

BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE CONSOLIDATED
PROTESTS OF:

AMERICAN COMMUNICATION SERVICES
OF ALBUQUERQUE, INC. (CAB 310-014) and

No. 99-26

ACSI LOCAL SWITCHED SERVICES, INC.,
(CAB 310-034)

TO 1999 NOTICES OF VALUATION

DECISION AND ORDER

A formal hearing on the above-referenced protests was held August 30, 1999, before Margaret B. Alcock, hearing officer. American Communication Services of Albuquerque, Inc. ("American") and ACSI Local Switched Services, Inc. ("ACSI") were represented by Christopher Zamora, Deloitte & Touche, LLP. The Taxation and Revenue Department ("Department") was represented by Bridget A. Jacober, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. American, a subsidiary of e.spire Communications, Inc., is a telecommunications company with a plant and equipment located in New Mexico.
2. In 1996, American first registered with the Department's Property Tax Division for purposes of reporting its property values to the Department as required by Section 7-38-8 NMSA 1978.
3. The Department provided American with instructions that, in all pertinent respects, were identical to the 1999 instructions admitted as Dept. Exhibit 9.

4. The section of the Department's instructions dealing with telecommunications companies states: "The value of property that is part of a telecommunications system is determined according to the special method of valuation as described in Section 7-36-30 NMSA 1978, as amended." Dept. Exhibit 9, page 5.

5. Section 7-36-30(C) NMSA 1978 provides that each taxpayer having property that is part of a communications system "shall elect to have that property valued by the department in accordance with either Subsection D or Subsection F of this section." Subsection D provides for valuation of property based on a cost valuation method; Subsection F provides for valuation of property based on a unit appraisal method.

6. The Department does not have a separate form for taxpayers to use in making the election provided in Section 7-36-30(C) NMSA 1978, but determines the method of valuation elected by a taxpayer based on the taxpayer's method of reporting the value of its property to the Department.

7. On March 27, 1996, American filed its 1996 property valuation report with the Department. Dept. Exhibit 10.

8. American listed all of its equipment, supplies and other property on Form CAB-06, Construction Work in Progress ("CWIP"). Pursuant to Section 7-36-30(D)(2) NMSA 1978, communications system property listed as CWIP is valued under the cost valuation method and reported at 50 percent of cost.

9. On April 17, 1996, a Department employee spoke with Kelly Groves, a senior tax accountant at American, and confirmed that all property had been reported as CWIP because the company's plant was under construction on January 1, 1996, the date of valuation.

10. Although American provided some information on the forms used to value property under the unit appraisal method, the forms were incomplete and did not provide sufficient information to allow the Department to value American's property in accordance with this method.

11. Based on the forms and information included in American's 1996 property valuation report, the Department issued American a 1996 Notice of Valuation using the cost valuation method set out in Section 7-36-30(D) NMSA 1978.

12. American did not protest the Department's 1996 Notice of Valuation or question the method the Department used to value American's property.

13. On March 31, 1997, American filed its 1997 property valuation report with the Department. Dept. Exhibit 11. American's report did not include any schedules pertaining to the unit appraisal method of valuation.

14. At some point during the 1997 valuation process, the Department received a telephone call from Kelly Groves, American's senior tax accountant, asking what method was used to value the company's telecommunications property.

15. In response to this call, the Department faxed Ms. Groves a copy of Section 7-36-30 NMSA 1978. The Department did not receive any further inquiries from Ms. Groves or from anyone else at American.

16. The Department issued American a 1997 Notice of Valuation using the cost valuation method.

17. American did not protest the Department's 1997 Notice of Valuation or question the method the Department used to value American's property.

18. In 1998, American again filed its property valuation report based on the cost valuation method and again received a Notice of Valuation based on the same method. Dept. Exhibit 12. American did not protest or question the 1998 Notice of Valuation.

19. In 1999, American filed its property valuation report based on the cost valuation method. American's report did not include any schedules pertaining to the unit appraisal method of valuation.

