

# A Tangible Victory in Louisiana

Following the attempt by several Louisiana assessors and the Louisiana Tax Commission to assess the intangible property of the communications industry, a grass-roots tax coalition was formed to fight the taxation of general business intangible property

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**I'M SURE EVERYONE** has experienced the sight of throwing a stone into a tranquil pond and watching the ripples radiate from the point of impact. Then, after several moments the ripples disappear and the pond is tranquil once again. This is an excellent metaphor for events that recently occurred in Louisiana, which revolved around an attempt to tax intangible property.

## **THROWING A STONE**

In this case, Telecable Associates, Inc. (TCA) and the assessors of Lincoln and Morehouse Parishes, found themselves in a confrontation that could have affected most businesses in the State of Louisiana.

Apparently, TCA and the assessor in Lincoln Parish had a longstanding dispute relating to the assessor's request for financial information, which the assessor claimed he needed to develop an income and market approach to value. TCA contended that the assessor's request was "irrelevant" in determining the taxable value of their cable system's fixed assets. They argued that the Louisiana Tax Commission (Commission) had historically placed cable systems in the "general business category" for property tax valuation purposes. Moreover, the Commission's own publication, *Real/Personal Property Rules And Regulations*, which is updated annually following public hearings, had never proposed that the income and

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market approach to value were the proper methods to assess personal property of businesses in the general business category. The guidelines stated that: "the fair market value of office furniture and equipment, machinery and equipment, and other assets used in general business activity can best be estimated by the cost approach. This approach allows the assessors across the State of Louisiana to fairly and uniformly assess business and industrial personal property. . . ."

Thus, the line was drawn in the sand with the Lincoln Parish assessor requesting information he felt he had a legal right to, and the TCA refusing to provide it. The standoff ended in 1989, when the assessor made three strategic moves to bring the matter to a head.

First, on February 9, 1989, the assessor communicated to TCA that, in his opinion, Louisiana Law allowed for the assessment of personal property using all three approaches to value (the income, market, and cost approaches). Further, this was his final request for "voluntary cooperation" from the TCA to provide him with certain financial information he deemed necessary in order to properly assess the TCA's assets. The assessor also made clear that failure to comply with his request would result in an "assessment based on the best information available as provided by law."

Second, when the Lincoln Parish assessor did not receive the information requested, he proceeded to raise the TCA's 1989 assessment by 272 percent over the prior year's assessment. The basis for the assessor's action was his incorporation of the use of all three approaches to value. The assessor took this action without sending TCA a Notice of Value. Although the assessor was not legally bound to send out a notice, it had been the assessor's practice in prior years.

Third, on January 29, 1990, the assessor advised TCA that, in his opinion, he was not tied to the Commission's Real/Personal Property Rules And Regulations. He considered the Commission's publication merely "guidelines."

So the stage was set for both sides to appeal the 1989 assessments through administrative remedy and, if necessary, to seek judicial relief. Unfortunately for TCA, this proved to be more difficult than expected. Not only did procedural problems prevent TCA from submitting its appeal until much later in the year, TCA also learned that the Morehouse Parish assessor had adopted the appraisal methodology of Lincoln Parish for the purpose of assessing TCA's cable system located in his parish. This action would force TCA to appeal its assessments in both parishes.

### **THE POINT OF IMPACT**

On December 19, 1990, the appeal reached the Commission, which identified and addressed the following issues:

1. The validity of the method of assessment used in the light of the provisions of the Rules and Regulations of the Louisiana Tax Commission.

2. The legality of assessment of intangible property.
3. The uniformity of the assessments of the property of those taxpayers with comparable property throughout the state.

After hearing and reviewing the evidence from both TCA and their experts and the assessors of Lincoln and Morehouse Parishes, the Commission made the following ruling on April 23, 1991:

1. Intangible property is taxable.
2. Intangible assets are presently assessed and taxed in a number of Louisiana industries, including banks, shareholder-owned thrift institutions, public service properties, and properties assessed using the income approach to value.
3. Intangible assets of much of the communications industry are not assessed or taxed.
4. Until such time as the audit is completed and the results implemented, there exists an impermissible inequity of assessments.
5. The Commission staff is ordered to complete its audit of the communications property as soon as possible.
6. Nothing in this decision shall preclude uniform assessment of intangible properties to the 1991 tax roll.

