal years 2004, 2005 or 2006, the Board has no jurisdiction over § 65 appeals for any of those years. The Board has no authority to ignore this jurisdictional defect and "convert" New Cingular's § 39 appeals into § 65 appeals. *See* ***Massachusetts Institute of Technology v. Assessors of Cambridge***, 422 Mass. 447, 452 (1996), *citing* ***Lenson v. Assessors of Brookline***, 395 Mass. 178, 179 (1985) ("jurisdiction is fundamental and cannot be ignored or waived").

A pretrial conference will be held in the instant appeals on **Thursday, August 4, 2011 at 10:00 a.m.** for the purpose of determining a discovery schedule and a date for the hearing on the merits of these § 39 appeals.

By Order of the Board, dated August 18, 2006, the appeals listed on the attached Appendix were consolidated for the purpose of all further proceedings, including discovery, hearing on the merits, and decision.

Cities and towns which are **appellees** in appeals on the attached Appendix may rest on their assessments, which have the presumption of correctness, and need not appear at this pretrial conference or at the hearing of these appeals. They may also rely on evidence presented by other parties, including the Commissioner of Revenue, at the hearing of these appeals. However, any such city or town which desires to present affirmative evidence at the hearing of these appeals should so notify the Board by letter no later than the date of this pretrial conference.

Cities and towns which have filed their own § 39 appeals against New Cingular may rely on evidence presented by other parties, including the Commissioner of Revenue, at the hearing of these appeals. However, any such city or town which desires to present affirmative evidence at the hearing should notify the Board by letter no later than the

date of the pretrial conference.

As noted above, the pretrial conference will be held in these appeals on **Thursday, August 4, 2011 at 10:00 a.m.**

ORDERED ACCORDINGLY

APPELLATE TAX BOARD

Chairman

Commissioner

Commissioner

Commissioner

Commissioner

Attest: _____
Clerk of the Board

Date: JUN 2 8 2011
(Seal)

MASSPCSCO *vs.* BOARD OF ASSESSORS OF WOBURN & another. [FN1]

No. 10-P-1286.

May 9, 2011. - September 15, 2011.

Taxation, Personal property tax: abatement, Personal property tax: exemption, Foreign corporation, Judicial review. *Words,* "Engaged in business."

APPEAL from a decision of the Appellate Tax Board.

Eric S. Tresh, of Georgia (*Zachary T. Atkins,* of Georgia, & *William T. Hogan, III,* with him) for the taxpayer.

Richard P. Bowen for board of assessors of Woburn.

Stephen W. DeCourcey (*John M. Lynch* with him) for board of assessors of Springfield.
The following submitted briefs for amici curiae:

Anthony M. Ambriano for board of assessors of Boston.

Martha Coakley, Attorney General, & *Daniel J. Hammond,* Assistant Attorney General, for Commissioner of Revenue.

Joseph X. Donovan & David J. Nagle for The Broadband Tax Institute.

Present: Berry, Trainor, & Vuono, JJ.

TRAINOR, J.

This is an appeal from a decision of the Appellate Tax Board (board) in favor of the assessors of the cities of Woburn and Springfield (assessors), which denied applications for abatement of certain personal property taxes paid by MASSPCSCO. Because we agree that MASSPCSCO was not entitled to the "stock in trade" exemption from property tax set forth in G.L. c. 59, § 5, Sixteenth (2), we affirm the board's decision.
We summarize the facts as found by the board. Sprint Spectrum, L.P. (Sprint Spectrum), was formed as a Delaware limited partnership on March 28, 1995, to provide wireless telecommunications services to customers throughout the United States. On June 3, 1996, Sprint Spectrum registered with the Secretary of the Commonwealth as a foreign limited partnership. In an effort to build Sprint Spectrum's wireless communications network (network), Sprint Spectrum Equipment Company, L.P. (EquipmentCo), another Delaware limited partnership, was formed on May 15, 1996, and subsequently registered in the

Commonwealth as a foreign limited partnership on July 19, 1996. Substantially all of the partnership interests in EquipmentCo were owned by Sprint Spectrum. Shortly after its formation, EquipmentCo began purchasing personal property to be used in the network and leasing all of its network property to Sprint Spectrum.

From 1999 through 2002, Sprint Spectrum filed Form 5941 tax returns with the Commissioner of Revenue (commissioner) pursuant to G.L. c. 59, § 41. During these years, Sprint Spectrum was not required to report the majority of its network assets, including its towers, antennas, and switching equipment, because such items were deemed exempt from taxation. The aggregate valuation certified by the commissioner for the personal property reported by Sprint Spectrum was $330,800 for fiscal year 2000, $330,800 for fiscal year 2001, $1,703,000 for fiscal year 2002, and $1,762,900 for fiscal year 2003.