20. On April 7, 1999, the Department issued its 1999 Notice of Valuation to American using the cost valuation method.

21. On May 3, 1999, American protested the 1999 Notice of Valuation on the grounds that the Department failed to notify American of its right to elect a valuation method under Section 7-36-30 NMSA 1978 and American was therefore entitled to have its property revalued using the unit appraisal method rather than the cost valuation method.

22. On June 16, 1999, American supplemented its protest to clarify that only \$4,222,200 of the \$10,552,200 property valuation shown on the Department's 1999 Notice of Valuation was in controversy and subject to protest.

23. ACSI, a subsidiary of e.spire Communications, Inc., is a telecommunications company with plant equipment located in New Mexico.

24. In 1999, ACSI first registered with the Department's Property Tax Division for purposes of reporting its property values to the Department as required by Section 7-38-8 NMSA 1978..

25. On March 1, 1999, ACSI filed its 1999 property valuation report with the Department. Taxpayer Exhibit 1.

26. ACSI's report was based on the cost valuation method with almost all property reported as CWIP on Form CAB-06 and valued at 50 percent of cost as provided in section 7-36-

30(D)(2) NMSA 1978. ACSI's report did not include any schedules pertaining to the unit appraisal method of valuation.

27. On May 10, 1999, the Department issued its 1999 Notice of Valuation to ACSI based on the cost valuation method.

28. On May 25, 1999, ACSI protested the 1999 Notice of Valuation on the grounds that the Department failed to notify ACSI of its right to elect a valuation method under Section 7-36-30 NMSA 1978 and ACSI was therefore entitled to have its property revalued using the unit appraisal method rather than the cost valuation method.

29. On June 16, 1999, ACSI supplemented its protest to clarify that only \$480,000 of the \$813,087 property valuation shown on the Department's 1999 Notice of Valuation was in controversy and subject to protest.

30. On June 23, 1999, the hearing officer notified American and ACSI that formal hearings on their respective protests would be held on August 9, 1999.

31. The taxpayers and the Department subsequently filed a joint request to continue the hearings on the taxpayers' protests until August 30, 1999, which request was granted by the hearing officer.

33. At the beginning of the August 30, 1999 hearing on ACSI's protest, Christopher Zamora of Deloitte & Touche, LLP, the taxpayers' authorized representative, asked that American's protest be consolidated with ACSI's protest and that both matters be heard and decided together.

DISCUSSION

American and ACSI ("Taxpayers") maintain they are entitled to have their New Mexico telecommunications property revalued for tax year 1999 in accordance with the unit appraisal method of valuation. The Taxpayers' position is based on the following argument: (1) the

Department had an affirmative duty to notify the Taxpayers of the election provided in Section 7-36-30 NMSA 1978, and (2) if the Department had notified the Taxpayers of the election, they would have elected to file their property valuation reports using the unit appraisal method rather than the cost valuation method.

Burden of Proof. Section 7-38-6 NMSA 1978 states that values of property determined by the Department's Property Tax Division are presumed to be correct. It is therefore the Taxpayers' burden to come forward with evidence and legal authority to support their protests to the Department's 1999 Notices of Valuation.

Valuation of Telecommunications Property. Section 7-36-30 NMSA 1978 sets out special rules for valuing property that is part of a communications system. Subsection (C) states, in pertinent part:

C. Each taxpayer having property subject to valuation under this section shall elect to have that property valued by the department in accordance with either Subsection D or Subsection F of this section. The election shall be effective for subsequent property tax years unless prior permission of the secretary is obtained to change the election for good cause shown. A taxpayer may not seek permission to change an election unless the prior election has been effective for at least three consecutive property tax years....

The statute places responsibility for electing a valuation method on the taxpayer, not the Department. This is consistent with Section 7-38-8 NMSA 1978, which places the initial responsibility for reporting and valuing property on the taxpayer. *See, Zwaagstra v. Board of County Commissioners*, 119 N.M. 675, 894 P.2d 1031 (Ct. App. 1995) (New Mexico is a self-rendition state and a taxpayer is required to report all property subject to valuation under Section 7-38-8). *See also, Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977) (every person is charged with the reasonable duty to ascertain the possible tax consequences of his actions).

