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You Can't Have Your Cake and Eat It Too: Tax Classification and *Bresnan Communications, LLC v. State Department of Revenue*

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**YOU CAN'T HAVE YOUR CAKE AND EAT IT TOO: TAX
CLASSIFICATION AND *BRESNAN COMMUNICATIONS, LLC V.
STATE DEPARTMENT OF REVENUE***

Brianne McClafferty

I. INTRODUCTION

The result of *Bresnan Communications, LLC v. State Dept. of Revenue*¹ significantly increased Bresnan's tax bill by reclassifying the company's "cable television system" property as "telecommunication service company" property.² The new classification was a result of Bresnan expanding its operations into phone and internet services.³ This decision was put in the public spotlight when Charter Communications ("Charter"), a Connecticut-based company that bought Bresnan Communications, sponsored Initiative 172.⁴ If passed, the initiative would have essentially reversed the Montana Supreme Court decision by changing the property tax rates for companies, like Charter, who provide "physically bundled" television, phone and internet services.⁵ The result Bresnan sought through a law suit, and Charter sought through the initiative was the same; both wanted to realize the benefits of their newly expanded operations without facing the costly tax consequences.

II. FACTUAL AND PROCEDURAL BACKGROUND

Bresnan Communications, LLC purchased cable television infrastructure in Montana in 2003 and shortly after upgraded to provide more than just television programming.⁶ Bresnan's significant investments in equipment allowed it to offer the "Triple Play" package.⁷ This package "bundled" expanded cable programming, on-demand video services, high speed internet services and voice-over internet protocol telephony services.⁸ In 2010, Bresnan began providing the same equipment to all customers regardless of the services used.⁹ In other

¹ *Bresnan Communications, LLC v. State Dept. of Revenue*, 315 P.3d 921 (Mont. 2013).

² *Id.* at 926.

³ *Id.* at 924.

⁴ Ted McDermott, *Corporate Initiative: Charter withdrew I-72, but has it set a precedent?*, Missoula Independent, <http://perma.cc/UZ8F-TJ3P> (<http://missoulanews.bigskyexpress.com/missoula/corporate-initiative/Content?oid=2058057>) (June 26, 2014).

⁵ *Ballot Language for Initiative No. 172 (I-172)*, <http://perma.cc/K7QZ-WT65>, (<http://sos.mt.gov/Elections/2014/BallotIssues/documents/I-172.pdf>) (accessed August 12, 2014).

⁶ *Bresnan Communications, LLC*, 315 P.3d at 923.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 924.

words, all equipment had the ability to provide each of the “Triple Play” services even if the customer was only using one service.¹⁰

Despite bundling services, Bresnan separated services for advantageous tax purposes.¹¹ A 1999 Montana tax code amendment included “allocations of centrally assessed telecommunications services companies” as class thirteen properties.”¹² A property is considered “centrally assessed” if the taxpayer uses central filing, as opposed to local filing.¹³ Class thirteen properties are taxed at six percent of the property’s market value.¹⁴ However, class eight properties which include “cable television systems” are taxed at a maximum of three percent of the market value.¹⁵ In tax years 2007 to 2009, Bresnan reported ten percent of their assets (voice and microwave services) as statewide centralized assets, which are classified as class thirteen properties and taxed at six percent.¹⁶ During the same years, Bresnan reported the remaining 90 percent of their assets as locally assessed cable and internet properties, which are classified as class eight properties and taxed at three percent.¹⁷

Bresnan was audited in 2008 for tax years 2007 and 2008.¹⁸ Upon completion of the audit in August of 2009, the State Department of Revenue (“Department”) concluded Bresnan was required to report their property as a single entity.¹⁹ It also concluded the property should be centrally assessed class thirteen property, subject to the six percent rate.²⁰ In 2010, the Department similarly assessed Bresnan’s property, subjecting all of Bresnan’s Montana property to the six percent rate, increasing Bresnan’s tax bill by 5.6 million dollars from 2009 to 2010.²¹

In response to the Department’s reclassification, Bresnan filed a declaratory judgment.²² On summary judgment, the District Court found the Department did not have the ability to issue retroactive assessments.²³ Then in a bench trial, the District Court vacated the retroactive assessments because it found the property should be classified as class eight property.²⁴ The Department appealed.²⁵

¹⁰ *Id.*

¹¹ *Id.*

¹² *Bresnan Communications, LLC*, 315 P.3d at 924.

¹³ *Id.*

¹⁴ *Id.* at 925.

