

SHOP TALK

Oregon Supreme Court Finalizes DOR's Complete Victory in Central Assessment Dispute

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On January 25, 2019, the Oregon Supreme Court issued its decision in *DISH Network Corporation v. Department of Revenue*, 364 Or. 254 (2019) ("*DISH Network*"). When coupled with *Comcast Corporation v. Department of Revenue*, 356 Or. 282 (2014) ("*Comcast I*"), the decision finalizes the victory of the Oregon Department of Revenue ("Department") in a long-fought battle with the communications industry. Further, the Department power confirmed by the Oregon Supreme Court in *DISH Network* potentially impacts all centrally assessed taxpayers.

Background: Central assessment and the Measure 50 limitation

Understanding the scope of the Department's victory requires familiarity with two key aspects of Oregon property tax: central assessment and Measure 50.

Central Assessment: As described in *Comcast I*, central assessment arose in the second half of the 19th century to address the difficulty of determining the value of a taxpayer's property in a particular county where the property was part of a unit that operated in several counties or states. For example, the only tangible property a railroad may have in a county are railroad tracks. If those tracks are part of an interstate network (the unit), the value of the tracks exceeds the amount it would cost to replace the tracks. In addition, it would be unduly burdensome for the railroad company if each county in which the railroad had tracks separately assessed the tracks or other railroad property in the county.¹ Central assessment solves these issues by having the Department handle the assessment of the applicable property.

Or. Rev. Stat. §308.515 limits central assessment to certain property:

(1) The Department of Revenue shall make an annual assessment of any property that has a situs in this state and that, except as provided in subsection (3) of this section, is used or held for future use by any company in performing or maintaining any of the following businesses or services or in selling any of the following commodities, whether in domestic or interstate commerce or in any combination of domestic and interstate commerce, and whether mutually or for hire, sale or consumption by other persons:

- (a) Railroad transportation;
- (b) Railroad switching and terminal;
- (c) Electric rail transportation;
- (d) Private railcar transportation;
- (e) Air transportation;
- (f) Water transportation upon inland water of the State of Oregon;
- (g) Air or railway express;
- (h) Communication;
- (i) Heating;
- (j) Gas;
- (k) Electricity;
- (l) Pipeline;
- (m) Toll bridge; or
- (n) Private railcars of all companies not otherwise listed in this subsection, if the private railcars are rented, leased or used in railroad transportation for hire.²

Subject to certain exceptions, property not described above is assessed by the county assessor, what is generally referred to as "local assessment." Broadly speaking, in centrally assessing property, the Department (1) determines the value of the entire unit of property, which can include property outside of Oregon; (2) allocates to Oregon the applicable value of the unit; and (3) apportions this Oregon value among the counties in which the taxpayer has property.

An important difference between local assessment and central assessment is that local assessment excludes intangible property³ but central assessment includes intangible property.⁴ The growth of the types of intangible property and increased value of items like goodwill since the 19th century origins of central assessment makes central assessment more costly to taxpayers and lucrative for the state.⁵

Measure 50: Measure 50 is a voter-approved Oregon constitutional provision that generally limits the growth of the assessed value ("AV") of property.⁶ A property's AV equals the lesser of the property's real

market value ("RMV") or maximum assessed value ("MAV").⁷ Unless a so-called "exception" event occurs, a property's MAV cannot increase by more than 3% a year.⁸ The addition of new property is an exception event.⁹

Comcast I

Historically, property used to provide cable or satellite television services was subject to local assessment. For the 2009-10 property tax year, the Department asserted that property related to cable television services was subject to central assessment as communication property, based on a 1973 change to the definition of communication to include "data transmission by whatever means provided."¹⁰ The Department further asserted that central assessment caused all of Comcast's property to constitute "new" property triggering an MAV exception event and allowing a substantial increase in the MAV and AV. For 2008-09, the aggregate RMV, MAV and AV for Comcast's Oregon properties pursuant to local assessment were:¹¹

RMV=\$244,044,900; MAV=\$434,084,202; AV=\$224,044,900

For 2009-10, the Department asserted that central assessment increased these to:¹²

RMV=\$1,013,000,000; MAV=\$1,013,000,000; AV=\$1,013,000,000

In the ensuing litigation, the Regular Division of the Oregon Tax Court ruled in favor of Comcast, holding that a business uses property to provide data transmission services only if the business uses the property to transmit the customer's data to another location of the customer or another party for a fee. Although the provision of cable television services involves transmitting data to a customer, the data is owned or licensed by the cable business and not the customer. Accordingly, property used to provide cable television service is not subject to central assessment.¹³ This determination mooted the MAV exception event issue.

The Oregon Supreme Court reversed, broadly defining data transmission services as "the service of transmitting coded electronic information between computer and computer-like devices."¹⁴ The state high court remanded the case to the Regular Division to determine whether central assessment triggered an MAV exception event.

