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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2016-2017

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Atheer Wireless, LLC

v.

State Department of Revenue

**Appeal from Montgomery Circuit Court
(CV-15-901031)**

MOORE, Judge.

Atheer Wireless, LLC ("Atheer"), appeals from a judgment entered by the Montgomery Circuit Court granting a motion for a summary judgment filed by the State Department of Revenue

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("the Department") and denying Atheer's motion to amend the complaint. We affirm.

Procedural History

On August 21, 2013, the Department sent Atheer a final assessment of sales tax, notifying Atheer that it owed \$60,028.68 in taxes, plus \$4,391.11 in interest for the prepaid wireless services it had sold during the period September 1, 2009, through August 31, 2012. At the time of the notice and during the period of the assessment, Ala. Code 1975, § 40-23-1(a)(13), provided:

"Prepaid Telephone Calling Card. A sale of a prepaid telephone calling card or a prepaid authorization number, or both, shall be deemed the sale of tangible personal property subject to the tax imposed on the sale of tangible personal property pursuant to this chapter."

On August 26, 2013, Atheer filed with the Department's Administrative Law Division its notice of appeal from the final assessment, arguing that prepaid wireless services were not subject to sales tax under § 40-23-1(a)(13), and that appeal was ultimately heard by the recently created Alabama Tax Tribunal, see Ala. Code 1975, § 40-2B-2(a) (creating the tax tribunal to "to resolve disputes between the Department

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... and taxpayers").¹ On September 30, 2013, the Department filed an answer to the appeal.

On October 3, 2013, the appeal was held in abeyance pending a decision in a case that involved a similar issue, Beauty & More, Inc. v. State of Alabama, Docket No. S. 12-236, Montgomery Circuit Court Case No. CV-13-901682. On August 27, 2014, the Department filed an amended answer and a motion to set the case for a hearing. The Department asserted that the legislature had passed Act No. 2014-336, Ala. Acts 2014 ("the 2014 Act"), effective July 1, 2014, amending § 40-23-1(a)(13) by clarifying that sales of prepaid wireless services are subject to sales tax. Specifically, § 40-23-1(a)(13) was amended to provide:

"Prepaid Telephone Calling Card. A sale of a prepaid telephone calling card or a prepaid authorization number, or both, shall be deemed the sale of tangible personal property subject to the tax imposed on the sale of tangible personal property pursuant to this chapter. For purposes of this subdivision, the sale of prepaid wireless

¹Pursuant to Ala. Code 1975, § 40-2B-3, "all administrative proceedings commenced prior to October 1, 2014, that ha[d] not been the subject of a final and irrevocable administrative action as of October 1, 2014," were transferred from the Department's Administrative Law Division to the tax tribunal for the remainder of the proceeding, and the statutes applicable to the tax tribunal are applicable to those transferred proceedings.

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service that is evidenced by a physical card constitutes the sale of a prepaid telephone calling card, and the sale of prepaid wireless service that is not evidenced by a physical card constitutes the sale of a prepaid authorization number."

Additionally, pursuant to the 2014 Act, Ala. Code 1975, 40-23-1(a)(14), was added; that subsection provides:

"Prepaid Wireless Service. The right to use mobile telecommunications service, which must be paid for in advance and that is sold in predetermined units or dollars of which the number declines with use in a known amount, and which may include rights to use non-telecommunications services or to download digital products or digital content. For purposes of this subdivision, mobile telecommunications service has the meaning ascribed by Section 40-21-120[, Ala. Code 1975]."

In response to the Department's amended answer and motion to set the matter for a hearing, Atheer asserted that the 2014 Act was unconstitutional.

After a hearing, the tax tribunal entered an order on June 5, 2015, finding that "[the] Department [had] correctly assessed [Atheer] pursuant to § 40-23-1(a)(13), as amended by [the 2014 Act]." The tax tribunal also noted that it was without jurisdiction to consider Atheer's constitutional challenges and that those challenges could be made in an appeal to the circuit court.

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On June 26, 2015, Atheer filed in the circuit court an appeal from the tax tribunal's order, alleging that the Department had "improperly and erroneously assessed sales taxes in excess of \$60,000 against Atheer for the period of September 2009 through August 2012 ... based on Atheer's gross proceeds from the sale of prepaid wireless cellular services during the period in issue." Atheer specifically argued that the 2014 Act was unconstitutional.

