

IN THE SUPREME COURT OF THE STATE OF OREGON

LEVEL 3 COMMUNICATIONS,
LLC,

Plaintiff-Appellant,

v.

DEPARTMENT OF REVENUE, State
of Oregon,

Defendant-Respondent.

Tax Court Nos. 5236, 5269, 5291

SC S067283

RESPONDENT'S ANSWERING BRIEF

Appeal from the Judgment of the Oregon Tax Court
The Honorable Robert T. Manicke, Judge

Continued...

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RESPONDENT'S ANSWERING BRIEF

STATEMENT OF THE CASE

Respondent Department of Revenue accepts appellant's statement of the case, except for the Question Presented, which the department restates, and except to the extent that the facts are supplemented or clarified in the argument below.

Question Presented

ORS 308.515 and ORS 308.505(14) together require the department to make an annual assessment of "all property of any kind, whether real, personal, tangible or intangible, that is used or held by" a company subject to central assessment "for the performance or maintenance of" the company's business. ORS 308.555 allows the department to value the entire property of a company as a unit. And OAR 150-308-0690 adopts the 2009 Western States Association of Tax Administrators (WSATA) Appraisal Handbook as the department's official valuation guide for centrally assessed property. The WSATA Handbook, in turn, provides for property to be appraised using cost, income and market approaches to arrive at the value that is assessed to the company carrying on the business enterprise.

The question presented is: Does Oregon law allow the value of a centrally assessed company's tangible and intangible property to be determined

by the stock and debt and income approaches provided in the unit appraisal guidelines adopted in OAR 150-308-0690?

Summary of Argument

Level 3 has posed the question to this court as “what property may be assessed,” but they in actuality dispute “how the property is valued”—specifically whether a stock and debt (market) approach and income approaches that estimate growth in cash flows from existing assets may be used to value Level 3’s property.¹ The value of a centrally assessed company’s property must include all of the company’s tangible and intangible property, and the department’s administrative rule, which Level 3 does not challenge, provides that value may be determined using a stock and debt (market) approach as well as income approaches. The real market value of a centrally assessed company’s property is the price that an informed buyer could reasonably be expected to pay an informed seller for that entire property as a unit. When, as here, a company’s sole business is subject to central assessment, the unit value of the company’s property is (with minor adjustments) equivalent to the value indicated by the company’s stock and debt reconciled with the income

¹ The Tax Court described these approaches as the valuation of a company’s centrally assessed property “by reference to the value of the company itself.” Level 3 describes them as the valuation of “the company to its shareholders.” But regardless of what they are called, the question is whether these approaches can be used to value centrally assessed property as defined by Oregon Law. The answer is yes.

approaches and other approaches. The income approaches indicate the present value of the income that the unit of property is anticipated to generate, and in this case the income is generated by Level 3's communication company property.

This case involved a dispute about the real market value of Level 3's tangible and intangible property. The department's evidence before the Tax Court included appraisals using well-established unit valuation methodologies, consistent with its administrative rule governing central assessment valuation methodologies, which sought to ascertain the value of Level 3's entire property as a going concern. The Tax Court permissibly considered and accepted that evidence in arriving at a final value of Level 3's taxable property, and this court should accordingly affirm its judgment.

In urging reversal, Level 3 starts from the flawed premise that the Tax Court's valuation reached beyond the scope of "property" subject to taxation under ORS 308.505(14). But the Tax Court did no such thing. The court recognized that the ultimate question was the value of the company's assets. Based on case law and legislative analysis, the Tax Court upheld the validity of the stock and debt approach for valuing the company's property. The Tax Court did not employ an erroneous legal standard for what property of Level 3 was properly subject to valuation and assessment, and this court should reject Level 3's argument suggesting otherwise.

ANSWER TO ASSIGNMENT OF ERROR

The Tax Court did not conclude that the “property” subject to central assessment is the value of the company itself to shareholders. The Tax Court correctly concluded that in this case the value of Level 3’s assessable property was properly determined through use of a stock and debt (market) indicator reconciled with income and other approaches to the value of that property.

A. Preservation

Level 3 preserved the claim of error it raises on appeal.

B. Standard of Review

This court reviews the Tax Court’s legal conclusions for errors of law and factual findings for substantial evidence in the record. ORS 305.445.

The determination of property’s real market value is ultimately a question of fact, but the interpretation of the statutes and rules governing assessment and valuation is a question of law. *See Hewlett-Packard Co. v. Benton County Assessor*, 357 Or 598, 609–10, 356 P3d 70 (2015).

ARGUMENT

A. The Tax Court determined the value of Level 3’s tangible and intangible property based on evidence of the value of Level 3’s business property as a going concern.

Taxpayer, Level 3 Communications, provides data transmission services. Those operations use real and personal property, both tangible and intangible. As a communication company, Level 3 is subject to “central assessment” by the

Oregon Department of Revenue. ORS 308.515(1)(h). Before turning to the specific facts of this case, the department begins by reviewing the general principles governing central assessment in Oregon.

