

<p>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203</p> <hr/> <p>Petitioner:</p> <p>BROADWING COMMUNICATIONS SERVICES, INC.</p> <p>v.</p> <p>Respondent:</p> <p>PROPERTY TAX ADMINISTRATOR.</p>	
<p>Attorney or Party Without Attorney for the Petitioner:</p> <p>Name: Gregory S. Tamkin, Esq. Address: 370 Seventeenth Street, Suite 4700 Denver, Colorado 80202-5647 Phone Number: (303) 629-3400 E-mail: Attorney Registration No.:</p>	<p>Docket Number: 37865</p>
<p>ORDER</p>	

THIS MATTER was heard by the Board of Assessment Appeals on February 12, 2001, Harry J. Fuller, Karen E. Hart, and Mark R. Linné presiding. Petitioner was represented by Gregory S. Tamkin Esq. Respondent was represented by Larry A. Williams, Esq.

PROPERTY DESCRIPTION:

Subject property is described as follows:

**State Assessed Property
(DPT File No. TX091)**

Petitioner is protesting the 2000 actual value of the subject property, fiber optical cable containing 96 individual strands, used to carry telecommunications traffic.

ISSUES:

Petitioner:

Petitioner contends that the subject property had not yet been placed in service as of the assessment date. The provisions of CRS 39-3-118.5 provide an exemption under these circumstances. The Division of Property Taxation did not exempt Broadwing's property that was not in use. The subject comprises a fiber optic cable which was "dark," i.e., unable to carry any telecommunications traffic during the applicable period. If the subject property was not in use, it is subject to the exemption. An exemption should be granted.

Respondent:

Respondent contends that the subject property is used in the business of the taxpayer. The cable was completed in September 1999, and all of the 96 strands within the fiber optic cable began to be depreciated in 1999. This asset of the business was used to bring in revenue to Broadwing, and the fact that the cable was not lit does not mean that it is not an asset. The Division of Property Taxation denied exemption because it was used in the business. Once the subject is leased or put into service, it is taxable.

FINDINGS OF FACT:

1. Petitioner's witness, John W. Anderson, Senior Manager for Broadwing Communications within the Network Services Department, testified that the responsibilities of his department include the expansion of business by talking to companies who want to expand their networks. Broadwing swaps Indefeasible Rights to Use (IRU) with other companies. Mr. Anderson indicated that Broadwing's business is to sell telephonic capacity to carry voice and internet traffic, and to facilitate connectivity between offices and buildings throughout the country. The witness described "light" as the mode of data transport. His specific job is to acquire more "routes" between cities. Broadwing currently has 18,000 route miles in the United States. The witness indicated that at the end of 1999, there were approximately 16,000 route miles. The witness described an IRU as a right to use certain optical fiber. The transfer does not utilize a bill of sale; rather it is a contract. Mr. Anderson indicated that an IRU is the best method for a telecommunications company to transfer "dark" fiber, or optical fiber that has not yet been activated. Lines are not simply sold because of right-of-way issues. Any other manner of transferring the right to use optical fiber would be very impractical and time consuming. An IRU is the best manner of accomplishing the transfer.

2. Mr. Anderson testified with respect to the installation process. Initially, engineers and right-of-way personnel are sent to determine the appropriate route. Once a route is chosen, permits and easements are acquired. Construction then begins, with the placement of a flexible PVC conduit in the ground. An additional requirement involves the placement of 1,200 square foot buildings every 40-50 miles. Buildings are built after the laying of the cable, and involve the same general time-lines. The witness indicated that the buildings house equipment that puts the "light" on the fiber. The buildings contain large boxes the size of a computer, which are

involved in the optical transmission process. The buildings also house a DC power plant, which must be installed. The reason for the 40-50 mile distance between buildings relates to the fact that the optical transmission essentially involves firing lasers. The optical signal gets dimmer over long distances, and the buildings and their requisite equipment allow for long distance transmission. Mr. Anderson described the process: the “light” transmission enters the building, changes from light to electrical signals, then is converted back into light. Broadwing contracts out the installation of the conduit and buildings.

