



The Commonwealth of Massachusetts
Appellate Tax Board

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DEC - 3 2008

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Re: Bell Atlantic Mobile of Massachusetts Corporation, Ltd.
v. Commissioner of Revenue and Various Cities & Towns
Docket Nos. C290897 - C291143

Various Cities and Towns
v. Commissioner of Revenue and Bell Atlantic Mobile
Corporation, Ltd.
Docket Nos. (See Appendix)

Dear Madam,

Enclosed please find copy of Findings of Fact and Report promulgated by the Appellate Tax Board in the above-entitled appeals.

Very truly yours,

Michelle Callent
Clerk of the Board

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/jb
Enclosure

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COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

BELL ATLANTIC MOBILE
OF MASSACHUSETTS
CORPORATION, LTD.

v. COMMISSIONER OF REVENUE
& VARIOUS CITIES and TOWNS

Docket Nos. C290897 - C291143

VARIOUS CITIES and TOWNS

v. COMMISSIONER OF REVENUE
& BELL ATLANTIC MOBILE
CORPORATION, LTD.

Various Docket Nos.
(See Appendix)

Promulgated:
December 3, 2008

These appeals were filed with the Appellate Tax Board ("Board") under G.L. c. 59, § 39 by Bell Atlantic Mobile of Massachusetts Corporation, LTD ("Bell Atlantic Mobile") against the Commissioner of Revenue ("Commissioner") and various cities and towns and by the boards of assessors of various cities and towns ("assessors") against Bell Atlantic Mobile and the Commissioner. All of the appeals at issue challenge the central valuation by the Commissioner of certain personal property owned by Bell Atlantic Mobile. A complete list of the docket numbers, parties and fiscal years at issue is included in the attached Appendix.

Commissioner Scharaffa heard the motions of the Newton Assessors and the Boston Assessors to consolidate their

§ 39 appeals with certain overvaluation appeals filed by Bell Atlantic Mobile pursuant to G.L. c. 59, §§ 64 and 65. Commissioner Scharaffa denied those motions and was joined in the decisions for the appellees by Chairman Hammond and Commissioners Egan, Rose and Mulhern, ruling that the Supreme Judicial Court's decision in *Bell Atlantic Mobile of Massachusetts, LTD v. Commissioner of Revenue and others (and a companion case)*, 451 Mass. 280, 281 (2008) was dispositive, requiring dismissal of the instant appeals.

These findings of fact and report are made pursuant to requests by the Commissioner and certain cities and towns which filed § 39 appeals.

Kathleen King Parker, Esq. for Bell Atlantic Mobile.

Richard G. Chmielinski, Esq. for the Newton Assessors.

Anthony M. Ambriano, Esq. for the Boston Assessors.

Daniel A. Shapiro, Esq. for the Commissioner.

FINDINGS OF FACT AND REPORT

The relevant facts of these appeals are not contested. At all material times, Bell Atlantic Mobile provided wireless cellular telecommunications services. Purporting to act under G.L. c 59, § 39, the Commissioner certified

the value of Bell Atlantic Mobile's personal property¹ to Bell Atlantic Mobile and to each of the cities and towns in which Bell Atlantic Mobile's personal property was located. Bell Atlantic Mobile and various cities and towns filed the instant appeals with the Board under § 39 challenging the Commissioner's certified values.²

In addition to its § 39 appeals, Bell Atlantic Mobile also filed appeals with the Board under G.L. c. 59, §§ 64 and 65 ("§ 65 appeals") for the same fiscal years seeking abatement of the personal property taxes assessed to it by the cities and towns in which its property was located.