“[T]he Department of Revenue is charged with centrally assessing property in Oregon that is ‘used or held for future use by’ certain kinds of businesses—generally those that provide services through networks or systems that operate over a large geographic area,” including communication businesses like Level 3. *DISH Network Corp. v. Dept. of Rev.*, 364 Or 254, 257, 434 P3d 379 (2019) (citing ORS 308.215(1)). “Property” for purposes of central assessment means all property, both tangible and intangible, that is used or held for the performance or maintenance of the centrally assessed business, except for a few specific categories of property such as cash and marketable securities. ORS 308.505(14).

Centrally assessed property may be subjected to “unit valuation.” *Id.* at 258 (citing ORS 308.555). Under unit valuation, “the value of a business’s property ‘both within and without the state’ is determined ‘as a unit’ and * * * part of the unit is deemed to be assessable and taxable in Oregon.” *Id.* That is, “[u]nit valuation actually values the company as a going concern: It considers a company’s market value as a whole and does not, either in practice or in theory, purport to assess the various component parts that go into that whole.” *Id.* at 292.

Assessments are based on the real market value of property—that is, “the amount in cash that could reasonably be expected to be paid by an informed buyer to an informed seller, each acting without compulsion in an arm’s-length transaction occurring as of the assessment date.” ORS 308.205(1). “Real market value in all cases shall be determined by methods and procedures in accordance with rules adopted by the Department of Revenue * * *.” ORS 308.205(2).

As that statute authorizes, the department has adopted the Western States Association of Tax Administrators 2009 Appraisal Handbook for Unit Valuation (WSATA Handbook) as the official valuation guide for property central assessment. OAR 150-308-0690. Level 3 does not challenge the department’s adoption of the WSATA Handbook as part of its administrative rule. The WSATA Handbook describes three approaches to determining real market value of centrally assessed property: the income approach, the cost approach, and the market approach. (App 3, 27, 676); *see also Delta Air Lines v. Department of Revenue*, 328 Or 596, 603–06, 984 P2d 836 (1999) (describing the approaches). An appraiser generally will consider all of the approaches and then reconcile them into a final value. (App 3-4).

Level 3 has essentially no “nonoperating property”—that is, no tangible or intangible property used in a business other than communication. (ER 110). Accordingly, for each of the 2014-15, 2015-16, and 2016-17 tax years under

appeal, the department’s appraiser valued all of the property owned, used, or held for future use in Level 3’s communication business as an integrated unit of property, except for the cash and marketable securities excluded from the definition of property in ORS 308.505(14). (ER 110; SER 45-46). Consistent with the WSATA Handbook, he considered cost, income, and market approaches. (ER 86-111). He performed a cost approach, two income approaches, a direct capitalization approach, and a stock and debt approach (the market approach used when comparable sales are unavailable) as his indicators of the value of Level 3’s unit of property.² He “weighed” those approaches to arrive at a reconciled opinion of value for the entire international unit of Level 3’s property, giving primary weight to the income indicators.³ (ER 112). For the 2016-17 tax year, for example, his reconciled opinion of the value of the property was a conservative \$19.15 billion dollars, even though his stock and

² The words “approach” and “indicator” are used somewhat interchangeably to describe valuation methodology. To simplify the valuation discussion in this brief, the department will discuss only the stock and debt and income approaches or indicators of value.

³ The department’s appraiser considered all three approaches as provided by the unit appraisal guidelines in the WSATA Handbook adopted in OAR 150-308-0690—cost, income, and stock and debt (market)—but in reconciling those approaches he gave primary weight to his two income approaches, the least weight to the cost approach, and only secondary weight to the stock and debt and direct capitalization indicators. (ER 112). The Tax Court took judicial notice of the entire WSATA Handbook during trial. (Tr 599).

debt indicator was \$26.84 billion dollars.⁴ (SER 47-48). For each tax year, he then allocated a portion of that unit to Oregon using the administrative rule allocation formula. (ER 113-14). The department will apportion the allocated value to the counties once this case is concluded; the allocation formula and apportionment are not in dispute in this case.

Level 3 submitted its own valuation, which valued Level 3's property significantly lower than the department had valued it. (ER 26). The premise of Level 3's valuation was that essentially the only property subject to assessment was the tangible assets that Level 3 uses in its communication business, which rapidly becomes obsolete. (App Br 90). Level 3 asserted that it creates ongoing growth in its revenues only by acquiring new assets—not through the assets actually existing on the assessment date—so its appraisal could not include any expectation that the assets would exist beyond the assessment date. (Tr 571-73). In other words, Level 3's values were essentially the scrap values of the individual tangible assets of a company that was shutting down and auctioning everything off on the assessment dates. (Tr 592-93, 597, 1633-34). Level 3's valuation witness conceded that he did not attempt to comply with the

⁴ The department's appraiser testified that the trends he was observing, culminating in the sale of Level 3 to CenturyLink approximately a year after the assessment date for \$30 billion, corroborated his opinion of value. (Tr 818-19).

guidelines in the WSATA Handbook, which is required under the department's rule. (Tr 531; ER 1-56).