On January 13, 2003, the commissioner notified "telephone and telegraph filers" of a change in the valuation process. Beginning with fiscal year 2004, filers of Form 5941 organized as partnerships or limited liability companies would be required to report "all machinery, including switching equipment, used for telephone and telegraph purposes." Entities filing as corporations, however, would need to report only "poles and wires over private property, underground conduits, wires and pipes in public or private property, and electric generating machinery." Complying with the commissioner's orders, Sprint Spectrum filed its fiscal year 2004 return and reported all the machinery and equipment located in the Commonwealth that it had leased from EquipmentCo and used in the network. As a result, the commissioner certified an aggregate taxable value of $172,899,300 on the property, a figure nearly 100 times larger than the certified value of Sprint Spectrum's personal property in fiscal year 2003.

Faced with an overwhelming increase in tax liability, Sprint Spectrum decided to restructure its operations and sought counsel from outside professionals at Deloitte & Touche, LLP (Deloitte). Deloitte advised Sprint Spectrum to place its otherwise taxable Massachusetts assets in an entity that would be recognized as a corporation so that Sprint Spectrum could benefit from the relevant personal property tax exemptions. Deloitte also recommended, among other things, that the entity be structured to engage in third-party transactions and that any leases from the entity to Sprint Spectrum be at "arms' length prices."

In accordance with Deloitte's advice, EquipmentCo executed a trust agreement forming MASSPCSCO as a Delaware statutory trust, thereby permitting Sprint Spectrum to obtain Massachusetts corporate property tax exemptions without any Federal income tax consequences. On December 22, 2003, EquipmentCo transferred all of its tangible network property located in Massachusetts, including cellular towers, antennas, and switches, to MASSPCSCO as a contribution to capital valued at net book cost without any other consideration. No sales tax was paid in connection with the transaction. On December 23, 2003, Sprint Spectrum and EquipmentCo terminated their prior lease agreement. The same day, Sprint Spectrum and MASSPCSCO executed a lease agreement concerning the recently transferred network property. Pursuant to the lease agreement, Sprint Spectrum paid rent to MASSPCSCO on a monthly basis, with lease factors calculated to produce a rate of return of nine percent. This same rate of return was used for all categories of leased property, though there was no evidence establishing its relationship to market value or how the figure was calculated. [FN2]

Contrary to Deloitte's advice, MASSPCSCO did not lease property to any person or entity other than Sprint Spectrum. MASSPCSCO had no employees and did not conduct any regular business activities other than owning and leasing network equipment to Sprint Spectrum. In addition, MASSPCSCO did not purchase the equipment it leased to Sprint Spectrum. Rather, Sprint Spectrum purchased the equipment and marked the purchase against MASSPCSCO's account on a common ledger. Moreover, Sprint Spectrum and MASSPCSCO did not maintain separate bank accounts. Instead, all lease payments made by Sprint Spectrum to MASSPCSCO were implemented by ledger entries in Sprint Spectrum's books.

The board of assessors of Springfield issued assessments against MASSPCSCO for additional personal property taxes of $8,356.68 for fiscal year 2005 and $8,271.51 for fiscal year 2006. Likewise, the board of assessors of Woburn issued assessments against MASSPCSCO for additional personal property taxes of $330,682.90 for fiscal year 2006 and $215,508.85 for fiscal year 2007. For each of the assessments, MASSPCSCO made timely applications for abatement, all of which were ultimately denied. MASSPCSCO subsequently filed appeals from the assessments under formal procedure pursuant to G.L. c. 58A, §§ 6-7, and G.L. c. 59, §§ 64-65. Following a full hearing, the board ruled in favor of the assessors on September 10, 2009. Specifically, the board determined that although MASSPCSCO was a foreign corporation within the meaning of G.L. c. 63, § 30, it was not entitled to the "stock in trade" exemption under G.L. c. 59, § 5, Sixteenth (2), because it was not "engaged in business" as required by *Brown, Rudnick, Freed & Gesmer v. Board of Assessors of Boston,* 389 Mass. 298, 304 (1983) (*Brown Rudnick*). The board also concluded that MASSPCSCO had failed to prove that it was not the result of a sham transaction.

