

**Matter of Level 3 Communications, LLC v  
Chautauqua County**

2015 NY Slip Op 32698(U)

August 31, 2015

Supreme Court, Chautauqua County

Docket Number: K1-2014-1515

Judge: Paul B. Wojtaszek

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This opinion is uncorrected and not selected for official publication.

At a Civil Special Term of the  
Supreme Court, held in and for the  
County of Chautauqua, State of New York,  
on the 27<sup>th</sup> day of July 2015.

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PRESIDING: HON. PAUL B. WOJTASZEK, J.S.C.

**SUPREME COURT: STATE OF NEW YORK  
COUNTY OF CHAUTAUQUA**

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**In the Matter of the Application of  
LEVEL 3 COMMUNICATIONS, LLC,**

Petitioner,

**DECISION**

vs.

K1-2014-1515

**CHAUTAUQUA COUNTY, CITY OF DUNKIRK,  
VILLAGE OF BROCTON, VILLAGE OF  
WESTFIELD, BROCTON CENTRAL SCHOOL  
DISTRICT, DUNKIRK CITY SCHOOL DISTRICT,  
FREDONIA CENTRAL SCHOOL DISTRICT,  
RIPLEY CENTRAL SCHOOL DISTRICT, and  
WESTFIELD CENTRAL SCHOOL DISTRICT,**

Respondents,

**For a Judgment Under Article 78 of the Civil Practice  
Law and Rules.**

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**DECISION**

In this proceeding pursuant to Civil Practice Law and Rules Article 78 and § 3001, the  
Petitioner, LEVEL 3 COMMUNICATIONS, LLC (hereinafter the “Petitioner” and/or “Level 3”) challenges the assessment and collection of real property taxes imposed on the Petitioner’s fiber optic cables and inclosures (hereinafter “Cables” and/or the “Property”) located at various private

right of way locations in Chautauqua County. The Respondents, CHAUTAUQUA COUNTY, CITY OF DUNKIRK, VILLAGE OF BROCTON, VILLAGE OF WESTFIELD, BROCTON CENTRAL SCHOOL DISTRICT, DUNKIRK CITY SCHOOL DISTRICT, FREDONIA CENTRAL SCHOOL DISTRICT, RIPLEY CENTRAL SCHOOL DISTRICT, and WESTFIELD CENTRAL SCHOOL DISTRICT, (hereinafter collectively the “Respondents”), levied the taxes, oppose all of the relief sought by the Petitioner, and seek dismissal of the Verified Petition.

The Petitioner paid real property taxes with respect to the Cables for the 2010, 2011, and 2012 tax years before commencing this proceeding by way of a Verified Petition seeking the following relief: (1) a CPLR § 3001 declaration that the Petitioner’s Cables are not real property that is taxable under the RPTL; and (2) a CPLR § 7806 Order requiring the Respondents to approve the Petitioner’s tax refund applications and to refund the taxes paid with interest.

The Respondents conversely seek an Order denying the Verified Petition’s request for relief and dismissing the Verified Petition in all respects. Respondents submitted multiple points of law in support of dismissal, most notably the argument that the Property is taxable real property under RPTL § 102 (and has been for approximately 30 years), and the language of the statute contains neither a tax exemption nor exclusion.

The parties all submitted papers in support of their respective positions. On July 27, 2015 oral argument was conducted with John Nicolich, Esq. on behalf of the Petitioner appearing (telephonically, at the request of Mr. Nicolich). The Respondents appeared by the following counsel: Michael Risman, Esq. for the Village of Brocton, City of Dunkirk, Village of Westfield, Brocton School District, Dunkirk City School District, Fredonia Central School District, Ripley Central School District, and Westfield Academy and Central School District; Samuel Drayo, Jr.,

Esq. for the Village of Brocton; Kurt Gustafson, Esq. for the County of Chautauqua; Joel Seachrist, Esq. for the Village of Westfield; and Ronald Szot, Esq. for the City of Dunkirk.

After reviewing all submissions, and hearing oral argument of all parties before this Court, the Verified Petition is dismissed in its entirety.