The Tax Court rejected Level 3's legal premise and value computations as incorporating an incorrect view of the scope of property that may be valued. (ER 283). It held instead that the department's stock and debt and income approaches to value for the property of a company like Level 3 as a going concern are the same as or equivalent to the value of all the company's tangible and intangible property. (ER 260-61). With regard to the legal question raised by plaintiff, the Tax Court concluded:

Oregon's central assessment law does not dictate a specific valuation method, but it certainly does not stand for the proposition that use of the value of the company or its shares of stock as an indicator of, or proxy for, value is invalid as a matter of law. The court sees no indication in the statutory text or context that the legislature has imposed any legal requirement to distinguish between the value of the company to its shareholders and the value of all of the company's tangible and intangible property. Indeed, the legislature has blurred the line between a centrally assessed company and the property it uses, most notably by incorporating into the definition of 'property' a corporation's inalienable right to exist.

(ER 267-68). And, with that understanding of the pertinent legal and valuation principles, the Tax Court concluded that only the department's appraisals valued all of Level 3's property subject to central assessment. (ER 283-85, 294).

Level 3 now appeals to this court. Level 3 does not contest the factual sufficiency of the evidence supporting the Tax Court's ultimate finding as to the

value of Level 3's property. Rather, Level 3's argument on appeal is directed solely at the Tax Court's predicate legal premise that the growth component of the income approach and the stock and debt value of Level 3, appraised as a going concern, may be considered as equivalent to the value of all of Level 3's tangible and intangible property subject to central assessment. But the Tax Court employed the correct legal standard in assessing the parties' appraisals, so this court should affirm its conclusion as to the value of Level 3's property.

B. The value of a company's property indicated by a stock and debt approach may be used to value the company's tangible and intangible property.

Although Level 3's brief might leave a different impression, there is no dispute in this case about the meaning of the term "property" as used in the central assessment statutes. (*See* App Br 22–72). All agree that the property subject to central assessment is the property owned, used, or held for future use in Level 3's communication business. As explained below, the Tax Court did not conclude otherwise. The dispute here is not about what property is subject to central assessment but rather about what valuation indicators appraisers and the Tax Court may consider when determining the real market value of that property.

The text and context of the pertinent central assessment statutes show that the Tax Court permissibly accepted the value of Level 3's unit of property derived from the department's income and stock and debt indicators as

equivalent to the value of Level 3’s tangible and intangible property subject to central assessment. In interpreting statutes, this court’s goal “‘is to determine the meaning of the statute that the legislature that enacted it most likely intended.’” *Goodwin v. Kingsman Plastering, Inc.*, 359 Or 694, 700, 375 P3d 463 (2016) (quoting *Halperin v. Pitts*, 352 Or 482, 486, 287 P3d 1069 (2012)). To do that, this court “‘examine[s] the text of the statute in context, along with relevant legislative history and canons of construction.” *Id.* (quoting *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009)).

- 1. The text of the central assessment statutes charges the department with assessing the property as it is used in the operating business, which allows it to consider the stock and debt indicator among other valuation approaches.**

The statutes’ text shows that the legislature intended the tangible and intangible property of a centrally assessed company to be valued as an ongoing business enterprise—that is, the value a willing buyer would pay to a willing seller for that property in the context of its use in an ongoing business enterprise, not as if the business was shutting down on the assessment date.⁵

⁵ This is what is sometimes referred to as a going concern, although as explained in the WSATA Handbook (App 32-33 [III-6 to III-7]), valuation of all of the tangible and intangible property of a business enterprise for central assessment is broader than the term “going concern” is often construed. The different ways in which the term “going concern” may be used were discussed by the Tax Court in *Boise Cascade v. Department of Revenue*, 12 OTR 263, 267-69 (1991).

The text of the statutes unambiguously requires the department to assess all property of any kind—tangible or intangible—that is owned, used, or held for future use in Level 3’s communication business, with the exception of a few expressly enumerated intangible property items. ORS 308.515 requires the Department of Revenue to “make an annual assessment of *any property* that has a situs in this state”⁶ that is “used or held for future use by any company in performing or maintaining,” among other things, “communication” businesses or services. ORS 308.515(1)(h) (emphasis added). ORS 308.505(14) defines “property” for purposes of ORS 308.515. ORS 308.505(14) provides:

(14) “Property”:

(a) Means *all property of any kind*, whether real, personal, tangible or intangible, that is *used or held by a company* as owner, occupant, lessee or otherwise, *for the performance or maintenance of a business* or service or for the sale of a commodity, *as described in ORS 308.515*.

(b) Includes, but is not limited to, the lands and buildings, rights of way, roadbed, water powers, vehicles, cars, rolling stock, tracks, office furniture, telephone and transmission lines, poles, wires, conduits, switchboards, machinery, appliances, appurtenances, docks, watercraft irrespective of the place of registry or enrollment, merchandise, inventories, tools, equipment, machinery, franchises and special franchises, work in progress and all other goods or chattels; and

(c) Does not include items of intangible property that represent:

(A) Claims on other property, including money at interest, bonds, notes, claims, demands or any other evidence of indebtedness, secured or unsecured; or

⁶ Under unit valuation, it is the portion of the unit of property that is allocated to Oregon that has a situs in the state.

(B) Any shares of stock in corporations, joint stock companies or associations.

(Emphasis added).