The Commission went on to contradict their own publication (Real/Personal Property Rules and Regulations) by stating in their decision that from the inception of the Commission Rules and Regulations “. . . the primary focus of the rules has been depreciation tables and cost multipliers for assessment of tangible personal property on the cost basis.” But now the Commission was saying that the use of the cost approach was not appropriate in the valuing of the fixed assets of the communication industry. The Commission stated that the “Assessors have valued the property in question using published data giving the purchase prices paid for cable television systems sold recently. The publication used gives not only the total purchase price, but also the value of the system in relation to the number of current subscribers.”

In summarizing their decision, the Commission came up with the following confusing and contradicting formula to value TCA's' property:

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| Step 1: | Establish a value per subscriber                             |
| Step 2: | Multiply it by the number of subscribers in the service area |
| Step 3: | Subtract the value of exempt property                        |
| Step 4: | This equals the total value of taxpayer's property           |
| Step 5: | Subtract the value of other taxable property on the rolls    |
| Step 6: | The result is the fair market value of cable equipment       |
| Step 7: | Multiply Step 6 by 15% ratio of assessment                   |
| Step 8: | This equals the assessment of cable equipment                |

- Step 9: Add the assessment of other personal property
- Step 10: The result is the total assessment of personal property
- Step 11: Add the assessment of land on the rolls
- Step 12: Add the assessments of improvements on the rolls
- Step 13: The result is the total assessment of Taxpayer

In the November/December 1991 issue of the *Journal Of Multistate Taxation*, attorney Robert Bowser, with the law firm of Breazeale, Sachse & Wilson, rightly argued that the Commission's instructions to value TCA's property contained a number of "double assessments." A quick review of the Commission's formula proves Mr. Bowser right. First, the Commission's calculation calls for Step 1, to establish a per subscriber value. The Commission implies that this can be done by using published sales data. The reader should note at this point that the Commission's ruling made no provisions for applying any number of accepted appraisal adjustment techniques (e.g., time adjustments, location, size, effective age) to the sales data to make it comparable to TCA's property. Theoretically, Step 1, represents the total tangible and intangible value of TCA's cable system on a per-subscriber basis. Second, multiplying the per subscriber value (Step 1) by the total of subscribers in TCA's service area and subtracting exempt property and other taxable property on the rolls, would result in the total fair market value of TCA's system. Problems begin to arise when the formula allows the assessors in Steps 9, 11, and 12 to effectively double assess certain personal property and real estate already accounted for up to that point in the calculation.

In looking at the larger picture, it becomes apparent that in one swooping decision the Commission made a historical ruling regarding the assessment of intangible property. They enforced a provision of the Louisiana Constitution that had been on the books since 1974. The Commission acknowledged in its decision that "both the federal and the state constitutions require that assessments must be uniform." But the Commission argued that they found no legal precedent that indicated ". . . that uniformity must be instantly achieved." The obvious question to this statement was, if not now, when?

The Commission staff were given their marching orders, which was to proceed as quickly as possible to conduct and complete an audit of the cable industry. Upon completion of this audit, they were to begin audits of television and radio stations, newspapers, and other media industries. In the meantime, TCA appealed the Commission's decision to the 19th Judicial District.

### THE RIPPLES

The ripples hit Louisiana cable system operators in March of 1991 when they began receiving letters notifying them of a supplemental 1990 and 1991 property tax audit. The audit was to be conducted by the Louisiana Tax Commission pursuant to Louisiana Revised

Statute 47:1837. The purpose of the audit was to “ensure that assessments of like businesses are correct, uniform and consistent throughout the state.”

The fact that the Commission was conducting an audit was, in itself, not significant. However, it was immediately apparent that this audit would be vastly different from the 1986 Commission mandated audit of the Louisiana cable industry. This time around, the Commission intended to value not only the fixed assets of cable systems, but also their intangible assets. The Commission’s letter requesting information from the taxpayers was overwhelming. They stated that “. . . the records to be reviewed by our auditors will include, but will not be limited to the following:”

1. Depreciation schedules “should indicate date, description and acquisition costs of all assets, both tangible and intangible.”
2. “Balance sheets at the end of accounting years, 1989 and 1990 . . . income and expense statements for the last five years.”
3. “A complete chart of accounts and access to the general ledgers and source documents for the calendar years 1989 and 1990.”
4. Their request went on to ask for information on any real estate assets, leased equipment, and purchase agreements.