3. The witness next testified regarding the installation of cable. This occurs after the conduits are installed. The cable contains 96 bundles of fiber strands. The next step is to “light” the fibers. The installation of the boxes occurs contemporaneously with the lighting of the fiber. These represent two distinct stages in the construction process. The witness explained the term “accepting the fiber” as the act of shooting light through the fiber to make sure the 5-mile splice points were properly connected. The testing is done by Broadwing employees prior to the completion of the dirt work. Incremental testing is first done to ensure that data can successfully travel along the entirety of the route.

4. The Board then heard testimony regarding confidential documents.

5. The witness testified during cross-examination that there were no previous agreements on the subject route, nor were there any trades or swaps on the line. Additionally, the only long-term lease in 1999 relating to the line was a right-of-way agreement to Kansas City Turnpike Authority, which was contained within their right-of-way.

6. Mr. Anderson testified that no options had been sold on the line. He further explained that the difference between an exchange and an IRU is that an exchange is essentially comprised of two IRU agreements, one going each way. He indicated that he was not sure if the company placed a value for accounting purposes on each side of the exchange agreement. He indicated that Broadwing did not have non-cash agreements on the Denver-Kansas City line.

7. In redirect testimony, Mr. Anderson testified that he was not aware of any other agreements on the Denver-Kansas City line. He was very familiar with all agreements, and there were no agreements relating to the fiber located within Colorado. The only agreement on the line was for a portion located within the state of Kansas.

8. The witness testified that as of the end of 1999, there were no fibers in use and only four fibers were subject to an IRU.

9. Petitioner’s witness Bruce Cartwright, employed by Ernst & Young LLP, testified that he had expertise in unitary valuation, and that he had applied a three-prong approach in valuing the subject property. He reviewed the Colorado allocated value of \$11,583,730.00, which was 1.26% of the total system market value.

10. The witness testified that his job was to check that the quantification was appropriate and supported by the methodology. Deductions were taken from the aggregate amount. He felt that the subject represented Construction Work in Progress (CWIP).

11. Mr. Cartwright testified that he felt that additional deductions should have been taken. A portion of the line from Denver to Kansas City should have been deducted as well. He filed an amended return to exempt that portion of the property located in Colorado, based on the ARL provision for *Business Personal Property Not As Yet In Use*. Mr. Cartwright felt, based on this document, that Paragraphs 3 and 4: “on-site, but has not initially been put into service,” were important considerations. Given that the property is not capable of carrying telecommunications traffic, he felt that this was appropriate. Optronics equipment had not yet been installed.

12. The witness testified that the calculation requires knowing how the component relates to the overall valuation placed on the asset by the DPT.

13. The witness testified that the current valuation of the subject arrived at by the State of Colorado is \$11,309,839.00 (a value of \$11,583,090.00 less construction work in progress of \$273,891.00). If all 96 fibers were exempt, the indicated exemption amount would be \$8,887,200.00, which would represent 60% of the \$14,812,000.00 cost of the “dark” fiber. The 60% ratio represents the ratio between the value assigned to the subject by the DPT and the actual cost of the property ($\$11,583,000.00 / \$19,280,879.00$). The exemption amount of \$8,887,200.00 should be subtracted from \$11,309,839.00, for a Colorado actual valuation of \$2,422,639.00.

14. Mr. Cartwright felt that the value of IRU agreements ranges from \$1,500.00 to \$3,000.00 per fiber mile. The appropriate deduction for the subject would be \$2,000.00 per fiber mile, which is a market level of value.

15. The witness testified that an IRU was equivalent to a lease.

16. Mr. Cartwright testified that though Broadwing has depreciated the “dark” fiber line for federal income tax purposes, this was due to a different set of rules and guidelines, which do not include a “placed in service” provision.

17. Mr. Cartwright testified under cross-examination that he had not prepared an appraisal of the subject property, though he noted that he had performed many unitary property tax appraisals.

18. The witness testified that he had adopted the numbers of the DPT in valuation of the subject. He indicated that he interpreted “adopted” as referring to the fact that he used the numbers that the Division of Property Taxation (DPT) used. He further stated that he had verified the numbers, based on the declarations of the taxpayer. There was a revision (in the DPT numbers) due to a mistake in the Construction Work in Progress (CWIP) for the company.