Similarly, for fiscal year 2004, the fiscal year at issue in *Bell Atlantic Mobile*, Bell Atlantic Mobile filed both § 39 and § 65 appeals and the Newton Assessors filed their own § 39 appeal. In *Bell Atlantic Mobile*, the Board consolidated the § 39 and § 65 appeals for fiscal year 2004 and then bifurcated them for hearing, first hearing and deciding the issues of whether Bell Atlantic Mobile was a "telephone company" eligible for central valuation under

¹ The vast majority of Bell Atlantic Mobile's personal property is its machinery, including antennae, analogue and digital computer components, amplifiers, switching equipment, generators and power equipment. See *Bell Atlantic Mobile, et al v. Commissioner of Revenue, et al*, Mass. ATB Findings of Fact and Reports, 2007-121, 139.

² The appeals filed by Bell Atlantic Mobile concern fiscal year 2008. The appeals filed by the Newton Assessors concern fiscal years 2003 and 2005 through 2008, while the appeals filed by the Boston Assessors are for fiscal years 2005 through 2008.

§ 39 and whether it was entitled to the corporate utility exemption under G.L. c. 59, § 5, clause 16(1)(d) and deferring all issues of valuation to later proceedings. The Board's ruling in the § 39 appeals for fiscal year 2004 filed by Bell Atlantic Mobile and by the Newton Assessors that Bell Atlantic Mobile was not a "telephone company" entitled to central valuation under § 39 was affirmed by the Supreme Judicial Court. **Bell Atlantic Mobile**, 451 Mass. at 283. The Court's affirmance ended the fiscal year 2004 § 39 appeals filed by Bell Atlantic Mobile and the Newton Assessors.

Simultaneously with its Decision in the § 39 appeals, the Board issued an Order in the § 65 appeals in which it ruled that Bell Atlantic Mobile, as a provider of wireless cellular telecommunications services, was not entitled to the corporate utility exemption, but stayed further proceedings in the § 65 appeals pending appellate review of the Board's decision concerning Bell Atlantic Mobile's § 39 appeals. See **Bell Atlantic Mobile**, Mass. ATB Findings of Fact and Reports, 2007-121, 124. The primary issue remaining in the § 65 appeals is whether Bell Atlantic Mobile's personal property was overvalued.

After the Supreme Judicial Court's decision in **Bell Atlantic Mobile** disposing of the fiscal year 2004 § 39

appeals filed by Bell Atlantic Mobile and by the Newton Assessors, the Newton Assessors and the Boston Assessors filed motions to consolidate their § 39 appeals³ with Bell Atlantic Mobile's § 65 appeals. The assessors sought to keep their § 39 appeals alive because, under § 39, unlike § 65, the Board could find values higher than those assessed, resulting in additional taxes for the municipalities. The assessors' primary argument in support of their claim that the Board should find higher values than those certified by the Commissioner is that the Commissioner, in certifying the value of Bell Atlantic Mobile's property, erroneously excluded certain property from the values certified to the assessors by granting the corporate utility exemption to Bell Atlantic Mobile for the years at issue other than fiscal year 2008.⁴

At the hearing of the motions to consolidate, the Board advised the parties of its intent to dismiss all the remaining § 39 appeals on its own motion, pursuant to the

³ The Newton Assessors' motion to consolidate included the § 39 appeals for fiscal year 2004, which the Board and the Supreme Judicial Court have already disposed of in *Bell Atlantic Mobile*, as well as their remaining § 39 appeals for fiscal years 2003, 2005, 2006, 2007 and 2008. The Boston Assessors' motion to consolidate included only their § 39 appeals for fiscal years 2005 through 2008.

⁴ The Board's decision in the § 39 appeals and its order in the § 65 appeals were promulgated on May 15, 2006. Accordingly, in valuing Bell Atlantic Mobile's property for fiscal year 2008, with a valuation date of January 1, 2007, the Commissioner valued Bell Atlantic Mobile's personal property without recognizing the corporate utility exemption.

Supreme Judicial Court's decision in *Bell Atlantic Mobile*, and allowed the parties the opportunity to address the proposed dismissal of the § 39 appeals. For the reasons detailed in the following Opinion, the Board denied the motions to consolidate, dismissed the instant § 39 appeals on its own motion, and issued decisions for the appellees.