On August 26, 2015, Atheer moved for a summary judgment, which, by an order entered November 17, 2015, was denied after a hearing. On October 23, 2015, the Department filed a motion for a summary judgment. On February 29, 2016, the Department filed a second motion for a summary judgment, along with a brief and evidentiary materials in support thereof. On March 9, 2016, Atheer responded to the Department's second summary-judgment motion. In support of its response, Atheer submitted the affidavit of Cynthia Underwood, who "served as Assistant Commissioner of Revenue during the years 2001 through 2012." In her affidavit, Underwood attested, among other things, that, during her tenure, "the Department had not

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previously construed the sales of the prepaid cellular minutes as being subject to Alabama's sales taxes."

On March 17, 2016, Atheer, based on the content of Underwood's affidavit, filed a motion for leave to amend its complaint to assert a violation of the Alabama Administrative Procedure Act, § 40-22-1 et seq., Ala. Code 1975. On March 23, 2016, the circuit court entered a judgment granting the Department's summary-judgment motion and denying Atheer's motion to amend its complaint. On April 29, 2016, Atheer filed its notice of appeal to this court.

Discussion

I.

On appeal, Atheer first argues that the circuit court erred by not allowing it to amend its complaint to allege that the Department had violated the rule-making provisions of the Alabama Administrative Procedure Act. Specifically, Atheer sought to add a claim that the Department had adopted a new interpretation of § 40-23-1(a)(13) in order to make the sale of prepaid cellular-wireless-telephone minutes sold by Atheer taxable transactions without first complying with §§ 41-22-4 and 41-22-5 of the Alabama Administrative Procedure Act.

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Rule 15(a), Ala. R. Civ. P., provides, in pertinent part:

"Unless a court has ordered otherwise, a party may amend a pleading without leave of court, but subject to disallowance on the court's own motion or a motion to strike of an adverse party, at any time more than forty-two (42) days before the first setting of the case for trial, and such amendment shall be freely allowed when justice so requires. Thereafter, a party may amend a pleading only by leave of court, and leave shall be given only upon a showing of good cause. A party shall plead in response to an amended pleading within the time remaining for a response to the original pleading or within ten (10) days after service of the amended pleading, whichever period may be longer, unless the court orders otherwise."

In the present case, the circuit court had set the case for a trial to be held on April 20, 2016. Therefore, Atheer's motion for leave to amend its complaint, which was filed on March 17, 2016, came within 42 days of the trial setting and could be granted only "upon a showing of good cause."

After the Department notified Atheer of the final assessment of sales tax on August 21, 2013, Atheer initially challenged the assessment on the ground that Alabama law, in particular § 40-23-1(a)(13) as it existed before its amendment in 2014, did not provide for a sales tax on the prepaid cellular-wireless-telephone minutes sold by Atheer. After the legislature amended § 40-23-1(a)(13) in 2014, Atheer argued that the amendments did not merely clarify preexisting law,

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but unconstitutionally created a new sales-tax liability that should not be enforced against Atheer. However, at no point during the administrative proceedings did Atheer assert that the Department had violated the rule-making provisions of the Alabama Administrative Procedure Act when assessing sales taxes against Atheer. The record shows that Atheer raised this issue for the first time in its motion to amend the complaint filed in the circuit court.

As a general rule, "[i]n a review of an administrative agency's decision, 'the circuit court's jurisdiction [is] limited to a consideration of the issues properly raised and made of record before the [agency].'" Ex parte Williamson, 907 So. 2d 407, 416 (Ala. 2004) (quoting Joyner v. City of Bayou La Batre, 572 So. 2d 492, 493 (Ala. Civ. App. 1990)). Section 40-2B-2(m)(4), Ala. Code 1975, provides for a trial de novo on an appeal from a final order of the tax tribunal, but nothing in the language of § 40-2B-2(m) authorizes the circuit court to consider new issues on appeal that could have been, but were not, raised in the tax tribunal.

