

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE PROPERTY TAX COMMISSION
SITTING AS THE STATE BOARD OF
EQUALIZATION AND REVIEW

90 PTC 409
and
91 PTC 26

In the matter of:)
The appeals of Northern)
Telecom, Inc. From Orders of)
the Durham County Board of)
Commissioners Concerning)
Assessments For Tax Years)
1984 through 1991.)

ORDER

This matter was heard by the Property Tax Commission, sitting as the State Board of Equalization and Review in the City of Beaufort, Carteret County, North Carolina on 13 June 1991 pursuant to the appeal of Northern Telecom, Inc. (hereinafter "Taxpayer") from decisions of the Durham County Board of Commissioners concerning assessments issued for the tax years 1984 through 1991. The hearing was limited to the matters raised by the County in its Motion In Limine filed 31 May 1991 and by the Taxpayer in its Motion to Declare Discovery Null and Void and to Suppress Use of Information Illegally Obtained filed 5 June 1991. The Taxpayer was represented at the hearing by Charles B. Neely Jr., and Nancy S. Rendleman, attorneys at law; the County was represented by William F. Maready and Mark A. Stafford, attorneys at law.

ISSUES

1. In its Motion In Limine filed 31 May 1991, the County asks that the Commission bar the Taxpayer from introducing any evidence concerning the auditing contract dated 21 December 1988 and amended 8 March 1991 between Durham County and Tax Equity Consultants, Inc. (hereinafter "TEC"). In support of its Motion, the County asserts that the County's discovery of the Taxpayer's personal property for the years 1984 through 1991 was not the direct or indirect result of the County's entry into the said contract and that the contract is therefore irrelevant to the matters properly before the Commission pursuant to the Taxpayer's appeals.

2. In its Motion to Declare Discovery Null and Void and to Suppress Use of Information Illegally Obtained filed 5 June 1991, the Taxpayer asks that the Commission: (1) enter an order declaring the auditing contract between the County and TEC null and void from its inception, (2) enter an order declaring the County's discovery of the Taxpayer's business personal property for the tax years 1984 through 1991 null and void, and (3) enter an order prohibiting the County from using in the future any information acquired by the County as a result of its entry into the contract with TEC and requiring the County to return all such information to the Taxpayer. In support of its Motion, the Taxpayer asserts that the discoveries issued by the County against the Taxpayer were the

direct result of the County's entry into the contract with TEC, and that the said contract and discovery are null and void for the reasons set forth by this Commission in its Final Decision entered 24 May 1991 in the matter of In re Appeal of Philip Morris U.S.A., case number 90 PTC 426.

EVIDENCE

The evidence presented by the Taxpayer and considered by the Commission consisted of the following:

1. Taxpayer Exhibit 1 - Affidavit of Jack L. Gribble, with attachments, dated 7 June 1991.
2. Taxpayer Exhibit 2 - Affidavit of Mark Loftis, dated 7 June 1991.

The evidence presented by the County and considered by the Commission consisted of the following:

1. County Exhibit 1 - True and correct copy of an agreement between Tax Equity Consultants, Inc. and Durham County made and dated 21 December 1988; amended 8 March 1991. Submitted as Exhibit A to the County's Motion in Limine.
2. County Exhibit 2 - True and correct copy of a letter from Paul N. Warren, Interim County Manager for Durham County, to John I. Farthing, dated 31 May 1991. Submitted as Exhibit B to the County's Motion in Limine.
3. County Exhibit 3 - Affidavit of Douglas Marlowe dated 10 June 1991, with Exhibit 1, letter dated 28 August 1989 to Mark D. Loftis and Exhibit 2, letter dated 23 October 1989 to Mark D. Loftis.

4. County Exhibit 4 - Affidavit of Hugh Sparks Owen dated 10 June 1991.
5. County Exhibit 5 - Affidavit of Patricia T. Antley dated 10 June 1991, with Exhibit 1, letter dated 5 June 1990 to Mark Loftis, Exhibit 2, letter dated 13 July 1990 to Mark Loftis and Exhibit 3, letter dated 2 August 1990 to Mark Loftis.
6. County Exhibit 6 - Supplemental affidavit of Douglas Marlowe dated 12 June 1991.
7. County Exhibit 7 - Supplemental affidavit of Hugh Sparks Owen dated 12 June 1991.
8. County Exhibit 8 - Supplemental affidavit of Patricia T. Antley dated 13 June 1991, with two exhibits.
9. Oral testimony of Patricia T. Antley.