In addition to expansively defining the word “property” as “all property of any kind,” the legislature also provided enumerated examples of property. But it prefaced that list by making clear that property “[i]ncludes, but is not limited to” the enumerated examples. Level 3 improperly applies the statutory construction principles of *eiusdem generis* and *noscitur a sociis* to derive a limitation on the general language from the examples of property following the phrase “included but not limited to” in ORS 308.505(14). (App Br at 42-46). But that phrase conveys the legislature’s intent that the examples be read in a nonexclusive sense. *State v. Kurtz*, 350 Or 65, 75, 249 P3d 1271 (2011).

Furthermore, although the legislature described property that was in existence at the time of assessment, it made clear that the assessment focused on the property “used or held” by the company “for the performance or maintenance of” its business. ORS 308.505(14)(a). And, as noted, the department ascertains the market or exchange value of that property—*i.e.*, the amount a willing and informed buyer would pay for it. ORS 308.205(1).

The legislature also allowed the department to “value the entire property, both within and without the State of Oregon, as a unit,” before allocating a portion of that value to Oregon. ORS 308.555. As this court has recognized,

unit valuation “actually values the company as a going concern.” *DISH*, 364 Or at 292. Thus, by allowing unit valuation for centrally assessed property, the legislature authorized the department to assess that property in the context of the business as a going concern, not as separate unrelated assets.

This court has recognized that there are several accepted approaches to determining the value of a company’s property as a unit. *See Delta Air Lines*, 328 Or at 603–06. Those include an income approach, which is based on the present value of the future stream of income that the property is expected to generate; a cost approach, which is based on what the company paid to acquire the tangible and intangible property it has, less depreciation; and a market approach, which is based directly on the price the property as a unit would likely command if it were for sale. (App 19 [WSATA Handbook]). The market approach, in turn, is informed by factors including sales of comparable property and, when there are no comparable sales and the company is publicly traded, the stock and debt indicator. (App 67).

The WSATA Handbook explains the logic behind the stock and debt indicator. As a matter of basic economic theory, “the total value of a firm’s assets is equal to the total value of its liabilities, including stockholders’ equity.” (App 67 [WSATA Handbook at IV-1]). That is because “[f]irms purchase assets using equity or debt financing,” so the value of the assets should equal the value of the equity and debt. (App 67). The handbook traces

the history of the stock and debt indicator back to 1875 and notes that for more than a century it “has been commonly used in unitary valuation for tax purposes.” (App 67-70 [IV-1 to IV-4]).

As used in unit valuation, the stock and debt indicator is used to determine the value of the company’s tangible and intangible property. The value of the company’s property is equivalent to the value of its stockholder equity, and economic theory confirms that the equity plus any debt the company incurred must equal the sum of its assets—its tangible and intangible property.

The text of the central assessment statutes requires the department to value all the company’s property (with minor exclusions) as an operating unit, and settled valuation theory confirms that the value of the company’s stock and debt is one indicator of the value of the company’s property. Nothing in the statutes’ text suggests that it is impermissible for the department or the Tax Court to consider the stock and debt approach to value when determining the value of a company’s property if that business is subject to central assessment.

Level 3 argues that the statutory exclusion from the definition of property for “shares of stock in corporations” points in a different direction. (App Br 27-28 (citing ORS 308.515(14)(c)(B)). But “[t]he exclusion of ‘shares of stock’ applies only to investment securities, not to a controlling stock interest.” *S. Pac. Transp. Co. v. Dept. of Revenue*, 295 Or 47, 63–64, 664 P2d 401 (1983). Level 3’s own stock is not a stock investment in another company.

2. Context and legislative history confirm that, in assessing the value of a company's property, the department and the Tax Court may consider the stock and debt approach.

The context and legislative history of the central assessment statutes confirm that the legislature intended to allow the department and the Tax Court to consider the value of all of a company's property used or held for future use in a centrally assessed business enterprise when determining the value of that business's tangible and intangible property subject to central assessment. Oregon first adopted a central assessment taxation regime in 1909, which specifically authorized unit valuation. *See Comcast*, 356 Or at 291 (citing Lord's Oregon Laws, title XXVIII, ch VI, § 3614 to 3660); *see also* Lord's Oregon Laws, title XXVIII, ch VI, § 3623 (authorizing unit valuation). The preexisting statutory framework and decisional law supplies additional informative context for that enactment. *Work v. Dept. of Rev.*, 363 Or 745, 755, 429 P3d 375 (2018).

As the Tax Court observed, by the time the legislature enacted the central assessment regime in 1909, there was "a robust public record" establishing that the stock value of a business was considered equivalent to the value of the whole "unit" of the business's tangible and intangible property. (ER 251). The United States Supreme Court recognized that equivalency in several cases challenging state tax regimes, rejecting in each case the taxpayer's arguments that using the total value of the business as a whole with all its intangibles

