



# *Pennsylvania Tax Reports*

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## ***CELLULAR TOWERS ARE REAL ESTATE***

A panel of the Commonwealth Court held that a cellular tower is real estate and therefore can be included in assessed value for real estate tax purposes. *Shenandoah Mobile Co. v. Dauphin County Board of Assessment Appeals*, No. 1299 C.D. 2004 (Pa. Commw. Feb. 1, 2005).

The court first held that the decision by the county board to add cellular towers to the assessed value of real estate did not constitute a spot assessment. The concept of a spot assessment is constitutional in origin; it is an application of the requirement of tax uniformity. Spot assessment is codified and defined in the Second Class A and Third Class County Assessment Law as the reassessment of a property that is not conducted as part of a countywide revised assessment, which creates, sustains or increases disproportionality among the assessed values of properties. 72 P.S. § 5342.1. Dauphin County is a third class county. The court below found that the addition of cellular towers to the tax rolls by the board was permitted by the statutory authority to make additions and revisions to the assessment role during the tax year. 72 P.S. § 5348(f). The Commonwealth Court held that there was no spot assessment because cellular towers were added as a new subject of taxation and were given new tax parcel numbers. It is not clear why the Commonwealth Court placed particular emphasis on the establishment of new tax parcel numbers. Whether or not new numbers were assigned, the substance of the assessments is that previously the towers were not considered real estate, and after the Board's decision, they were. Thus, new items of real estate were added to the assessment rolls; the Board's action did not consist of changing the value of real estate that was already on the rolls. In any event, it is not clear why a separate tax parcel number was given to the particular cellular tower, because the tower was built on leased land, not on subdivided real estate.

On the merits, the court held that cellular towers constituted real estate under *Appeal of Sheetz, Inc.* 657 A.2d 1011 (Pa. Commw. 1995), *appeal denied*, 666 A.2d 1060 (Pa.). The cellular tower was substantially affixed to the land because significant effort would be required to disassemble it, even though it was simply bolted to a concrete pad. The court stated that the tower was essential to the permanent use of the improvement, mainly the cement pad to which it was bolted. A lease with several renewal options indicated that the parties intended that the tower be a part of the real estate.

The court found no inconsistency with the position of the Department of Revenue that for Sales Tax purposes a cellular tower constitutes tangible personal property. The court stated that it was not inconsistent to treat the sale of a cellular tower as tangible personal property and then

treat it as real estate once bolted to a concrete pad, citing *Sheetz*. However, the observation misses the point. It is correct that it is not inconsistent to treat an item as tangible personal property and then to treat it as real estate once it is affixed to the land. However, that is not the position the Department has taken. The Department of Revenue has held that even after a cellular tower is bolted to a cement pad, it remains tangible personal property and therefore a lease of the tower is taxable for Sales & Use Tax purposes. Conversely, a cellular tower embedded in a concrete base is treated as real estate. Pa. Ruling No. SUT 04-005, *Leasing of Space on Telecommunications Towers*. The Department's position is fundamentally inconsistent with the decision in *Shenandoah*.

Finally, the court concluded that it was not an abuse of discretion that the trial court did not strike either the assessment board's brief or the reference therein to an unreported opinion of the Commonwealth Court. The unreported opinion had held that a cellular tower is not machinery and equipment in an industrial plant for purposes of an exclusion from the value of real estate for Realty Transfer Tax purposes. The internal operating procedures of the Commonwealth Court state that unreported opinions cannot be relied upon or cited in another case. 210 Pa. Code § 67.54. Putting aside the question whether the brief or reference should have been stricken, the issue highlights why opinions should not go unreported. The opinion in question construed a phrase in the transfer tax statute that is virtually identical to an exclusion from taxable real estate in the General County Assessment Law. The decision was in fact the catalyst for the assessments by the Dauphin County Board. Such decisions should be public; they should not be hidden from view. If the rule of law means anything, it means that like cases are decided on like principles. That principle is difficult to apply if litigants do not know what the principles are, or worse yet, if they do know, are barred from bringing them to the attention of a court.