How serious a problem could this audit pose to cable operators? Experts estimate that between 70 percent to 90 percent of a cable television system’s total value is composed of intangible assets. Noted below are the major components comprising a system’s intangible value:

1. The Subscribership Value: Contractual agreements between the cable system operator and its subscribers;
2. Franchise Value: Agreements with political subdivisions to provide for the construction, operation and marketing of cable systems within certain geographical area;
3. The Going Concern Value;
4. Value of Non-Compete Agreements.

Thus, the Commission audit had the potential to increase the property tax burdens on the Louisiana cable operators astronomically. The cable industry quickly recognized that something had to be done to contest the Commission’s ruling, which effectively called for the complete dismantling of established procedures used in valuing the personal property of businesses and industries included in the general business category. Pandora’s box had been opened on the intangible issue! But which industries would be targeted next?

#### **A RETURN TO TRANQUIL WATERS**

The Commission staff was inundated by calls from the cable industry and their representatives after receiving the notification of the Commission’s audit. Thus, on May 20, 1991,

Commission staff held a meeting in Dallas to discuss their pending audit with cable industry representatives. Cable representatives made clear their dissatisfaction with the Commission's ruling in the TCA case and also pointed out to the Commission's representative that two options were available to them:

1. Litigation to determine the constitutionality of the Commission's ruling.
2. The willingness of the cable companies and their representatives present at said meeting to work with the Commission staff to reach a fair and equitable administrative remedy to the question at hand, thus avoiding lengthy and expensive litigation for both sides.

The Commission scheduled a meeting in Baton Rouge on July 15, 1991, to determine if an administrative remedy could be hammered out. Participants in the meeting included Commission staff, various assessors from around the state, attorneys representing the participants, cable operators and their representatives.

As a result of the meeting, a cable industry property tax committee (cable committee) was established. Its purpose was to author an administrative proposal to be given to a personal property committee of the Louisiana Association of Assessors (assessors' committee) for their review. It was hoped that both sides could, working in "good faith", reach a mutually acceptable agreement, which the Commission could then implement into their Rules and Regulations, thereby avoiding numerous lawsuits. The meeting also generated a "good faith" agreement by the cable operators to cooperate with the Commission staff in their audits.

During the months of July through September, the cable operators cooperated with the Commission auditors, and the committee produced a proposal for the assessors to review. Clearly, the cable committee was not interested in making a proposal that would allow assessors to tax cable intangible property. However, the cable committee's ultimate proposal would have increased the assessments of cable systems throughout the state. The proposed formula called for the assessment of fixed assets at their replacement cost new (RCN) less depreciation, using indexing schedules developed from an independent study commissioned by the cable industry. The assessors' committee, as time would tell, would never make formal response to the proposal given them. When a timely response did not arrive, a representative of the Louisiana Cable Television Association pressed the assessors' committee for an explanation for their non-response. The committee simply indicated that they were inclined to wait for a court ruling in the TCA/Lincoln and Morehouse Parishes Lawsuit.

By October it had become evident to everyone on the cable industry side of the issue that steps needed to be taken independent of the Commission and the assessors' committee. Thus, on October 29, 1991, representatives of the cable industry met with the Louisiana Association of Business and Industry (LABI) to seek their aid in opposing the Commission's position regarding the intangible issue.

The LABI membership is made up of thousands of businesses, 60 trade associations, and 70 chambers of commerce. The initial meeting was held on October 29, 1991, and a follow-up meeting held on November 27, 1991. At these meetings a multi-industry coalition (tax coalition) was created. This is the first time the author has ever seen a multi-industry coalition made up of concerned taxpayers from a diverse background, including cable television, telecommunications, oil and gas companies, real estate, nursing homes, broadcasters, lawyers, and accountants, who took preemptive steps to correct a potential threat. This was truly a grass roots effort, with all interested parties donating their time, knowledge, and resources for a common goal of preventing businesses from having their intangible property assessed. The coalition also believed that an intangible property tax on general businesses would have a detrimental effect on Louisiana's existing business climate and its ability to attract new companies to their state.

The coalition determined that the following three point approach to contest the intangible question would be the best:

1. Approach the members of the yet-to-be-named new Commission and seek a resolution of the issue. The new Commission would be named in January, 1992.
2. Introduce legislation during the 1992 session of the legislature to exempt the general business category from the taxation of intangibles.
3. Take legal action to challenge the constitutionality of the Commission's ruling. It was also recommended that TCA attempt to reach an out of court settlement with the assessors of Lincoln and Morehouse Parishes.