In its motion, Atheer explained to the circuit court that it was seeking to amend its complaint because its attorney had "recently" learned from Underwood that the Department had not

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previously considered prepaid cellular-wireless-telephone minutes to be subject to Alabama sales tax. However, without further explaining with legal authority how the circuit court, in an appeal from a final order of the tax tribunal, could exercise jurisdiction over an issue not previously considered or decided by the tax tribunal, Atheer failed to present good cause for the amendment. Therefore, the circuit court did not exceed its discretion in denying the motion to amend the complaint. See D.C.S. v. L.B., 4 So. 3d 513, 517 (Ala. Civ. App. 2008) (holding that denial of a motion to amend complaint is to be reviewed for abuse of discretion).

II.

Atheer next argues that the circuit court erred in entering a summary judgment in favor of the Department. In its final order, the tax tribunal determined that the Department had properly assessed the sales taxes against Atheer under the 2014 Act. Atheer raised various constitutional challenges to the 2014 Act, but the tax tribunal determined that it did not have jurisdiction to rule on those issues. In its appeal to the circuit court, Atheer asserted that the 2014 Act is unconstitutional based on six

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different grounds. The Department initially moved for a summary judgment, asserting that the circuit court lacked jurisdiction to consider the appeal because Atheer had failed to serve the attorney general with a copy of the appeal challenging the constitutionality of the 2014 Act, as required by Ala. Code 1975, § 6-6-227. The Department further contended that the 2014 Act was not unconstitutional as alleged by Atheer, an argument it reiterated more thoroughly in its second motion for a summary judgment. The circuit court entered a summary judgment in favor of the Department without specifying the grounds.

On appeal, Atheer asserts that the circuit court erred in determining that the 2014 Act is constitutional, but Atheer does not address the alternative ground asserted by the Department -- that the circuit court lacked jurisdiction to consider its constitutional arguments due to noncompliance with § 6-6-227. When a trial court enters a summary judgment without specifying the bases for its ruling, the appellant must set forth an argument in its principal brief as to the invalidity of each and every ground asserted in the motion for a summary judgment; if not, the appellant waives any argument

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as to the omitted ground, resulting in automatic affirmance of the summary judgment. See Fogarty v. Southworth, 953 So. 2d 1225, 1232 (Ala. 2006).

Section 6-6-227 provides, in pertinent part, that "if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard." Section 6-6-227 is "mandatory and jurisdictional" and requires service on the attorney general in any type of action in which a statute is challenged as unconstitutional. Barger v. Barger, 410 So. 2d 17, 19 (Ala. 1982).

"In interpreting § 6-6-227, [Ala. Code 1975,] this Court has consistently held that the failure to serve the attorney general will deny the trial court jurisdiction to resolve any claim based on the constitutional challenge. See Bratton v. City of Florence, 688 So. 2d 233, 234 (Ala. 1996). Any ruling that a trial court makes on a constitutional issue, when the attorney general has not been given notice and the opportunity to intervene, is void. See Ex parte St. Vincent's Hosp., 652 So. 2d 225 (Ala. 1994); Fairhope Single Tax Corp. v. Rezner, 527 So. 2d 1232 (Ala. 1987). See, also, Busch Jewelry Co. v. City of Bessemer, 266 Ala. 492, 493, 98 So. 2d 50, 51 (1957)."

Ex parte Jefferson Cty., 767 So. 2d 343, 345 (Ala. 2000).

Thus, in this case, a failure to serve the attorney general

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would constitute a valid legal ground for the entry of the summary judgment.

In its first filing in the circuit court, Atheer certified that it had served the appeal on the attorney general; however, in its first summary-judgment motion, the Department denied that the attorney general had been served. The record contains no return of service or any other indication that the attorney general was served. In order to decide this appeal, we need not decide whether the attorney general was served or even whether the attorney general had to be served in order for the circuit court to obtain jurisdiction of Atheer's constitutional challenges. We conclude only that Atheer has failed to argue on appeal to this court that the circuit court erred in entering the summary judgment based on the application of § 6-6-227. Accordingly, the summary judgment is due to be affirmed.

Conclusion

Based on the foregoing, we affirm the circuit court's judgment.

AFFIRMED.

Thompson, P.J., and Pittman, Thomas, and Donaldson, JJ., concur.