19. Mr. Cartwright testified that the subject property was not in business use because it could not carry traffic. He further stated that he felt it was in fact, incapable of carrying traffic as of the lien date: there was no optronic equipment installed. He testified that George Christy, an employee of Broadwing, indicated that it was not “lit” and, therefore, incapable of carrying telecommunications equipment.

20. Mr. Cartwright testified that dark fiber can be traded among companies. Broadwing's business is to provide communications via fiber optic systems. Their business would be to lease fiber under certain circumstances. They could provide options on fiber; dark fiber can be sold, leased, or traded.

21. Mr. Cartwright testified that Broadwing has the ability to swap fiber without lighting, but it was important to note that they cannot sell dark fiber.

22. Petitioner is requesting a 2000 actual value of \$2,695,890.00 for the subject property.

23. Respondent's witness, Bruce Mitchell, a Senior Professional Engineer with the Colorado Public Utilities Commission, testified that he was familiar with fiber optic cable issues. He has reviewed literature detailing when cable is ready to transport product, i.e. is ready to go into service. He indicated that companies usually order equipment at the same time that they obtain the conduit and cabling; thus it is ready for simultaneous installation.

24. Mr. Mitchell testified under cross-examination that though companies might be different, systems are the same.

25. The witness testified that he was not familiar with Broadwing in his duties with the PUC.

26. Respondent's witness Alan B. Hahne, Property Tax Specialist with the Division of Property Taxation, testified that he was familiar with the valuation placed on Broadwing Communications, and described their business as nationwide voice and data telecommunications. He indicated that Broadwing was involved in IRU's, swaps and exchanges. He testified that part of Broadwing's business was to lease fiber to other companies.

27. The witness testified that he determined that when a fiber optic line produced income for a company, he concluded that it had been used in their business.

28. The witness testified that Broadwing had depreciated the optical fiber assets for federal income tax purposes, a fact of which he was aware after having examined Broadwing's income tax documents.

29. The witness testified that he considered whether the asset lasted more than one year, and whether it could wear out. He then considered if it could be used in business or held to produce income. Mr. Hahne stated that he did not consider the IRU agreement, given that he had already considered that the subject produced income.

30. Mr. Hahne testified with respect to the completion of the subject, which he concluded to have occurred on September 15, 1999, based on various documents, including an affidavit of George Christy of Broadwing. He concluded that leasing dark fiber is part of their business.

31. Mr. Hahne testified that he prepared an appraisal report for the subject. He utilized the three approaches to value. For properties appropriately valued within a unitary valuation environment, the stock and debt approach is utilized. He also used the income and cost approaches.

32. Mr. Hahne testified that he only had two years of income available, and that he considered this to represent an unstable information base, which he was unable to stabilize. He therefore concluded that there was no reliable value estimate from the income approach.

33. The witness testified that he next looked to the cost approach and put 100% of the weight in the appraisal on the cost approach.

34. Mr. Hahne testified with respect to the Broadwing annual report, which stated that part of the company's business was to lease network capacity in the form of Indefeasible Rights To Use agreements. He testified that the report also indicated that the company had revenues from the IRU's, which were thus producing income for the firm.

35. Mr. Hahne testified that the fiber optic line was being depreciated in both Colorado and Kansas. This was consistent with information being provided to Mr. Hahne from other sources.

36. Mr. Hahne testified that he had heard nothing in the hearing, which had changed his mind regarding the subject property valuation.

37. Under cross-examination testimony, the witness admitted that an asset could be depreciated if it was used in business or held to produce income. He indicated that the federal tax code recognizes the fact that it could be one or the other.

38. Mr. Hahne testified that his understanding of Broadwing's business description was that the company both leased capacity on its cables and received income from IRU's. This was based on his examination of the company's 10-K report. He admitted under cross-examination that he did not know if any of this information related to the subject's Denver to Kansas City line.

39. Mr. Hahne testified that he felt that all 96 fibers were offered to be leased out, though he admitted that the 10-K report, on which he based this belief, only stated that 4 fibers were subject to an IRU.

40. In response to a question from the Board, the witness testified that he felt that the subject represented an operating asset. He felt that the company had offered it for lease.

41. Mr. Hahne testified that they might have offered the line while it was still under construction, and would only be available at a later date.