During December and January, the LABI advised its membership of the potential dangers of the intangible tax issue. On December 20, 1991, LABI formally advised the sitting members of the Commission of the potentially adverse effect their earlier ruling might have on the Louisiana business community. The Chairperson of the Commission responded by stating that "Unfortunately, the law governing the Tax Commission does not allow us to address matters of policy. These are matters for the Legislature, and in the case of exemptions from ad valorem taxation, for the voters to decide. Unknowingly, the Chairperson had correctly prophesied the future actions, which the coalition would have to take.

By January of 1992, the newly elected governor had replaced the Commission members. On January 22, 1992, all lobbying efforts paid off when the new Commission ruled in favor of TCA's 1991 appeal. Initially, the assessors attempted, through a Motion To Dismiss, to prevent the Commission from hearing TCA's 1991 appeal. The Chairman ruled that the hearing would proceed.

In hearing the 1991 TCA/Lincoln and Morehouse Parishes appeal, the Commission to some extent reversed itself on the uniformity issue. In their ruling, they did not find that the assessors had improperly assessed TCA's property, however, they did find their assessments were not uniform and equal, when compared to the assessments of like prop-

erties. Thus the Commission ruled that uniformity needed to be achieved and that "Until such time, these assessors should use the cost approach from the guidelines; as are all other assessors." The ruling went on to question the legal right to assess intangible property at the parish level. The Commission felt that the Louisiana corporate franchise tax already is a "direct tax on intangibles." Further, "Parishes are not empowered to levy an income or franchise tax" . . . The Commission also explained that parishes were not given "the power to tax the going enterprise . . . the state retained this power".

After reviewing the Commission's ruling, The Lincoln and Morehouse Parish assessors filed suit appealing the Commission's decision relating to their 1991 assessments.

### **NO ROCK THROWING. . . PLEASE!**

By March of 1992, the coalition had prepared, introduced, and successfully lobbied for legislation to address the intangible question. The 1992 Louisiana Legislature enacted two pieces of legislation addressing the issue. First, House Concurrent Resolution #94 ("the Suspense Bill") effectively suspended the assessment of intangible or incorporeal property for taxpayers in the general business category for approximately one year. Second, House Bill #653 ("the Interruption Bill") was enacted as a means of clarifying the intent of the Constitution as it relates to the taxation of intangible or incorporeal property in the general business category. The Bill expressly exempts general business industries from the taxation of intangible and incorporeal property.

In September of 1992, the State of Louisiana held a Constitutional Convention dealing with a number of issues. A Constitutional Amendment was be introduced to exempt industries in the general business category from the taxation of intangible property. If the Amendment successfully passes the Convention, the citizens of Louisiana will vote on it and all other proposed Constitutional Amendments in November of 1992.

As of August of 1992, the Commission has not released to the cable industry the results of its audit conducted during summer of 1991. TCA and the Lincoln and Morehouse Parishes are still involved in litigation resulting from their 1990 and 1991 Commission rulings. No out of court settlement seems possible between the parties involved.

### **A FINAL LOOK AT THE POND**

So where are we now? It appears, based on the events of the last two years, that the question of the taxation of intangible property is still a very open issue. Ultimately, assessors across the state will have to decide for themselves whether they wish to pursue this matter.

The author believes that all parties involved should take a step back, look at the following issues, and determine their effect on Louisiana:



1. What would be the effect of assessing intangible property? Would it increase the tax burden on most, if not all, businesses within the state?
2. Would the wholesale assessment of intangibles in Louisiana be viewed negatively by the business communities both inside and outside the state? Ultimately, would such assessment have a detrimental effect on the state's economy?
3. Does Louisiana want the distinction of having the most aggressive personal property program in the nation?
4. Across the country, assessors and tax representatives are striving to find their way through the mystery of establishing the market value of real and personal property. It's a very difficult job, requiring huge investments of resources, time, and effort. No assessing entity in the nation has ever attempted to assess both tangible and intangible property for all general businesses categories. Does Louisiana really want to attempt such an endeavor? Does Louisiana have the means and/or the resources to implement this new tax in a fair and equitable manner?

There is an old saying, "If it ain't broke, don't fix it." The system in place has served the State of Louisiana well over the last 18 years. Both the business community and the assessors would be well served by attempting once more to negotiate a fair and equitable settlement of this issue. If and when an agreement can be reached, all parties would press for changes to the Tax Commission's "Rules and Regulations" and consider jointly pushing for a constitutional amendment to finally put this issue to rest.