OPINION

General Laws c. 59, § 39 provides for the valuation and assessment of § 39 property owned by "all telephone and telegraph companies" ("telephone companies"). In *Bell Atlantic Mobile*, the Supreme Judicial Court upheld the Board's determination in the fiscal year 2004 § 39 appeals filed by Bell Atlantic Mobile and by the Assessors of Newton that providers of wireless cellular telecommunications services are not "telephone companies" under G.L. c. 59, § 39. Accordingly, the Board ruled, and the Court affirmed, that Bell Atlantic Mobile's property was not subject to central valuation under § 39.

Notwithstanding the inapplicability of § 39 to the valuation and assessment of Bell Atlantic Mobile's personal property, the Newton Assessors and the Boston Assessors maintain that their § 39 appeals for the fiscal years at issue in these appeals should be allowed to stand because

§ 39 is the only mechanism by which the Commissioner's error in certifying a lower value for the property by granting the corporate utility exemption can be remedied. Acceptance of this argument would not only create the anomalous result of the same language in § 39 providing a right of appeal for assessors but not for property owners to whom values have been certified, but would also directly contradict the clear rulings of the Board affirmed by the Court in *Bell Atlantic Mobile*.

Section 39 provides that "every owner and board of assessors to whom any such valuation shall have been so certified" by the Commissioner has a right of appeal to the Board. In *Bell Atlantic Mobile*, the Board and the Court ruled that § 39 had no applicability to the taxpayer because it was not a telephone company for purposes of § 39. The assessors maintain that, even though the Commissioner had no authority to centrally value Bell Atlantic Mobile's property, the fact that she "certified" the value of its property to the assessors gives the assessors the right to appeal the valuation under § 39.

By that same logic, however, Bell Atlantic Mobile would still have the right to appeal the Commissioner's valuation, since she also certified the value to it. The Board and the Court clearly ruled, however, that Bell

Atlantic Mobile and the Newton Assessors had no such right, and the Assessors of Newton and Boston have offered little other than an equitable argument that they have been unfairly deprived of revenue to establish a basis for their right to appeal under § 39.

Moreover, the Board and the Court explicitly ruled that the question of whether the Commissioner properly granted the corporate utility exemption to Bell Atlantic Mobile could not be raised in a § 39 appeal. In its Findings of Fact and Report in *Bell Atlantic Mobile*, the Board detailed its reasoning:

On May 15, 2006, the Board issued a Decision for the 220 appellee cities and towns and the appellant City of Newton in the § 39 appeals 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.**

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 are affected by whether Bell Atlantic Mobile is subject to § 39. **If the Board is affirmed in its ruling that § 39 is not**

applicable to Bell Atlantic Mobile, the Commissioner will no longer be a party to the proceedings and, because the valuation issues will be addressed only in the § 65 appeals, the Board's determination of value cannot exceed the assessed values of Bell Atlantic Mobile's property. If, however, it is finally determined that Bell Atlantic Mobile is subject to § 39, the Commissioner would be a proper party to the valuation hearing and the Board could find values under § 39 in excess of those assessed, resulting in the assessment of additional taxes.

Bell Atlantic Mobile, Mass. ATB Findings of Fact and Reports at 2007-123-125 (emphasis added).

In affirming the Board's decision, the Court clearly understood and approved of the Board's reasoning and approach to the corporate utility exemption issue:

The board's conclusion that Bell Atlantic Mobile is not a telephone company under G.L. c. 59, § 39, *disposed of the § 39 appeals*. Because Bell Atlantic Mobile was not entitled to central valuation by the commissioner under § 39, the board ruled that the *commissioner had no authority either to grant or to deny the corporate utility exemption*, and therefore did not decide in the § 39 appeals whether Bell Atlantic Mobile was entitled to the exemption. The board did decide, in the context of the § 65 appeals, that Bell Atlantic Mobile was not entitled to the exemption. Those appeals, however, are not before us.