somehow resulted in the taxation of anything beyond the business's property itself. *See Taylor v. Secor*, 92 US 575, 589, 602-03 (1875); *Sanford v. Poe*, 165 US 194, 224-25, 17 S Ct 305, 41 L Ed 683 (1897) (recognizing that the “market value of property is what it will bring when sold” and that value permissibly may include value founded on “good will, franchise, skillful management of the property, or any other legitimate agency” without taxing anything beyond the property itself); *Adams Exp. Co. v. Ohio State Auditor*, 166 US 185, 219-20, 17 S Ct 604, 41 L Ed 965 (1897) (again explaining that the value of a company's property may be enhanced by the business's “franchises, the privileges the company possesses—its intangible property”; the inclusion of that value in the value of the company's property does not tax anything beyond the property itself). Indeed, the Court dismissed as “confusion of words” the proposition that a business's property is worth only the significantly smaller sum of its tangible property, considered in isolation, when the business itself, considered as a whole with all its intangibles, would fetch a substantially greater sum if sold. *Adams Exp. Co.*, 166 US at 220-21 (“Substance of right demands that, whatever be the real value of any property, that value may be accepted by the state for purposes of taxation, and this ought not to be evaded by any mere confusion of words.”).

Consistently with that understanding that the stock and debt value of a business itself was evidence of the value of all its tangible and intangible

property, this court also affirmed that principle in the years prior to the 1909 enactment of the central assessment regime. In *O & C.R.R. Co. v. Jackson County*, 38 Or 589, 621-22, 65 P 307 (1901), *modified on recons*, 38 Or 589 (1901), this court employed a unit valuation methodology in ascertaining the value of a railroad’s taxable property. It tested its assessment of that value against the market value of the railroad’s stocks and bonds, explaining that “the value of stocks and bonds may furnish an element by which to determine the worth of such property.” *Id.* at 608. The court acknowledged that that value might, due to other market forces, understate or overstate the value of the company’s property, but this court affirmed as a basic proposition nonetheless that the value of a company in the hands of its shareholders “may be legitimately resorted to in determining the value of the property which they represent.” *Id.*

Finally, shortly before the enactment of the central assessment regime, the legislature commissioned a bipartisan report on property taxation that supported the same understanding of unit valuation. That report, issued in 1906, endorsed this court’s observation in *O & C.R.R.* that the total stock price of a business could be evidence of the value of the business’s taxable property. It noted only two reservations about the utility of that metric: first, when a business holds “non-operating property”—that is, property used in businesses other than the business subject to central assessment—and second, when

comparable stock sales of similar businesses are rare. As a general matter, however, the report accepted the proposition that, when a company is engaged solely in a business subject to central assessment, the stock and debt value of that company is a permissible indicator of the value of all the company's tangible and intangible property.

In sum, the foregoing sources show that, when the legislature enacted the central assessment regime empowering the department to assess all property of subject businesses by the unit valuation methodology, the legislature would have understood that ascertaining the total stock and debt value of a subject business would be an indicator of the business's taxable property.

In short, the text, context, and legislative history of the pertinent statutory provisions shows that, in assessing the value of all tangible and intangible property of a business subject to central assessment, the legislature intended to permit the department and the Tax Court to consider the value of the company's entire property as an operating unit. ORS 308.555. The stock and debt value of the company is one indicator of the value of the company's taxable property unit, along with the cost and income approaches to value.

C. Level 3's contrary arguments misunderstand the difference between what is assessed and how it is valued.

1. Using the stock and debt value of a company as an indicator of the value of its property does not assess attributes not related to the company's property.

In seeking a different result, Level 3 argues that considering the value of a company's stock in the hands of its shareholders as an indicator of the value of the company's property impermissibly results in assessing something other than the company's "property" within the scope of ORS 308.505(14). The foregoing discussion makes apparent the fundamental flaw on which Level 3's argument rests: An assessment based on unit valuation methodology does not value anything other than the tangible and intangible property of a centrally assessed company. Level 3 argues that its list of "Attributes" of stock ownership (ER 225), such as stock liquidity and investor limited liability, are not property of the company. But the company's ability to readily sell shares of stock in the company to investors in order to finance acquisition of additional assets to maintain and grow the business is a benefit to the company as much or more so than to the investor. In rejecting Level 3's argument, the Tax Court expressed skepticism regarding any actual value created by the so-called Attributes, particularly where the task is to consider the value of all shares of stock together. (ER 272-73). But regardless, as discussed, the stock value of a company as a whole unit is a permissible indicator of the market value of all its tangible and intangible property. *Cf. Adams Exp. Co.*, 166 US at 220-21

(“Substance of right demands that, whatever be the real value of any property, that value may be accepted by the state for purposes of taxation, and this ought not to be evaded by any mere confusion of words.”); *O & C.R.R.*, 38 Or at 608 (the value of a company in the hands of its shareholders “may be legitimately resorted to in determining the value of the property which they represent”); *accord DISH*, 364 Or at 292 (“Unit valuation actually values the company as a going concern: It considers a company’s market value as a whole and does not, either in practice or in theory, purport to assess the various component parts that go into that whole.”).

Indeed, it is difficult to square Level 3’s argument with ORS 308.505(14)’s plain allowance for the assessment of a company’s “intangible” property, in addition to its tangible property. As this court explained in *Comcast*, one core purpose of unit valuation is “to capture additional value inherent in certain property,” reaching “those large intangible values, called franchise value or good will, which could not be effectively taxed by local assessors.” *Comcast*, 356 Or at 290 (quoting *Bonbright*, 2 *The Valuation of Property* at 637)). Level 3’s argument that the department may not assess any “attributes of Taxpayer as a company” separate from its tangible property (App Br 19) irreconcilably conflicts with that foundational purpose of unit valuation.