In this case, the Department's reporting instructions notified American and ACSI that their telecommunications property should be valued according to the special method of valuation described in Section 7-36-30 NMSA 1978. By failing to include the information needed to determine the value of property in accordance with the unit appraisal method set out in Subsection F of Section 7-36-30, the Taxpayers necessarily elected to have the Department determine value in accordance with the cost valuation method set out in Subsection D of that section. The Department's notices of valuation were based on the Taxpayers' own reports, and the Department's use of the cost valuation method was dictated by the manner in which American and ACSI completed those reports. The Taxpayers cannot now claim the right to have their property revalued in accordance with an election they never made.

Taxpayers' Election of Valuation Method. American and ACSI contend they are entitled to revalue their property based on the unit appraisal method because this is the method they would have chosen if the Department had informed them of the election provided in Section 7-36-30 NMSA 1978. The evidence does not support the Taxpayers' position on this issue.

American's Election. At the August 30, 1999 hearing, Christopher Zamora testified that none of the employees responsible for filing American's property valuation reports for prior years are still with the company. Mr. Zamora acknowledged that no one now employed by American knows whether the former employees were aware of the election provided in Section 7-36-30 NMSA 1978. Nor do the current employees know why the reports American filed for prior years did not include information to support a valuation based on the unit appraisal method.

What the evidence does show is that Kelly Groves, an American employee who worked on both the 1996 and 1997 reports, called the Department sometime in 1997 to ask what method was used to value the company's property. At that time, the Department faxed Ms. Groves a copy of

Section 7-36-30 NMSA 1978, which clearly states that taxpayers must elect between the cost valuation and unit appraisal methods of valuing telecommunications property. The Department did not receive any follow-up inquiries from Ms. Groves or anyone else at American. Instead, American continued to file its property valuation reports based on the cost valuation method. Although American would have been eligible to apply for permission to change to the unit appraisal method of valuation for the 1999 tax year, American did not do so. Nor has American applied for permission to change its method of valuation for the 2000 tax year.

These facts do not support American's contention that it would have chosen the unit appraisal method of valuation if it had been aware of the election provided in Section 7-36-30 NMSA 1978. To the contrary, the evidence supports the conclusion that American was aware of the election and knowingly chose to value its telecommunications property in accordance with the cost valuation method set out in Subsection D of Section 7-36-30 NMSA 1978.

ACSI's Election. In 1999, ACSI filed its first property valuation report with the Department. ACSI's report was based on the cost valuation method with almost all property reported as CWIP on Form CAB-06 and valued at 50 percent of cost as provided in Section 7-36-30(D)(2) NMSA 1978. ACSI's report did not include any schedules pertaining to the unit appraisal method of valuation. No testimony or other evidence was presented at the hearing to explain why ACSI filed its 1999 report based on the cost valuation method. Nor was there any

testimony to support ACSI's contention that the company would have used the unit appraisal method of valuation if it had been aware of the election provided in Section 7-36-30 NMSA 1978.

CONCLUSIONS OF LAW

1. American and ACSI filed timely, written protests to the Department's 1999 Notices of Valuation and jurisdiction lies over the parties and the subject matter of this protest.

2. The Department does not have a statutory duty to notify taxpayers of the election provided in Section 7-36-30 NMSA 1978; the responsibility for making the election is on the taxpayer, not the Department.

3. Both American and ACSI elected to have the Department value their New Mexico telecommunications property in accordance with the cost valuation method set out in Subsection D of Section 7-36-30 NMSA 1978 and may not change their election except as specifically provided in Subsection C of Section 7-36-30 NMSA 1978.

For the foregoing reasons, the protests filed by American and ACSI are denied.

Dated September 16, 1999.