¹⁵ Mont. Code Ann. § 15–6–138(3)(b) (2013).

¹⁶ *Bresnan Communications, LLC*, 315 P.3d at 925.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Bresnan Communications, LLC*, 315 P.3d at 925.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

III. MAJORITY HOLDING

In a 5-2 opinion written by Justice Morris, the Court held Bresnan's property was class thirteen property, the property required central assessment, and the department was authorized to issue revised assessments.²⁶ In classifying the property as class thirteen, the Court found the District Court erred in only considering the physical attributes of the property and ignoring the results of the use of the property.²⁷ The Court reasoned class eight's definition of "cable television systems" was not broad enough and ignored the use of the improved network's capabilities.²⁸ The Court decided central assessment was appropriate because "Montana law requires the Department to assess centrally property owned by a corporation . . . operating a single and continuous property operated in more than on county."²⁹ The Court found Bresnan fit this description, because customers paid one bill for multiple services, customers received those services from one piece of equipment, and the company operated from one principal location.³⁰ The Court determined the Department possessed the authority to issue revised assessments for tax years 2007 to 2009, because according to appropriate tax procedures Bresnan's property was not taxed fully.³¹

IV. RICE'S DISSENT

In the dissent, Justice Rice proposed Bresnan should be taxed under multiple property classes, determined by the specific use of the property.³² Rice argued Bresnan's property should not all be taxed as class thirteen property when only a small portion of the property is actually used in two-way transmissions.³³ Rice accused the majority opinion of "side-stepping the hard work of analyzing the record evidence," because the majority declined to determine the number and type of data signals Bresnan transmitted over its network to determine the use of Bresnan's network.³⁴ Lastly, the dissent claimed the majority holding acts as a disincentive for companies to expand telecommunication services, characterizing the 329% increase in Bresnan's tax bill as a "superhighway robbery."³⁵

²⁶ *Id.* at 928, 929, 931.

²⁷ *Bresnan Communications, LLC*, 315 P.3d at 927.

²⁸ *Id.*

²⁹ *Bresnan Communications, LCC*, 315 P.3d at 929 (citing Mont. Code Ann. 15-23-101(2)).

³⁰ *Id.* at 929.

³¹ *Id.* at 930.

³² *Id.* at 932 (Rice, J., dissenting).

³³ *Id.*

³⁴ *Id.* at 933.

³⁵ *Bresnan Communications, LLC*, 315 P.3d at 933.

V. ANALYSIS

The multi-million dollar tax question comes down to whether Bresnan's property is best defined as a "cable television system" or as a "telecommunications service company."³⁶ The purpose of the tax classification system is to "impose the burdens of government upon property in proportion to its use, its productivity, its utility, its general setting in the economic organization of society, so that everyone will be called upon to contribute according to his ability to bear the burdens. . . ."³⁷ Therefore, the Court appropriately concluded the productivity resulting from the use of Bresnan's property should be considered in addition to the property's physical attributes.³⁸

Considering the use of Bresnan's property the Court properly decided the definition "cable television system" falls short of capturing the newly improved network's uses.³⁹ Bresnan's upgrades allowed the company to offer consumers more than just cable television. Therefore the definition "cable television system" is not broad enough; it ignores the networks other capabilities.⁴⁰ Classifying Bresnan as a telecommunications company is a better fit. Retail telecommunications is defined as "two-way transmission of voice, image, data, or other information over wire, cable fiber optics, microwave, radio, satellite, or similar facilities that originates or terminates in this state and is charged to a customer with a Montana address."⁴¹ Bresnan's upgrades to its network allow it to provide the described "two-way transmissions."⁴² Classifying Bresnan as a "telecommunication services company" better accounts for the company's new capabilities. Bresnan's expanded operations increase the amount of its contribution in taxes because the ability to offer multiple services increases the company's ability to bear the additional burden.

The dissent's argument that Bresnan's property should be taxed under multiple property classes is more appealing in theory than it is in practice. Bresnan provides consumers with the same equipment regardless of the service provided to each consumer.⁴³ Therefore, Bresnan has the ability to provide two-way transmissions to every consumer.⁴⁴ Rather than parsing through Bresnan's signals individually to try to determine the ever-changing use and productivity of the network,

³⁶ *Id.* at 926 (majority).

³⁷ *Yellowstone Pipe Line Co. v. State Bd. of Equalization*, 358 P.2d 55, 64 (Mont. 1960).

³⁸ *Bresnan Communications, LLC*, 315 P.3d at 927.