2. The income approaches used by the department's appraiser do not value property not in existence on the assessment date.

Level 3 may be right that much of its value as a company comes from its anticipated ability to upgrade the physical equipment it uses to meet its customers' needs. (App Br 10). But that does not mean that the department is assessing property Level 3 does not yet own. The income approach indicates the value of Level 3's existing tangible and intangible assets by capitalizing the net present value of an estimated income stream into the future. (App 27).

Anyone can buy new equipment, but only a company like Level 3 can immediately make it profitable on a large scale. That is because Level 3 already has important *intangible* property allowing it to deploy the new equipment like technical expertise and established customer accounts. As the Tax Court observed, "the potential for revenue growth may derive from an attribute of the unit of assembled equipment, real property, customer relationships and workforce in place, or from the ability of the company to attract merger partners and additional capital investment." (ER 271).

By looking only at the value of its soon-to-be-obsolete tangible assets, Level 3's approach ignores entirely the value of the intangible property it currently has as well as anticipated growth in income from the existing assets. Including an estimated percentage of growth in cash flows in the income approach does not assess future property; it assesses the value of the company's

property including its anticipated ability to make use of the existing assets—including intangible property—in the future. The Tax Court properly accepted the inclusion of growth in the department’s income approaches.

3. This court’s decisions do not prohibit use of a company’s stock and debt value as an indicator of the value of its property.

Level 3 purports to find support for its legal premise in this court’s decisions in *Comcast Corp. v. Department of Revenue*, 356 Or 282, 337 P3d 768 (2014), and *Delta Air Lines, Inc. v. Department of Revenue*, 328 Or 596, 984 P2d 836 (1999). More specifically, Level 3 argues that those cases support the proposition that there is a distinction between the “company” and its “property” and only the “property” can be assessed.⁷ But that unremarkable proposition has no bearing on the question here. The question is not what can be assessed—all agree that it is Level 3’s property—but rather whether Level 3’s stock and debt value as a company is a permissible indicator of the unitary

⁷ A “company” is the persons who are carrying on the business. *Black’s Law Dictionary* (4th ed. 1968) defines “company” as “[a] society or association of persons, in considerable number, interested in a common object, and uniting themselves for the prosecution usually of some commercial or industrial undertaking or other legitimate business.” *Webster’s New Collegiate Dictionary* 226 (1981) defines “company,” in pertinent part, as “an association of persons for carrying on a commercial or industrial enterprise.” The department did not value Level 3’s “persons” (except as workforce in place, which is intangible property), nor does the Tax Court’s decision require that persons be included in the assessment. Level 3’s real quarrel is with the Tax Court’s valuation conclusions, not its determination of the property subject to assessment.

value of its tangible and intangible property. Nothing in *Comcast* or *Delta Air Lines* suggests that it is not.

In *Comcast*, the taxpayer disputed whether it was subject to central assessment at all as a communication business; *Comcast* involved no issue about the proper valuation of centrally assessed property. *Comcast*, 356 Or at 284. In preliminarily describing the central assessment statutes, this court stated, as an aside, “It bears emphasizing, however, that only the *property* used in the business, service, or commodity is assessed (and thus taxed). The value of the business, service, or commodity itself is not subject to central assessment.” *Id.* at 293-94 (emphasis in original).

But nothing about the statement is inconsistent with the Tax Court’s decision here or the department’s position before this court, for at least two reasons. First, as noted above, the department’s position here is not that it may *assess* anything other than all tangible and intangible property of a centrally assessed business. Rather, the department’s position is that, in assessing the value of that property, the department permissibly may use the stock and debt value of a centrally assessed business as one *indicator* of the value of that business’s tangible and intangible property. The department’s appraiser actually gave greater weight in the reconciliation to his two income approach indicators of value. (ER 112).

Second, as discussed above, and as the Tax Court also recognized, the department's position in this case regarding the use of the stock and debt value of a company as an indicator of the value of its property is in regard to Level 3, whose sole business is subject to central assessment. The total stock and debt value of a company still may be used but is less useful as an indicator of the value of the company's taxable property if the company holds significant "non-operating property"—that is, property held or used in a business enterprise not subject to central assessment. In that instance, an appraiser might likely give it little to no weight. In light of those principles, this court's *dictum* in *Comcast* may fairly be read to emphasize that only property used in the business enterprise subject to central assessment may be assessed by the department.

For the same reasons, Level 3 finds no support from a similar statement in *Delta Air Lines*. One issue in that case was whether the department had permissibly used a "limited-life model" in valuing certain aircraft of Delta under the department's income approach. *Delta Air Lines*, 328 Or at 614-16. That was the approach prescribed by the WSATA Handbook in effect at that time (not the current version) and adopted by department rule. *Id.* Delta argued, by contrast, that its "perpetuity model" was more appropriate because the department was "valuing an ongoing unit of operating property." *Id.* at 615. Delta cited this court's decision in *Burlington Northern v. Dept. of Rev.*, 291 Or 729, 738-39, 635 P2d 347 (1981), to support that argument, in which this court

rejected for purposes of unit valuation an approach that “assume[d] * * * the noncontinuation of [the] business enterprise” after a finite time, which did not “comport with reality when viewing the facts of [the] case through the eyes of a reasonably prudent investor.” *Id.* at 615 n 11.