### **Taxable Real Property**

New York Real Property Tax Law § 102(12) reads in part as follows:

"Real property", "property" or "land" mean and include:

(f) Boilers, ventilating apparatus, elevators, plumbing, heating, lighting and power generating apparatus, shafting other than counter-shafting and equipment for the *distribution* of heat, light, power, gases and liquids, but shall not include movable machinery or equipment consisting of structures or erections to the operation of which machinery is essential, owned by a corporation taxable under article nine-a of the tax law, used for trade or manufacture and not essential for the support of the building, structure or superstructure, and removable without material injury thereto (emphasis added);

(i) When owned by other than a telephone company as such term is defined in paragraph (d) hereof, all lines, wires, poles, supports and inclosures for electrical conductors upon, above and underground used in connection with the *transmission* or switching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain, except that such property shall not include: (A) station connections; (B) fire and surveillance alarm system property; (C) such property used in the transmission of news wire services; and (D) such property used in the transmission of news or entertainment radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public, whether or not a fee is charged therefor (emphasis added).

Real property within the state is taxable unless exempt from taxation by law, and tax exemptions are to be strictly construed with doubt being resolved against the exemption if ambiguity or uncertainty occurs (*Matter of the City of Lackawanna v. State Board of Equalization & Assessment of the State of New York*, 16 NY2d 222, 230, 264 NYS2d 528 [1965]).

Similarly, tax exclusions are never presumed or preferred and before the Petitioner can benefit from an exclusion, the burden rests on it to establish that the item comes within the language of the exclusion (*see Matter of Mobil Oil Corp. v. Finance Administrator of the City of New York*, 58 NY2d 95, 99, 459 NYS2d 566 [1983]). Although the Petitioner argued to this Court that this is not a tax exemption case, rather this is a case about statutory construction and the Petitioner's property is not part of the statute, under either analysis the construction or interpretation must be made against the taxpayer.

The Petitioner bases the majority of its present argument upon the facts and finding in *Matter of RCN New York Communications, LLC v. Tax Commission of the City of New York*, (95 AD3d 456, 943 NYS2d 480 [1<sup>st</sup> Dept 2012], *lv denied* 20 NY3d 855 [2012]) where the Appellate Division found that that the cables at issue there, consisting of electrical insulators which transmit light impulses and do not conduct electricity, were not taxable under the RPTL.

Initially, this holding of the First Department is not binding upon this Court. The more important distinction, however, is that *Matter of RCN New York* only analyzed the property taxes assessed pursuant to RPTL § 102(12)(i). The Respondents here argue that RPTL § 102(12)(f) is the applicable statute, and that the Property is in fact taxable under RPTL § 102(12)(f).

The Petitioner conceded at oral argument in this case that if the Property is found to be taxable, its other arguments and points of law are moot. The Court agrees, and for the reasons set forth herein finds that the Petitioner's Property is taxable under RPTL § 102(12)(f).

While not controlling precedent, the recent Commercial Division Decision and Order issued by Hon. Timothy J. Walker, A.J.S.C. constitutes authority from a Court of concurrent jurisdiction that decided the very same legal issues faced here in favor of the taxing entities (*Level 3 Communications, LLC v. Erie County, et al*, (Sup Ct. Erie County, November 3, 2014, Walker,

J., index No. 2014-64)).<sup>1</sup> In *Erie County* the same Petitioner that is before this Court challenged the assessment and collection of real property taxes upon fiber optic cables and inclosures located within various Erie County municipalities arguing, just like here, that based upon *Matter of RCN New York* the taxes paid in 2010, 2011, and 2012 should be corrected, refunded, and credited to the Petitioner. Respondents in *Erie County* relied upon RPTL § 102(12)(f) arguing that the phrase “equipment for the distribution of...light” requires taxation of the property. Identifying this particular issue as one of first impression in New York, *Erie County* held the property was taxable under RPTL § 102 (12)(f) because Petitioner admitted there, as here, that the Cables “transmit signals by way of modulated light waves” (Verified Petition, ¶ 17). *Erie County* further stated that under the ordinary meaning of RPTL § 102(12)(f) the language is clear, there is no need for interpretation, and the words “transmit” and “distribute” cannot be qualitatively distinguished. This Court agrees with the reasoning and analysis of *Erie County*, and concludes that Level 3’s Cables are subject to taxation.

