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B.C. TELEPHONE COMPANY

v.

ASSESSOR OF AREA 4 - NANAIMO-COWICHAN
ASSESSOR OF AREA 10 - BURNABY-NEW WESTMINSTER

Supreme Court of British Columbia (A861732) Vancouver Registry

Before: MR. JUSTICE D.B. HINDS

Vancouver, September 12, 1986

J.R. Lakes for the Appellant
R.S. Gill for the Respondents

Reasons for Judgment October 15, 1986

This is an appeal by way of Stated Case under s. 74(2) of the *Assessment Act*, R.S.B.C. 1979, c. 21 (the *Act*) from a decision of the Assessment Appeal Board (the Board) dated April 22, 1986.

The impugned decision relates to the assessment of three properties owned by the petitioner, two of which are located in Burnaby and one of which is located in Duncan, B.C. The Burnaby properties are referred to as Lake City Way and Tenth Avenue; the Duncan property is referred to as Duncan.

Under B.C. Regulation 438/81 (the Regulation) property is classified for assessment purposes under the following classifications:

Class 1 - residential
Class 2 - utilities
Class 3 - forestry
Class 4 - machinery and equipment
Class 5 - industrial
Class 6 - business and other
Class 7 - tree farm
Class 8 - recreational property
Class 9 - farm land

Different classes attract different tax burdens. For example, the tax burden on Class 2 - utilities is higher than on Class 6 - business.

In its decision the Board classified some of the property at Lake City Way, Tenth Avenue and Duncan as Class 2 - utilities, and some of the property at those three locations as Class 6 - business. The appellant contends that the Board erred in law by classifying some of the property as utilities rather than as business. The issue in this appeal therefore relates to the classification of property.

The questions set forth for determination in the Stated Case are set forth below:

"1. Did the Assessment Appeal Board err in law in its interpretation of Class 2 Utilities as it applies to this appeal?

2. Did the Assessment Appeal Board err in law in applying the 'Utilities' Class 2 to the properties in dispute because they are owned by the appellant who is in the business of 'communication by telephone for compensation' rather than because of the actual uses of the property by the appellant?

3. Did the Assessment Appeal Board err in law by finding that the vacant space at the Lake City property was 'held for the purposes of the business of communication by telephone' where there was no evidence given to support any such finding and all the evidence was in fact contradictory to the finding?

4. Did the Assessment Appeal Board err in law by applying Class 2 Utilities to parts of the properties in dispute on the basis of service of employees of the appellant as part of its business rather than the actual uses of those parts of the properties, such as assembly rooms, lunchrooms and lavatories and janitor facilities?

5. Did the Assessment Appeal Board err in law in applying the Class 2 Utilities to all of the 'telephone refurbishing area' and the part of the warehouse area at the 10th Avenue property used for refurbishing and repairs of telephone instruments, despite the evidence that a portion of the refurbishing areas are used to repair or refurbish privately owned instruments and also instruments which were being exported outside the Province of British Columbia?

6. Did the Assessment Appeal Board err in law by finding that the training portables used as classrooms at the 10th Avenue property were being used for 'purposes ancillary to the business of communication by telephone' when there was no evidence given to the Board to support such a finding?"

In order to consider the foregoing questions it is necessary to quote the following provisions of the Regulations:

Class 2 - utilities

2. Class 2 property shall include only land or improvements, or both, used or held for the purposes of, or for purposes ancillary to, the business of
(a) transportation by railway,
(b) transportation, transmission or distribution by pipeline,
(c) communication by telegraph or telephone, including transmission of messages by means of electric currents or signals for compensation,
(d) generation, transmission or distribution of electricity, or
(e) receiving, transmission and distribution of closed circuit television; but does not include that part of land or improvements or both
(f) included in Classes I, 4 or 8,
(g) used as an office, retail sales outlet, administration building or purpose ancillary thereto, or
(h) used for a purpose other than a purpose defined in paragraphs (a) to (e) of this class.

Those portions of s. 2 which are relevant to this appeal have been underlined.

Class 6 - business and other

6. Class 6 property shall include all land and improvements not included in Classes I to 5 and 7 to 9.

In its decision the board set forth under appropriate headings the arguments of the appellant, the Board's findings of material facts with reference to the disputed property at each of the three locations, the Board's conclusion, and certain directions.