Bell Atlantic Mobile, 451 Mass. at 285, n. 11 (emphasis added). Accordingly, the Court ruled, as did the Board, that the determination that Bell Atlantic Mobile is not a telephone company disposes of the § 39 appeals because § 39 does not apply to the valuation of its personal property.

The question of whether Bell Atlantic Mobile is entitled to claim the corporate utility exemption is properly reserved for the § 65 appeals.

Further, the doctrines of res judicata, issue preclusion and collateral estoppel provide additional support for the Board's dismissal of the Newton Assessors' § 39 appeals. The Newton Assessors filed an appeal in **Bell Atlantic Mobile** for fiscal year 2004 "challenging the Commissioner of Revenue's classification of Bell Atlantic Mobile as a telephone company subject to central valuation under § 39 and alleging that Bell Atlantic Mobile did not qualify for the corporate utility exemption under any circumstance and that the Commissioner undervalued Bell Atlantic Mobile's § 39 property." **Bell Atlantic Mobile**, Mass. ATB Findings of Fact and Reports at 2007-122. The Court upheld the Board's decision for the Newton Assessors on the issue of classification and the Board's determination that the utility exemption, and therefore the undervaluation claim, could not be decided in the § 39 appeal because § 39 did not apply. Accordingly, the Newton Assessors are precluded from relitigating the issue because: "there was a final judgment on the merits" in **Bell Atlantic Mobile**; "the party against whom preclusion is asserted [the Newton Assessors] was a party to **Bell**

Atlantic Mobile"; and the issue in *Bell Atlantic Mobile* was "identical to the issue in the current adjudication" and "essential" to the decision in *Bell Atlantic Mobile*. See, e.g., *Anusavice v. Board of Registration in Dentistry*, 451 Mass. 786, 799, n. 16 (2008).

The Board is cognizant of the fact that dismissal of the § 39 appeals prevents the assessors from challenging the Commissioner's decision to grant the corporate utility exemption. However, the plain meaning of § 39, as interpreted by the Court and the Board in *Bell Atlantic Mobile*, compels this result. Although the assessors contend that they were compelled to accept the Commissioner's erroneous certified values, which were lower than the values they would have used because of the Commissioner's granting of the corporate utility exemption, the Commissioner's error in granting the exemption cannot give the assessors a right of appeal which the plain language of § 39, as interpreted by the Court and this Board, does not grant.

Further, the Board notes that the assessors did not pursue other avenues for challenging the Commissioner's exemption determination, including an action for declaratory judgment, an action in the nature of mandamus,

or other judicial proceeding. See, e.g., *General Dynamics Corporation v. Assessors of Quincy*, 388 Mass. 24 (1983).

Finally, the Board's dismissal of the assessors' § 39 appeals leaves the assessors who filed § 39 appeals in no worse position than the majority boards of assessors that did not file § 39 appeals for the years at issue. Although § 39 is not available to municipalities seeking a higher valuation, all municipalities may defend their assessments in the taxpayer's § 65 appeals.

CONCLUSION

In *Bell Atlantic Mobile*, the Board and the Supreme Judicial Court ruled that § 39 had no applicability to the valuation and assessment of property owned by providers of wireless cellular telecommunications services. The Court's decision covered the fiscal year 2004 § 39 appeals filed by Bell Atlantic Mobile and by the Newton Assessors and is dispositive as to the remaining § 39 appeals filed by Bell Atlantic Mobile, the Newton Assessors and the assessors of the other cities and towns. The assessors' attempt to circumvent the Court's ruling by arguing that § 39 gives them their only opportunity to challenge the Commissioner's valuation and exemption determinations is without merit.

Accordingly, the Board on its own motion dismissed these appeals and issued decisions for the appellees in all of the remaining § 39 appeals.


APPELLATE TAX BOARD

By:


Thomas W. Hammond, Jr., Chairman

A true copy,

Attest:


Clerk of the Board