This court rejected Delta’s argument and affirmed the Tax Court’s reliance on the department’s valuation. *Id.* at 614-16. It explained that the WSATA Handbook in effect at that time “answer[ed] the question,” because it provided that, “when the taxation requirement is to value assets that exist on the assessment date, it is proper” to use the limited-life model in an income approach “to forecast the expected income over the remaining economic life of the existing assets[.]” *Id.* at 616 (internal quotation marks omitted). By contrast, a perpetuity model was more appropriate where “the corporate entity is being valued.” *Id.* In that context, this court made the statements on which Level 3 relies here:

[T]he department’s task in this case was to value Delta’s taxable property, as a unit, as of the assessment date at issue. As discussed above, the WSATA Handbook provides that the limited-life model is the appropriate manner of valuing such property when using the income approach. In contrast, the perpetuity model would not have been appropriate here, because the department’s task was to determine the value of Delta’s assets, not the value of Delta as a firm. Accordingly, we reject Delta’s contention that the department erroneously applied the limited-life model in its income approach.

Id. at 616. This court distinguished the *Burlington Northern* case on the ground that that case was decided before the adoption of the WSATA Handbook. *Id.* at 615 n 11.

Those statements of this court in *Delta Air Lines* fail to undermine the department's approach in this case. As discussed above regarding *Comcast*, there is a difference between valuing a company as a firm as an end in itself and using that value as *an indicator* of the total value of the firm's tangible and intangible property under a unit valuation. Put simply, this court's statements in *Delta Air Lines* that the department's "task was to determine the value of Delta's assets, not the value of Delta as a firm" does not address, let alone preclude, the use of that firm value derived from a stock and debt approach as one indicator of the value of the company's tangible and intangible property.

Indeed, to the extent that Level 3 suggests in this case that using the total value of a company as a whole to find the total value of that company's taxable assets will impermissibly *overvalue* the company's assets, the opposite was true in *Delta Air Lines*. There, Delta's use of a perpetuity model yielded a *lesser* valuation than the department's approach focusing on the present value of future income to be obtained from the specific assets at issue. *See id.* at 606 (Delta's appraiser did not make a leased-equipment adjustment because, in his view, the value of Delta's leased aircraft was reflected in the value of its securities, particularly in the current market value of its stock). In other words,

this court in *Delta Air Lines* rejected Delta's enterprise valuation, not because it captured value beyond Delta's property, but rather because it *failed* to capture the full value of the assets at issue.

Second, as the Tax Court recognized (ER 265-66), this court in *Delta Air Lines* resolved the issue presented based on the WSATA Handbook in effect at that time. But the Handbook has since changed, and specifically because the limited-life model it prescribed in the former version came under criticism as not realistically reflecting the view of investors that central assessment companies are perpetuities rather than limited-life entities. (App 41-3 [WSATA Handbook, III-17 (2009)]); *compare Burlington Northern*, 291 Or at 738-39 (recognizing that the artificial assumption that an enterprise will cease operations at a finite point in the future fails to accurately value the property of a going concern), *with Delta Air Lines*, 328 Or at 615 n 11 (distinguishing *Burlington Northern* solely based on the then-current version of the WSATA Handbook).⁸

⁸ In the current version of the WSATA Handbook, “[f]orecasting income into perpetuity is proper when a *going concern* is being valued.” (App 33 WSATA Handbook III-7) The Handbook further distinguishes between “going concern” and “enterprise value” explaining that “enterprise value” is the broader term including all of the corporate entity’s tangible and intangible property whereas “going concern” simply relates to the exchange value of operating assets. (App 32 [III-6 n36]). The Handbook makes that distinction because, unlike Oregon, most of the member Western States exempt intangible property.

In sum, the statements of this court in *Comcast* and *Delta Air Lines* on which Level 3 relies do not undermine the Tax Court's conclusion that the stock and debt value of a company is one indicator of the value of that company's tangible and intangible property.

Other precedent from this court supports the same conclusion. In *S. Pac. Transp. Co. v. Dept. of Revenue*, 295 Or 47, 664 P2d 401 (1983), the Southern Pacific railroad had acquired a subsidiary railroad, the Cottonbelt, and disputed inclusion of the Cottonbelt property in its unitary valuation. This court held that, through its 97% stock control of the Cottonbelt, Southern Pacific used or held Cottonbelt's operations in the performance or maintenance of its railroad business, and thus the Cottonbelt properties and the property of Southern Pacific could be valued as a unit. *Id.* at 62-63. The court noted the parties' agreement that "Cottonbelt was not excluded from the 1977 amended definition of 'property' as "intangible property that represent[s] claims on other property including * * * all shares of stock in corporations," ORS 308.510(1) because "[t]he exclusion of 'shares of stock' applies only to investment securities, not to a controlling stock interest in a corporation doing designated railroad business." *Id.* at 63-64.