Discussion. "We will not reverse a decision of the board 'if it is based on substantial evidence and on a correct application of the law.' " *Global Cos., LLC v. Commissioner of Rev.,* 459 Mass. 492, 494 (2011), quoting from *Macy's East, Inc.* v. *Commissioner of Rev.,* 441 Mass. 797, 800, cert. denied, 543 U.S. 957 (2004). "Exemption from taxation is a matter of special favor or grace. It will be recognized only where the property falls clearly and unmistakably within the express words of a legislative command." *Willowdale LLC v. Assessors of Topsfield,* 78 Mass.App.Ct. 767, 769 (2011), quoting from *New England Legal Foundation v. Boston,* 423 Mass. 602, 609 (1996). As the taxpayer seeking abatement, MASSPCSCO bears the burden of demonstrating entitlement to the exemption claimed. See *Global Cos., LLC,* 459 Mass. at 494. "[B]ecause the board is an agency charged with administering the tax law and has 'expertise in tax matters,' ... we give weight to its interpretation of tax statutes, ... and will affirm its statutory interpretation if [it] is reasonable." *AA Transp. Co.* v. *Commissioner of Rev.,* 454 Mass. 114, 119 (2009), quoting from *RHI Holdings, Inc.* v. *Commissioner of Rev.,* 51 Mass.App.Ct. 681, 685 (2001).

At the time this action was before the board, G.L. c. 59, § 5, Sixteenth (2), amended by St.1979, c. 777, § 1, provided that all property, with certain exceptions not material here, of either "(a) domestic business corporation or (b) a foreign corporation, both as defined in section thirty of chapter sixty-three," shall be exempt from personal property taxes. [FN3], [FN4] In *Brown Rudnick,* 389 Mass. at 302-303, the Supreme Judicial Court concluded that an entity's mere compliance with the statutory definition of a corporation does not necessarily entitle the entity to claim exemption under G.L. c. 59, § 5, Sixteenth

(2). Rather, "[i]t must still be shown that the corporation was, in fact, engaged in business." *Id.* at 304. For the purposes of this inquiry, the court defined "business" as "an activity which occupies the time, attention and labor of men for the purpose of livelihood, profit or gain." *Id.* at 303, quoting from *Whipple v. Commissioner of Corps. & Taxn.*, 263 Mass. 476, 485-486 (1928). To further elaborate on the concept, the court quoted the language of Judge Learned Hand: "[T]o be a separate jural person for purposes of taxation, a corporation must engage in some industrial, commercial, or other activity besides avoiding taxation: in other words, that the term 'corporation' will be interpreted to mean a corporation which does some 'business' in the ordinary meaning; and that escaping taxation is not 'business' in the ordinary meaning." *Id.* at 306, quoting from *National Investors Corp.* v. *Hoey,* 144 F.2d 466, 468 (2d Cir.1944).

Here, the board properly concluded that MASSPCSCO did not "engage in business" as required by *Brown Rudnick.* MASSPCSCO was created solely for the purpose of avoiding tax liability. [FN5] The entity did not maintain a separate bank account, and all lease payments made by Sprint Spectrum to MASSPCSCO were implemented by ledger entries, not actual cash transactions. As the board astutely pointed out, these entries had "little economic substance." At all relevant times, MASSPCSCO had no employees. Significantly, MASSPCSCO did not implement several of the "legitimizing" strategies advised by Deloitte. For instance, MASSPCSCO did not hold any assets other than those it leased to Sprint Spectrum, nor did it lease property to anyone other than Sprint Spectrum. Additionally, the lease transactions between MASSPCSCO and Sprint Spectrum were not at "arms' length" as Deloitte had suggested. Given this factual scenario, the board was justified in determining that "MASSPCSCO did not engage in any real business other than escaping taxation."

MASSPCSCO contends that the board's application of the precepts of *Brown Rudnick* was inappropriate because it is a "foreign corporation" as opposed to a "domestic business corporation." This argument is unavailing. While it is true that *Brown Rudnick* involved a domestic business corporation rather than a foreign corporation, we see no reason why such a distinction should affect our analysis. Indeed, the inquiry here, as it was in *Brown Rudnick,* 393 Mass. at 303, is "whether a corporation claiming exemption under G.L. c. 59, § 5, Sixteenth (2), is operated for dominantly business purposes," not whether the corporation is a domestic or foreign corporation. Moreover, a significant and inappropriate loophole would exist if the prerequisites set forth in *Brown Rudnick* did not apply to foreign corporations. On this point, we agree with the board's determination that "it strain[s] credulity to suggest, as MASSPCSCO has, that the Legislature intended to treat a foreign corporation more leniently than a domestic business corporation for purposes of the stock-in-trade exemption."