COMMISSION EXHIBITS

In addition to the evidence presented by the parties, the Commission also reviewed and considered the following procedural documents:

- C-1A Notice of appeal, filed 20 November 1990.
- C-1 Notice of appeal, filed 27 February 1991.
- C-2A Commission acknowledgement of C-1A, 21 November 1990.
- C-2 Commission acknowledgement of C-1, 1 March 1991.
- C-3A Letter from Durham County Assessor to the Commission, filed 29 November 1990.
- C-3 Application For Hearing, filed 14 March 1991.
- C-4A Letter from Durham County Assessor to the Commission, filed 3 December 1990.
- C-4 Transmittal letter for C-3, filed 14 March 1991.

- C-5A Application For Hearing, filed 19 December 1990.
- C-5 Commission acknowledgement of C-3, 14 March 1991.
- C-6A Motion in Limine regarding contract with Tax Equity Consultants, Inc., filed 31 May 1991.
- C-6 Stipulation concerning discovery and confidentiality, filed 21 March 1991.
- C-7A Transmittal letter for C-6A, filed 31 May 1991.
- C-7 Transmittal letter for C-6, filed 21 March 1991.
- C-8A Notice of Hearing (Taxpayer), 3 June 1991.
- C-8 Letter from Mr. Stafford to Commission, with copy of Stipulation, filed 25 March 1991.
- C-9A Notice of Hearing (County), 3 June 1991.
- C-9 Notice of hearing (Taxpayer), 3 June 1991.
- C-10 Notice of hearing (County), 3 June 1991.
- C-11 Motion to Declare Discovery Null and Void and to Suppress the Use of Illegally Obtained Information, filed 5 June 1991.
- C-12 Memorandum in Support of Motion in Limine regarding Tax Equity Consultants, Inc. and in Opposition to Motion to Declare Discovery Null and Void (includes as Exhibit A the affidavit of Douglas Marlowe, Exhibit B the affidavit of Hugh Sparks Owen, and Exhibit C the affidavit of Patricia T. Antley), filed 10 June 1991.
- C-13 Memorandum in Support of Motion to Declare Discovery Null and Void and to Suppress Use of Information Illegally Obtained and in Opposition to Motion In Limine filed by the County of Durham, filed 10 June 1991.
- C-14 Affidavit of Jack L. Gribble, with attachments, filed 10 June 1991.
- C-15 Affidavit of Mark Loftis, filed 10 June 1991.
- C-16 Memorandum in Response to Memorandum in Support of Motion to Declare Discovery Null and Void and to Suppress Use of Information Illegally Obtained Filed by Northern Telecom, Inc., with supplemental affidavit of Douglas W. Marlowe and supplemental affidavit of Hugh Sparks Owen, filed 12 June 1991.

- C-17 Supplemental Affidavit of Patricia T. Antley, filed 13 June 1991.
- C-18 Motion to Reopen Record and For Leave to File Supplemental Affidavits, filed 17 June 1991.
- C-19 Transmittal letter for C-18, filed 17 June 1991.
- C-20 Commission acknowledgement of C-18, 20 June 1991.
- C-21 Letter from C. B. McLean, Commission Counsel, to Charles B. Neely, 24 June 1991.

The following items filed with the Commission after the hearing date were not considered:

- C-22 Reply Memorandum in Support of Northern Telecom, Inc.'s Motion to Declare Discovery Null and Void and To Suppress Use of Information Illegally Obtained and In Opposition to the Motion In Limine Filed by the County of Durham, filed 30 July 1991.
- C-23 Transmittal letter for C-22, filed 30 July 1991.
- C-24 Commission acknowledgement of C-22, 1 August 1991.
- C-25 Durham County's Response to Northern Telecom, Inc.'s Motion to Reopen the Record and For Leave to File Supplemental Affidavits and Request For Consideration of Post-Hearing Briefs, filed 2 August 1991.
- C-26 Transmittal letter for C-25, filed 2 August 1991.
- C-27 Commission acknowledgement of C-25, 2 August 1991.
- C-28 Memorandum in Response to Taxpayer's post-hearing brief, filed 19 August 1991.
- C-29 Transmittal letter for C-28, filed 19 August 1991.
- C-30 Commission acknowledgement of C-28, 20 August 1991.

RULING ON MOTION TO REOPEN RECORD AND
FOR LEAVE TO FILE SUPPLEMENTAL AFFIDAVITS

Soon after the hearing in this matter held on 13 June 1991, the Taxpayer filed, on 17 June 1991, its Motion to Reopen Record and For Leave to File Supplemental Affidavits. The said Motion is hereby DENIED.