42. Mr. Hahne testified that offering out an asset and having someone pay you money for it is an indication that all of the asset is ready to be leased. If 4 lines are ready to be leased, then all 96 are ready to be leased.

43. Mr. Hahne testified in a response to a question from the Board, that the George Christy affidavit from Broadwing indicated that the subject was still in a testing mode as of July 21, 2000. Mr. Hahne indicated that the lines were ready to be used, though he admitted that that was different than actually being used.

44. In redirect testimony, Mr. Hahne indicated that the whole line was available. The fact that it was not "lit" is not relevant. It is being depreciated as a whole, not just a portion.

45. The witness indicated that he looks at the entire DPT Assessors Reference Library manual in properly assessing properties such as the subject. He does not just look at section 3 or 4. Just looking at section 3 is not a sufficient evaluative process for the subject.

46. Mr. Hahne reiterated during his redirect testimony, that if one fiber is ready and able to be used in business, then all of the fibers are capable of being used. He felt the mere fact that the company had an IRU agreement for 4 fibers would not have any impact on the other 92 fibers.

47. In response to cross-examination questioning, the witness testified that his assumption was that if four fibers were leased, all of the fibers could be leased.

48. Respondent assigned an actual value of \$9,892,800.00 to the subject property for tax year 2000; and a revised actual value of \$11,310,400.00, rounded, to the subject property for tax year 2000.

CONCLUSIONS:

1. Petitioner presented sufficient probative evidence and testimony to prove that the subject property was incorrectly valued for tax year 2000.

2. The Board agrees that business personal property is exempt until first placed in service. The Board believes that the evidence is clear that the fibers were incapable of being placed in service due to the fact that they lacked the appropriate completion of relevant equipment to allow for integration of the data transport system.

3. There was demonstrable evidence that though four fibers were subject to an IRU, none of the fibers had the requisite equipment to operate.

4. The Board finds compelling the evidence that indicated the line was complete, but the optronic component was not in place, therefore the overall system could not be utilized for its internal purpose.

5. The Board disagrees with the contention of the Respondent that the fiber does not have to be "lit" to have value for property tax purposes. The critical concern is when an asset is first placed into service. The testimony was clear that the subject had not yet been placed in service, and that it therefore qualified for the exemption called for by statute.

6. The Board felt that entirely too much of the Respondent's analysis was based on an examination of corporate documents, which were fairly broad and non-specific to the subject property assets. The Respondent relied on extrapolation of the available information to understand the nature of the company's business practices. The Board also is not persuaded that the fact that the company chooses to take advantage of Federal tax laws pertaining to the depreciation of personal property was relevant to the taxation of personal property under the applicable Colorado Revised Statutes.

7. No testimony was offered relating to how the subject assets could be utilized prior to completion. There was no evidence other than witness Hahne's belief, based on extrapolation from the aforementioned corporate filings, that the subject was ever offered for lease. The fact that the IRU was consummated on 4 of 96 lines does not represent sufficient evidence of the company's intent with respect to the overall fiber optic line. Although the company may swap, exchange, trade, or lease out the fiber optic line when "dark", this does not confer completion status to the subject property. Testimony clearly indicated that it was, in fact, incomplete and therefore not in operational use.

8. The Board concluded that the 2000 actual value of the subject property should be \$2,422,639.00

ORDER:

Respondent is ordered to reduce the 2000 actual value of the subject property to \$2,422,639.00.

The Property Tax Administrator is directed to change her records accordingly.

APPEAL:

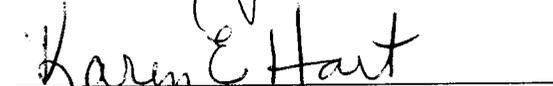
This order may be subject to appeal as provided in 39-4-109(1) C.R.S. to the Court of Appeals for judicial review within 45 days from the date of this decision.

DATED/MAILED this 30th day of March, 2001.

BOARD OF ASSESSMENT APPEALS



Harry J. Fuller



Karen E. Hart

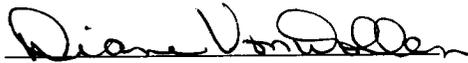


Mark R. Linné

This decision was put on the record

MAR 30 2001

I hereby certify that this is a true
and correct copy of the decision of
the Board of Assessment Appeals.



Diane Von Dollen



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