³⁹ *Id.* at 923.

⁴⁰ *Id.* at 927.

⁴¹ Mont. Code Ann. § 15-53-129(10)(a).

⁴² *Bresnan Communications, LLC*, 315 P.3d at 927.

⁴³ *Id.* at 924.

⁴⁴ *Id.*

the Court logically looks at the network as a whole unit.⁴⁵ Bresnan's ability to provide three separate services through one transmission line is the crux of its marketing plan and business strategy.⁴⁶ For Bresnan to reap the benefits of entering new markets, it must cope with the consequence of a larger tax burden.

Furthermore, the majority's opinion is supported by the absence of an express exemption of class eight "cable television" properties from the statutory definition of class thirteen property.⁴⁷ The Court considered the well-cited rule of statutory construction known as *expression unius est exclusion alterius*, which means "the expression of one thing implies the exclusion of another."⁴⁸ The statutory language defining class thirteen properties specifically excludes other property (class five properties) from the definition, but does not exclude class eight "cable television systems."⁴⁹ If the legislature intended to exclude class eight "cable television systems" from the higher class thirteen tax rate, the legislature could have expressly excluded class eight property, as it did with other properties.⁵⁰ It is not within the Court's judicial power to add an exception for class eight "cable television systems."

The dissent claims Bresnan reported the changes to its network and appropriately listed telecommunication service property as class thirteen property as its network evolved, making the retroactive tax assessment unfair.⁵¹ Justice Rice argued that the Department arbitrarily reclassified an entire company from class eight to class thirteen.⁵² However, the reclassification was authorized and not unjust. The 2009 audit of Bresnan revealed "Bresnan's cable operations and telephony [was] overstated."⁵³ For example, the Department discovered when a consumer would purchase telephone and internet services the service would be reported in the internet portion but not the telephony portion.⁵⁴ Therefore, the reclassification arose from this discovery that Bresnan's self-classification was not accurate, resulting in "property that had not been taxed fully according to appropriate tax procedures."⁵⁵ Therefore the Department had the authority to issue a revised assessment of Bresnan's property.⁵⁶

The tax system relies on tax payers to self-report, and the ability to audit and re-assess tax procedures allows the Department to enforce the

⁴⁵ *Id.* at 928.

⁴⁶ *Id.* at 923.

⁴⁷ *Id.* at 928.

⁴⁸ *Ominex Canada, Ltd. v. State, Dept. of Revenue*, 201 P.3d 3, 6 (Mont. 2008).

⁴⁹ *Bresnan Communications, LLC*, 315 P.3d at 928.

⁵⁰ *Id.*

⁵¹ *Id.* at 933 (Rice, J., dissenting).

⁵² *Id.*

⁵³ *Id.* at 931 (majority).

⁵⁴ *Id.*

⁵⁵ *Bresnan Communications, LLC*, 315 P.3d at 931.

⁵⁶ *Id.*

tax code on taxpayers. Without the Department's ability to audit and retroactively re-assess, the incentive to correctly self-report would drastically shrink. Discovering a taxpayer's error and fixing it so the taxpayer is taxed "fully according to appropriate tax procedures" is a fair application of the tax code.

The increase in taxes Bresnan (now Charter) is responsible for has the potential to be passed along to consumers in the form of increased service prices. Since there are few choices in Montana for citizens to obtain telecommunication services, some taxpayers may be forced to pay the higher price. However, if the Court were to rule Bresnan should be taxed at three percent, the decrease in Charter's taxes would significantly impact the Montana taxpayer.⁵⁷ It would cost the state general fund \$1.1 million a year, the Montana University System would suffer a loss of \$720,000 a year, and local governments would lose \$6 million a year.⁵⁸

Even if Charter increases its service price as a result of the tax increase, consumers still have the choice to pay the increase or cancel the service. If Montanans were forced to foot the bill in the form of increased taxes they would have no choice; taxpayers would pay regardless of whether they subscribed to Charter. The Court's ruling is consistent with the tax classification's goal to impose the burdens of government proportionally according on the ability to bear the burden. Bresnan's expanded operations and increased opportunities increase the company's ability to bear the additional burden.

⁵⁷ Charles Johnson, *Disputed 1-172 Off Ballot*, Billings Gazette, <http://perma.cc/7Z28-3UXR>, (http://billingsgazette.com/news/state-and-regional/montana/disputed-i-off-ballot/article_aab3978e-1869-5ec5-9891-b4c3d9b76615.html) (June 19, 2014).

⁵⁸ *Id.*