While the determination that the subject Cables are taxable real property effectively ends the proceeding here, this Court further finds cause, on at least one other point of law, to grant relief to the Respondents. Specifically, the voluntary payment rule compels dismissal of the proceeding as well.

### **Voluntary Payment of Taxes**

Petitioner alleges that the Respondents erroneously assessed real property taxes against it, among other ways, under mistake of law. It is well settled that to recover payments made under a

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<sup>1</sup> Notably, the recent Decision and Order in *Level 3 Communications, LLC v. Clinton County, et al*, (Sup Ct. Clinton County, February 25, 2015, Ellis, J., index No. 2013-1601), relied on the reasoning in *Erie County* and found RPTL § 102(12)(f) to be an appropriate basis for considering the cables to be taxable real property.

mistake of law, a taxpayer is required to show that the payments were made involuntarily (*Level 3 Communications, LLC v. Essex County*, 129 AD3d 1255, 11 NYS3d 334 [3d Dept 2015]). This requirement gives governmental entities notice they may need to provide tax refunds, and if the tax is paid fully without protest or in any way that would reflect the payment is not voluntary, then it is proper to deny the petition (*Level 3 v. Essex*, at 1255). “The taxpayer must establish that the taxes were paid involuntarily to succeed” (*City of Rochester v. Chiarella*, 65 NY2d 92, 99, 490 NYS2d 715 [1985]).

It is uncontested in this case that the Petitioner paid the taxes in 2010, 2011, and 2012 without protest of any sort. The Fourth Department has consistently stated that only taxes paid under protest are subject to repayment when illegally collected (*see Hurd v. City of Buffalo*, 41 AD2d 402, 343 NYS2d 950 [4<sup>th</sup> Dept 1973] *affirmed* 34 NY2d 628, 355 NYS2d 369 [1974]). The Third Department in *Community Health Plan v. Burckard*, (3 AD3d 724, 725, 770 NYS2d 485 [3d Dept 2004]), a case with a very similar procedural history (petitioner commenced an Article 78 proceeding seeking refunds of real property taxes held, and also filed an application pursuant to RPTL § 556 claiming tax exempt status) held that the petitioner would not have been entitled to a tax refund even if its applications were proper because it did not pay the taxes under protest or duress.

Level 3’s Cables at issue here are taxable real property. Additionally, Petitioner’s voluntary payment of the taxes effectively bars it from lawfully seeking redress in any event.

All other matters briefed and presented to this Court have been reviewed and considered, and it is not necessary to address the other matters because the findings herein are dispositive of all issues otherwise presented.

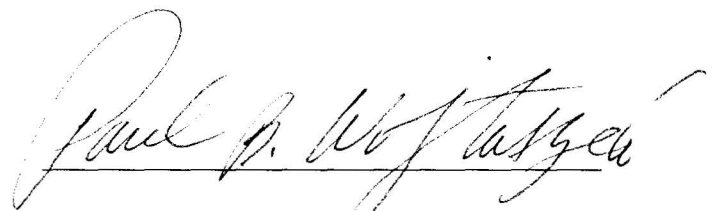
Accordingly, it is hereby:

ORDERED, that the Petitioner's Verified Petition is dismissed in its entirety, and it is further

ORDERED, that this shall constitute the Decision of the Court, and the parties are instructed to submit an Order on consent that attaches this Decision. The delivery of a copy of this Decision by this Court shall not constitute notice of entry.

DATED: Mayville, New York

*August 31, 2015*

A handwritten signature in cursive script, reading "Paul B. Wojtaszek", written over a horizontal line.

**HON. PAUL B. WOJTASZEK**

Justice of the Supreme Court