Even assuming that the *Brown Rudnick* holding was not applicable to foreign corporations, MASSPCSCO was still not entitled to claim the stock in trade exemption because it had failed to prove that it was not the result of a "sham transaction." "Massachusetts recognizes the 'sham transaction doctrine' that gives the commissioner the authority 'to disregard, for taxing purposes, transactions that have no economic substance or business purpose other than tax avoidance.' ... The doctrine generally 'works to prevent taxpayers from claiming the tax benefits of transactions that, although within the language of the tax code, are not the type of transactions the law intended to favor with the benefit.' " *Sherwin-Williams Co.* v. *Commissioner of Rev.,* 438 Mass. 71, 79-80

(2002), quoting from *Syms Corp.* v. *Commissioner of Rev.*, 436 Mass. 505, 509-510 (2002).

Under this doctrine, "for a business reorganization that results in tax advantages to be respected for taxing purposes, the taxpayer must demonstrate that the reorganization is 'real' or 'genuine,' and not just form without substance." *Id.* at 84. "Stated otherwise, the taxpayer must demonstrate that the reorganization results in 'a viable business entity,' that is one which is 'formed for a substantial business purpose or actually engage[s] in substantive business activity.' " *Ibid.*, quoting from *Northern Ind. Pub. Serv. Co.* v. *Commissioner of Int. Rev.*, 115 F.3d 506, 511 (7th Cir.1997).

As the board noted, "at all relevant times, MASSPCSCO had no employees; did not maintain separate bank accounts; did not independently invest any of its profits; did not do business with any other parties other than what was incidental to its leasing of equipment to its parent; did not attempt to lease any property to third parties; did not maintain any office space or real estate; was unable to exercise any independent control; did not purchase any of its equipment; and was not shown to be dealing with affiliates in an arm's-length manner or to be responsible for any debt incurred as a result of any purchases of equipment or property on its behalf." [FN6] On this record, it is clear that MASSPCSCO was created solely for the purpose of avoiding taxation and was not a viable business entity engaging in substantial business activities. [FN7] We therefore agree with the board's conclusion that the business reorganization employed by Sprint Spectrum, resulting in the creation of MASSPCSCO, was a sham transaction. Accordingly, MASSPCSCO's applications for abatement were appropriately denied.

For the foregoing reasons, the decision of the Appellate Tax Board is affirmed.

So ordered.

FN1. Board of Assessors of Springfield.

FN2. The accounting firm of Ernst & Young recommended that MASSPCSCO effectuate a lease factor schedule that would assign different lease factors to separate categories of properties, thereby more accurately reflecting market values. MASSPCSCO did not implement these recommendations.

FN3. At the time, G.L. c. 59, § 5, Sixteenth (2), read: "In the case of (a) domestic business corporation or (b) a foreign corporation, both as defined in section thirty of chapter sixty-three, all property owned by such corporation other than the following:--real estate, poles, underground conduits, wires and pipes, and machinery used in the conduct of the business, which term, as used in this clause, shall not be deemed to include stock in trade or any personal property directly used in connection with dry cleaning or laundering processes or in the refrigeration of goods or in the air-conditioning of premises or in any purchasing, selling, accounting or administrative function."

FN4. General Laws c. 59, § 5, Sixteenth (2), has since been amended by St.2008, c. 173, to read: "In the case of a business corporation subject to tax under section 39 of chapter 63 that is not a manufacturing corporation, all property owned by the corporation other than the following:--real estate, poles, underground conduits, wires and pipes, and machinery used in the conduct of the business, which term, as used in this clause, shall not be considered to include stock in trade or any personal property directly used in connection with dry cleaning or laundering processes or in the refrigeration of goods or in the air-conditioning of premises or in any purchasing, selling, accounting or administrative function." This amendment does not affect our analysis in this case.

FN5. We recognize that "tax motivation is irrelevant where a business reorganization results in the

creation of a viable business entity engaged in substantive business activity rather than in a 'bald and mischievous fiction.' " *Sherwin-Williams Co.* v. *Commissioner of Rev.,* 438 Mass. 71, 89 (2002), quoting from *Moline Props.* v. *Commissioner of Int. Rev.,* 319 U.S. 436, 439 (1943).

FN6. We note that the court's decisions in *Brown Rudnick* and *Sherwin-Williams* are complementary of each other. As a result, our factual analysis is similar under both the sham transaction doctrine described in *Sherwin-Williams,* 438 Mass. at 79-86, and the "engaged in business" inquiry set forth in *Brown Rudnick,* 389 Mass. at 301.

FN7. See note 5, *supra.*