Under the heading of "The Conclusion" the Board stated:

> It appears to the Board that the appellant is not placing sufficient importance upon the phrase, "the business of," in section 2 of the regulation. In the opinion of the Board, the appellant's emphasis on the word, "only," in the opening phrase of section 2 is inappropriate. The word, "only," is referred to in the opening phrase in each section, except 6, of B.C. Regulation 438/81. It appears that that word was intended to restrict, to each particular class, the property therein referred to. There is no mention of the qualifier, "only," in section 6 because that class was intended to be the catch-all for any property not otherwise included in the other classes. It appears, however, that the meaning of the word, "only," in section 2 is intended to be similar to the meaning in section 1, namely, to generally restrict the property designated as Class 2 - Utilities, to that property enumerated in that section.
>
> The construction of each section of the regulation is not the same. Section 5 is most similar to section 2 in construction; but there is a significant difference. Section 2 begins with a statement which includes land and improvements used or held for purposes, or purposes ancillary to certain businesses specified in paragraphs (a) through (e). There follows, however, a statement which excludes from Class 2 that part of land and improvements having certain uses specified in paragraphs (f) through (h). Section 2 is the only section which specifically states that certain parts of land and improvements are not included. The parts which the Board has decided are not included in Class 2 are referred to above.

I am in general agreement with the foregoing reasoning of the Board. In addition, I observe that the word "only" in the first line of s. 2 of the Regulation modifies the phrase "land and improvements." If the word "only" was meant to modify the phrase ". . . used or held for the purposes of, or for purposes ancillary to, the business of. . .," the word "only" would have been placed in a different position in the opening line of s. 2. Furthermore, if the word "only" was meant to modify "used or held for the purposes of . . . the business of . . .," the effect of the intervening phrase "or for purposes ancillary to" would be rendered nugatory.

The classification of property as Class 2 - utilities under s. 2 of the Regulations involves a two-step process. First, it must be determined whether land or improvements, or both, are used or held for the purposes of, or for purposes ancillary to, the business of one or more of the various enterprises listed in sub-paragraphs (a) to (e) inclusive. If that determination is made affirmatively, then any part of the land or improvements, or both, which come within the exceptions contained in sub-paragraphs (f) to (h) inclusive, must be deleted from the foregoing determination.

The Board correctly interpreted s. 2 of the Regulations and followed the aforementioned two-step process. Accordingly, question No. 1 is answered "no."

The answer to question No. 2 is "no." There is no indication in its decision that the Board classified any of the property at the three locations as utilities merely because such property was owned by the appellant. The Board's decision with respect to the various parts of disputed property was based upon the use of such property or the purpose for which such property was held.

With respect to question No. 3, it is observed that there was evidence from Mr. J. Baker that the vacant space at the Lake City Way property had been constructed to accommodate switching equipment but, due to technological advances, switching equipment had never been installed in that part of the building on the property. He further testified that consideration was being given to

making use of the vacant space as office space for a subsidiary of the appellant. In my view there was no evidence before the Board that the vacant space was being used or held for the purposes of, or for purposes ancillary to, the business of communication by telephone. It was not being "used" for anything. If it was being "held" for any purpose, it was for the purpose of an office and, as such, would fall within the exception contained in sub-para. (g) of s. 2. The answer to question No. 3 is "yes."

Question No. 4 is difficult to understand. It is not worded with clarity. From the submissions of counsel I learned that it pertained to the joint use of parts of the properties, such as assembly rooms, lunchrooms and lavatories, by employees of the appellant who were engaged in the business of communication by telephone, and by other employees of the appellant who were office or administrative personnel. The Board classified such jointly used parts of the appellant's properties as utilities. There was some evidence to support that finding. Question No. 4 is answered "no."

Counsel agreed that question No. 5 is essentially a "no evidence" matter. From reading the relevant portions of the transcript of the proceedings before the Board, I am satisfied that there was some evidence to support the findings of the Board with respect to its classification of the warehouse area at Tenth Avenue as utilities. As there was some evidence to support the finding, the Board did not commit an error in law. Question No. 5 is answered "no."

Counsel similarly agreed that question No. 6 involved a "no evidence" matter. Once again I am satisfied from reading the relevant portions of the transcript that there was some evidence before the Board to support its finding that the training portables used as classrooms at Tenth Avenue should be classified as utilities. Again, as there was some evidence to support the finding, the Board did not commit an error in law. Question No. 6 is answered "no."

Pursuant to s. 74(6) of the *Act* the opinion of the Court is hereby remitted to the Board.