Although this court examined the central assessment statutes' definitions of "property" and "company" extensively, this court expressed no concern about adding the entire property of a subsidiary to Southern Pacific's property

unit. *S. Pac.*, 295 Or at 52-63. This court also expressed no concern about the Tax Court's use of the stock and debt method in valuing the unit of property. *Id.* at 50. And this court reaffirmed that the purpose of unit valuation is to assess the going-concern value of a multi-state operation. *Id.* at 56-57. This court approvingly quoted *Cleveland Railway Co. v. Backus*, 154 U.S. 439, 444-45, 14 S Ct 1122, 1123-24, 41 L Ed 683 (1984), which stated

The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole.

S. Pac., 295 Or at 57 n 10. In other words, the value of the whole company operating all its parts must be included in the company's unit value, a portion of which is allocated to Oregon and assessed. *See id.*

D. The Tax Court correctly applied the governing principles in determining the value of Level 3's property.

The Tax Court found the value of Level 3's taxable property according to a correct understanding of the pertinent legal framework. It properly gave weight to the conclusions of the department's appraisal, which considered the stock and debt indicator, over those of Level 3's appraisal, which did not. (ER 281-82).

The department's appraiser valued the entire property using income approaches and a market approach.⁹ (ER 111-13). He valued Level 3's property as a unit, making only those reductions for items exempted under ORS 308.505(14)(c). (ER 110). With respect to the market approach, the appraiser used the stock and debt approach as an indicator of the value of Level 3's property. (ER 109-10). He explained that the stock and debt indicator is particularly appropriate where the company is a publicly traded, pure communication company. (ER 109-10; Tr 775-76).

Contrary to Level 3's assertion, the department's appraiser did not value Level 3's stock in the hands of its stockholders; he offered an opinion of the value of Level 3's property. (*See, e.g.*, ER 66 ("As you requested, I have prepared an appraisal of the operating property of Level 3 Communications, Inc. as of January 1, 2014.")). Level 3 points to the Tax Court's use of the phrase "valuing the stock in the hands of the shareholders" to suggest that the Tax Court's valuation ran afoul of ORS 308.505(14)(c)(B), which excludes shares of stock from the definition of "property." But, in context, the Tax Court's decision makes clear that it was permissibly assessing the value of Level 3's property under a stock and debt approach to valuation. *See S. Pac.*,

⁹ The department's appraiser also performed a cost approach but gave it virtually no weight in his reconciliation; nor did the Tax Court give it weight. Thus, it is not discussed in this brief.

295 Or at 62-63 (“The exclusion of ‘shares of stock’ applies only to investment securities, not to a controlling stock interest in a corporation[.]”).

The department’s appraiser testified that his valuation for the 2016-17 tax year in particular was corroborated by evidence of the sale price of Level 3 in 2017 for \$30 billion. (Tr 818-22). That amount was greater than the department appraiser’s \$26.84 billion stock and debt indicator and the conservative \$19.5 billion that in reconciliation he determined Level 3’s property was worth as of January 1, 2016. (SER 47-48). Although the Tax Court ultimately gave that sale “no weight” when considering whether the department’s appraiser had undervalued Level 3’s property (ER 284), at a minimum it shows that the value that the Tax Court determined an informed buyer would pay and an informed seller accept for that property was not unrealistically high.

Level 3’s valuation witness relied entirely on an income approach to determine the real market value of Level 3’s property. (ER 25-26; Tr 586-87). And that income approach made adjustments to remove intangible property value. (ER 23, 30-55). For that reason alone, the Tax Court was within its authority to find the appraisal less persuasive than the department’s. The department also offered expert testimony explaining other significant errors in the capitalization rate used in Level 3’s appraisal, providing further support for

the Tax Court's conclusion that the appraisal was unpersuasive. (ER 271-72; Tr 1151-1276, see also Ex V]).

Although Level 3 criticizes the department's appraiser for incorporating an expectation of growth in future cash flows in his income approach, (App Br 91-92), the Tax Court was well within its authority to accept that approach. Level 3's own internal projections were that its cash flow would increase. (ER 733-41). As explained above, even if that growth also involved buying new equipment, Level 3's ability to use that equipment profitably reflected intangible property that it currently had such as customer accounts and technical expertise. Expectations of growth in cash flows generated from existing assets would only be zero if one assumed, as Level 3 did, that the communication business will cease to exist as of the assessment date and all assets will be individually sold off. But there was no evidence that Level 3 planned to shut down, and so the department's appraiser and the Tax Court correctly valued its unit of property as a going concern.

Having credited the appraisal offered by the department and rejected the one offered by Level 3, the Tax Court correctly found that the value of Level 3's property matched what the department's appraisals suggested. Level 3's legal arguments supply no basis for rejecting the Tax Court's conclusions, and it does not otherwise dispute that those conclusions were supported by substantial evidence.

CONCLUSION

This court should affirm the judgment of the Tax Court.

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 11, 2021, I directed the original Respondent's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Cynthia M. Fraser and Daniel L. Keppler, attorneys for appellant, and Per A. Ramfjord, attorney for amicus curiae, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 8,245 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

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