Comcast II

As listed above, the Department asserted that central assessment increased the AV from \$224,044,900 to \$1,013,000,000. If the change to central assessment was not an MAV exception event, the increase in the

AV would have been to \$434,084,202. In *Comcast v. Dep't of Rev.*, 22 OTR 233, 2016 WL 4961875 (2016) ("*Comcast II*"), the Regular Division again ruled in favor of Comcast, holding that the intangible property that the Department added to the MAV was not new. As part of its analysis, the Regular Division noted the Oregon Supreme Court's conclusion in *Comcast I* that technological changes in cable television meant that cable involved data transmission services sometime in the mid-1990s. Accordingly, there was no "new" property for the 2009-10 property tax year at issue. Comcast and the Department thereafter reached a settlement.¹⁵

DISH Network

The Department made the same central assessment arguments against DISH Network Corporation and, with respect to the Measure 50 issue, the Regular Division "entered a limited judgment in DISH's favor,"¹⁶ which the Department appealed to the Oregon Supreme Court. In *DISH Network*, the Oregon Supreme Court rejected the Regular Division's analysis in *Comcast II*. Instead, the Oregon Supreme Court agreed with the Department's position that property is new property if it is "newly added to an account on the assessment rolls."¹⁷ In other words, in addition to property purchased or constructed by the taxpayer, new property includes the decision by the Department to centrally assess property. Further, the new property consisted of **all** of the property moved to the new account, and not just the property not previously subject to tax, such as the intangible property.

Potential implications of the Department's victory

Measure 50 is the primary tool Oregon property owners have to combat sudden increases in the assessed value of their property. In *Comcast I* and *DISH Network*, the Oregon Supreme Court allowed the Department to avoid this limitation by agreeing that the Department could (1) change the method of assessment (from local assessment to central assessment) and (2) treat the property moved to a new account on the assessment roll as new property for MAV purposes. This cements the Department's victory in a nearly decade-long fight concerning communications companies. It also potentially gives the Department new powers.

For example, in *Comcast I*, the Department successfully extended central assessment to a longstanding industry not previously treated as a communications company. Given technological changes, it is easy to imagine that a company could be reclassified as a communications company or other company subject to

central assessment. Further, the Department also undertakes the assessment of industrial property. Moving property from local assessment to state-assessed industrial property may constitute a new account, triggering *DISH Network* treatment (absent unit valuation and assessment of intangible property, it is unclear if this would result in an increase in MAV).

Finally, if property is used in both a centrally assessed business and a locally assessed business, Or. Rev. Stat. §308.510(4) provides the Department with limited discretion to determine whether the property is subject to central assessment or local assessment. Potentially, if the Department initially determines that the property should be locally assessed, a redetermination to centrally assess the property, or vice versa, could trigger an MAV exception event.

¹ As noted in *Comcast I*, county assessors were "likely to favor their own district in their assessment." *Comcast I*, 356 Or.at 290. Accordingly, the railroad company could have prolonged proceedings or litigation with some or all of the counties in which it had tracks.

² Generally, central assessment applies to businesses that historically were regulated utilities. Deregulation complicates this categorization.

³ See Or. Rev. Stat. §307.030 (generally subjecting to local assessment "[a]ll real property within this state and all tangible personal property situated within this state;" intangible property omitted).

⁴ See Or. Rev. Stat. §308.505(14) (broadly defining property subject to central assessment as "all property of any kind, whether real, personal, tangible or intangible, that is used or held by a company as owner, occupant, lessee or otherwise, for the performance or maintenance of a business or service or for the sale of a commodity, as described in [Or. Rev. Stat. §]308.515").

⁵ Arguably, when Oregon first adopted central assessment, the inclusion of intangible property was meant to capture intangible property like the right-of-way a railroad had. Regardless, there is no doubt that intangible property includes more amorphous items such as goodwill or workforce in place. See Or. Rev. Stat. §307.020(1)(a)(D), (F) (including both items in list of types of intangible property).

⁶ Or. Const. art 11, §11.

⁷ Or. Rev. Stat. §397.146(2).

⁸ Or. Rev. Stat. §308.146(1).

⁹ Or. Rev. Stat. §308.146(3)(a).

¹⁰ Or. Laws 1973, ch. 102, § 1.

¹¹ *Comcast Corp. v. Dep't of Revenue*, 22 Or. Tax 233, 240 (Reg. Div. 2016) ("*Comcast II*").

¹² *Id.*

¹³ The Regular Division also ruled that Comcast's property used to provide internet service allows a customer to transmit its data to another location or another party and thus was subject to central assessment. Comcast had agreed that central assessment applied to its property that provides telephone services.

¹⁴ *Comcast I*, 356 Or.at 329.

¹⁵ *DISH Network*, 364 Or. at n.16.

¹⁶ *Id.* at 264.

¹⁷ *Id.* at 268.