RULING ON POST-HEARING MEMORANDA

At the hearing before the Commission held 13 June 1991, neither the Taxpayer nor the County requested leave to file post-hearing briefs. Accordingly, the Taxpayer's Reply Memorandum in Support of Northern Telecom, Inc.'s Motion to Declare Discovery Null and Void and To Suppress Use of Information Illegally Obtained and In Opposition to the Motion In Limine Filed by the County of Durham (filed 30 July 1991), the County's Response to Northern Telecom, Inc.'s Motion to Reopen the Record and For Leave to File Supplemental Affidavits and Request For Consideration of Post-Hearing Briefs (filed 2 August 1991) and the County's memorandum (filed 19 August 1991) were not considered.

FINDINGS OF FACT

After carefully considering the arguments of counsel and the evidence presented by the parties, as listed above, the Commission makes the following Findings of Fact:

1. County Exhibit 1 is a true and correct copy of a contract between TEC and Durham County for audit services, in its original form and as amended.
2. The original agreement was duly executed by John P. Bond III, in his capacity as Durham County Manager, on or about 21 December 1988. The amendment to the agreement was executed by Paul N. Warren, in his capacity as Interim County Manager, on or about 8 March 1991.

3. In March of 1989, Mr. Douglas W. Marlowe, a Durham County employee, reviewed the Taxpayer's business personal property tax listing for tax year 1989, discovering a large discrepancy between the historical cost of fixed assets listed in 1989 and those listed in 1988. See County Exhibit 3 at paragraph 2.
4. In April of 1989, Mr. Marlowe directed Hugh Sparks Owen to begin an audit of the Taxpayer. The initial audit of the Taxpayer by Mr. Owen commenced soon thereafter. See County Exhibit 3 at paragraph 4 and County Exhibit 4 at paragraphs 4 and 5; see also Taxpayer Exhibit 2 at paragraph 3.
5. Ms. Patricia T. Antley assumed the position of Durham County Assessor in July of 1989.
6. In its original form, the agreement between the County and TEC contained the following provision:

Article III - CONTRACT SUM

County shall pay Contractor for the performance of this contract twenty percent (20%) of all taxes and penalties due as a result of this agreement.

Fifty percent (50%) of the amount due shall be paid to the Contractor when the local appeal right has been exhausted. The remaining fifty percent (50%) shall be paid upon receipt of the taxes and penalties by the County or on the last day that the bill can be paid without interest, whichever is earlier.

All invoices shall be paid within thirty days. Any amount not paid within thirty days shall accrue interest at the rate of one percent (1%) per month (12% annually).

County agrees to save Contractor harmless from any reductions in value made by the local Board of Equalization and Review that are inconsistent with advice from the N.C. Department of Revenue, Ad Valorem Tax Section. County shall pay Contractor the full amount of any fee that would have been payable if such reductions had not been made.

7. Article III was modified by the amendment dated 8 March 1991, but continued to describe a contingent fee arrangement in which the fees to be paid by the County to TEC were directly dependent upon the amount of taxes and penalties determined to be due the County as a result of the audit conducted by TEC. The agreement, originally and as amended, provided that the County agreed to hold TEC harmless from any reductions in value made by the County's Equalization and Review Board or Board of Commissioners " . . . contrary to or inconsistent with written advice from the Ad Valorem Tax Section of the North Carolina Department of Revenue." This provision had the effect of discouraging compromise or settlement between the Taxpayer and the County.
8. The discovery assessments issued by the County against the Taxpayer were the direct result of the audit of the Taxpayer conducted by TEC. The audit by TEC was the direct result of the County's entry into the agreement with TEC. But for the County's entry into the agreement, there would have been no audits of the Taxpayer by Durham County, and no discovery assessments issued against the Taxpayer. Indeed, one reason for the County's entry into the agreement was that the County was unable to conduct such audits on its own because it did not at that time have adequate resources of trained manpower with which to conduct them.

CONCLUSIONS OF LAW

Based on its Findings of Fact, as set forth above, the Commission makes the following Conclusions of Law:

1. The Property Tax Commission, sitting as the State Board of Equalization and Review, has the authority to hear and decide appeals concerning the appraisal of the property of public service companies (as defined in G.S. 105-333) and to act as a State board of equalization and review for the valuation and taxation of property in this State, as provided for in G.S. 105-290; see G.S. 143B-222.
2. In its capacity as the State board of equalization and review under G.S. 105-290(a), the Commission is required to hear and adjudicate appeals from boards of county commissioners and from county boards of equalization and review as provided in G.S. 105-290. Under G.S. 105-290(b), the Commission is required to ". . . hear and decide appeals from decisions concerning the listing, appraisal, or assessment of property made by county boards of equalization and review and boards of county commissioners."
3. The Taxpayer made timely appeals to the Commission from decisions of the Durham County Board of Commissioners. The decisions of the said board concerned the listing, appraisal, or assessment of property, and were, under G.S. 105-290, appealable to this Commission.

