

FOURTH DEPARTMENT REJECTS TELECOMMUNICATIONS COMPANIES' EFFORTS TO CIRCUMVENT COURT OF APPEALS RULING ON TAXABILITY OF TELECOMMUNICATIONS INFRASTRUCTURE AND FIBER OPTIC CABLES

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After the Court of Appeals held that telecommunication installations and fiber optic cables are taxable real property under Real Property Tax Law (“RPTL”) § 102(12)(i), telecommunications companies have sought other avenues to obtain tax exemptions. Applying, as the Court of Appeals did, the clear intent of the Legislature, the Appellate Division, Fourth Department, has rejected the two most recent attempts.

The cases, *Matter of Level 3 Communications, LLC v. Erie County*, 174 A.D.3d 1497 (4th Dep’t 2019) and *Matter of Level 3 Communications, LLC v. Chautauqua County*, 174 A.D.3d 1502 (4th Dep’t 2019) involve petitions for retroactive tax refunds in which the telecommunications industry has tried to sidestep (1) the clear statutory language of RPTL § 102(12)(i) and (2) the Court of Appeals recent ruling in *T-Mobile Northeast, LLC v. DeBellis*, 32 N.Y.3d 594, 608 (2018), *rearg. denied* 32 N.Y.3d 1197 (2019) (“T-Mobile”). *T-Mobile* conclusively held that T-Mobile’s installations and fiber optic cables are taxable real property under New York law. The Fourth Department rulings defeated efforts to circumvent that ruling through alternative arguments, resulting in a statewide victory for municipalities and school districts.

T-Mobile Northeast, LLC v. DeBellis Sets the Framework for the Fourth Department’s Decisions

The New York Court of Appeals’ *T-Mobile* decision was the linchpin upon which the two above July 31, 2019 decisions turned. We previously covered the impact of the *T-Mobile* decision in a Municipal Law Alert here. To recap, the court held that “[b]ecause the property at issue consists of lines that transmit signals between users across public domain, taxation of this property comports with the plain text of paragraph i [of RPTL § 102(12)] and the legislative intent underlying [RPTL § 102].” The court focused on the nature of the use of the property rather than its actual physical makeup to determine that T-Mobile’s installations and fiber optic cables were clearly taxable. The Fourth Department decisions discussed below

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denied attempts by the telecommunications industry to recast their exemption argument to avoid the Court of Appeals' holding in *T-Mobile*.

Matter of Level 3 Communications, LLC v. Erie County (Level 3-Erie County)

In *Level 3 v. Erie County*, the Fourth Department modified the lower court decision and dismissed a similar proceeding in which the petitioners sought a tax exemption for fiber optic installations alleging the radio and television transmission exception.

Erie County Supreme Court (Deborah A. Chimes, J.) held that the petitioners' fiber optic cables and inclosures in Erie County although generally taxable, were not taxable because they fall under the exception contained in RPTL § 102(12)(i)(D). An appeal ensued.

Level 3 conceded that, subsequent to the Supreme Court's decision, the Court of Appeals had conclusively determined that "fiber-optic cables are taxable as 'lines' under [RPTL § 102(12)(i)] despite the fact that they do not conduct electricity." *Matter of T-Mobile Northeast, LLC v. DeBellis*, 32 N.Y.3d 594, 608 (2018), *rearg. denied* 32 N.Y.3d 1197 (2019). Noting the concession, the Fourth Department reversed the Supreme Court's order and judgment to the extent they diverged from the holding in *T-Mobile*. The Fourth Department then went on to consider several issues raised by the parties regarding the taxability of Level 3's installations.

The petitioners argued that the towns bear the burden of establishing that the properties are taxable under the RPTL. However, the Court of Appeals found that "[t]ax exclusions are never presumed or preferred and before [a] petitioner may have the benefit of them, the burden rests on it to establish that the item comes within the language of the exclusion. Moreover, a statute authorizing a tax exemption will be construed against the taxpayer unless the taxpayer identified a provision plainly creating the exemption. Thus the taxpayer's interpretation of the statute must not simply be plausible, it must be 'the only reasonable construction.'" *Charter Dev. Co., L.L.C. v. City of Buffalo*, 6 N.Y.3d 578, 582 (2006) (brackets in original) (internal citations omitted).

After weighing the further contention that the installations were not taxable because they were used, to some unspecified extent, to transmit "news or entertainment, radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public" as provided for by RPTL § 102 (12)(i)(D), the court rejected that argument because it conflicts with the Court of Appeals' decision in *T-Mobile*. And further, that interpretation was not the only reasonable construction of the statute. The court clarified that it would only permit an exemption for installations "primarily or exclusively used for one of the exempt purposes in RPTL § 102 (12)(i)(A)-(D)."

Matter of Level 3 Communications, LLC v. Chautauqua County ("Level 3-Chautauqua County")

The *Level 3 v. Chautauqua County* decision was a similar and related case to *Level 3-Erie County*. But, unlike the Erie County case, the Supreme Court's decision was in favor of the taxing jurisdictions.

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The appeal was brought by the petitioner who sought to annul a March 24, 2018 determination by the Chautauqua County Supreme Court (Joseph Gerace, J.H.O.) stating that its fiber optic installations were taxable.

On appeal, the petitioner conceded that under *T-Mobile* its fiber optic installations “are taxable as ‘lines’ under [RPTL § 102 (12)(i)] despite the fact that they do not conduct electricity.” Because the petitioner failed to establish that its fiber optic installations are “primarily or exclusively used” for one of the exempt purposes in RPTL § 102 (12)(i)(A)-(D), the court in *Level 3-Chautauqua County* upheld the lower court’s decision that the petitioner’s installations did not fall within the exception for property used in the transmission of radio and television signals. The Fourth Department relied on its *Level 3-Erie County* decision in reaching this conclusion.

The Fourth Department’s two recent *Level 3* rulings align the Fourth Department with the landmark *T-Mobile* ruling from the Court of Appeals. As explained in our prior alert, taxing jurisdictions that removed “outside plant” from their tax rolls should now put such installations back on the assessment rolls for future years. New York courts are affirming the legislature’s intention for RPTL § 102 (12)(i) to tax equipment used for telecommunications purposes. This is an important victory for municipalities and school districts as they will now be able to rely on these taxes from future budgets.

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