4. The Commission concludes as a matter of law that, as the State board of equalization and review, the Commission has not only the authority, but the duty to rule upon all issues concerning the listing, appraisal, and assessment of property, except those of constitutional law, properly raised by parties to appeals before it. This includes questions such as the one presented here. The Commission's duty to make such rulings has been recognized by our appellate courts; see In re McElwee, 304 N.C. 68, 85, 283 S.E.2d 115, 126 (1981); see also King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970); see generally Johnston v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984), cert. denied 313 N.C. 508, 329 S.E.2d 392 (1985). In McElwee, the Court noted that the "[f]ailure of the Property Tax Commission to recognize the arbitrary and capricious approach taken by the county in this instance was, in itself, arbitrary" It would be arbitrary for the Property Tax Commission to fail to address the public policy issues regarding the fair, impartial, and uniform listing, appraisal, or assessment of property raised by the Taxpayer in this case.
5. The Commission concludes as a matter of law that the contract between TEC and the County was void as against public policy from its inception because its terms, particularly those contained in "Article III - CONTRACT SUM" so offended conventional standards requiring fair, impartial, and uniform

treatment of this State's taxpayers that it could not stand. The fundamental rule of our system of property taxation is that the tax will be administered in a fair, impartial, and uniform manner, without regard to the identity of the property owner. This principle cannot be followed where a county enters into a contract such as the one presented here. A recent case involving individuals or organizations having a financial interest in the assessment of property tax or the amount collected is Sears, Roebuck and Co. v. Parsons, Case No. S90A1678, decided 21 February 1991. In that case, the Georgia Supreme Court stated "[t]he people's entitlement to fair and impartial tax assessments lies at the heart of our system, and, indeed, was a basic principle upon which this country was founded. Fairness and impartiality are threatened where a private organization has a financial stake in the amount of tax collected as a result of the assessment it recommends." More recently, this Commission decided that the same rule should apply to property tax audits conducted in this State; see the Final Decision of the Commission entered 24 May 1991 in the matter of In re Appeal of Philip Morris U.S.A., case number 90 PTC 426. The terms of the contract at issue in this appeal are, if anything, more objectionable than those at issue in Philip Morris because the County agreed to " . . . save Contractor harmless from any reductions in value made by the County's Equalization and Review Board or Board of

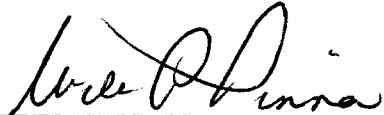
Commissioners contrary to or inconsistent with written advice from the Ad Valorem Tax Section of the North Carolina Department of Revenue." (From the amendment.)

6. The Commission concludes that the County's attempt to "discover" the Taxpayer's property under the provisions of G.S. 105-312 was void because it resulted directly from the County's entry into a contract that was void as against public policy. The Commission notes that the County is not precluded from initiating a proper discovery under North Carolina General Statute 105-312 with regard to any tax years still within the reach of that statute.

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the County's "discoveries" of the Taxpayer's business personal property for the tax years 1984 through 1991 are null and void; it is further ORDERED that the County is prohibited from using in the future any information acquired by the County as a result of its entry into the contract with TEC and the County shall return all such information to the Taxpayer; the County is instructed to revise its tax records as may be necessary to reflect the findings and conclusions of the Commission set forth herein.

Entered this the 4th day of November, 1991.

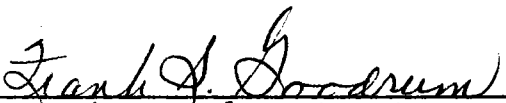
NORTH CAROLINA PROPERTY TAX COMMISSION



William P. Pinna, Chairman

Commission Vice-Chairman James C. Spencer Jr. and Member Clarence E. Leatherman respectfully dissent from this decision.

Attest:



Frank S. Goodrum, Secretary

Commission Vice-Chairman James C. Spencer, Jr. dissenting:

I agree that the contract between TEC and the County was void ab initio as against public policy for the reasons set forth in our decision in Philip Morris, 90 PTC 426, and in Conclusion of Law number 5 in the majority opinion herein. I do not believe, however, that it has been sufficiently established at this point in the proceedings that the discovery by the County conducted against the taxpayer was a direct result of the County's entry into the agreement with TEC and I would not declare the discovery void based on the evidence presently before us.