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# ALABAMA COURT OF CIVIL APPEALS

**SPECIAL TERM, 2016**

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**Ex parte State Department of Revenue**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: State Department of Revenue**

**v.**

**Decatur RSA LP and AT&T Mobility II, LLC)**

**(Montgomery Circuit Court, CV-15-900907)**

MOORE, Judge.

The State Department of Revenue ("the Department") has petitioned this court to issue a writ of mandamus directing

the Montgomery Circuit Court ("the circuit court") to grant its motion to dismiss. We deny the petition.

Procedural History

AT&T Mobility, LLC, operates in Alabama through its affiliates, Decatur RSA LP and AT&T Mobility II, LLC. We hereinafter refer to AT&T Mobility, LLC, Decatur RSA LP, and AT&T Mobility II, LLC, collectively as "AT&T." AT&T sells "internet access, voice, and text messaging services to Alabama customers." Although the Internet Tax Freedom Act, 47 U.S.C. § 151, prohibits states from taxing Internet-access charges, AT&T collected a service tax on Internet-access charges ("the Internet tax") from its Alabama customers and remitted the tax to the Department.

In 2009 and 2010, AT&T customers nationwide filed multiple class-action lawsuits in various federal courts against AT&T, alleging that AT&T had violated the Internet Tax Freedom Act by collecting taxes on Internet-access charges. The class representatives from Alabama were Stephanie Diethelm, Ann Marie Ruggerio, James Marc Ruggerio, and Joseph Phillips ("the Alabama AT&T customers"); they asserted that the class consisted of "all individuals who contracted with AT&T to provide wireless internet access through an AT&T

system smart phone or an AT&T datacard who were charged purported sales 'taxes' for internet access." The federal cases were consolidated and transferred to the United States District Court for the Northern District of Illinois. In June 2010, the parties involved in the federal litigation entered into a "Global Class Action Settlement Agreement," which provided that AT&T would no longer collect tax on Internet-access charges; the class members authorized AT&T "to petition the various taxing jurisdictions on their behalf to obtain refunds of the tax erroneously collected on internet access charges and remitted to those jurisdictions."

Pursuant to the settlement, Decatur RSA LP ("Decatur") and AT&T Mobility II, LLC, submitted to the Department petitions for refunds on behalf of the Alabama AT&T customers, seeking to recover the tax that had been improperly collected by AT&T on its customers' Internet-access charges. The Department denied the refund petitions, and Decatur and AT&T Mobility II subsequently appealed the denial of the petitions to the Department's administrative law division, 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

... and taxpayers"). On May 6, 2015, the tax tribunal entered an order directing the Department to issue the requested refunds. On June 5, 2015, the Department filed an appeal of the tax tribunal's order to the circuit court.

On April 1, 2016, the Department filed in the circuit court a motion to dismiss its appeal for lack of subject-matter jurisdiction. The Department asserted that the Alabama AT&T customers had failed to comply with the notice and cure provisions of Ala. Code 1975, § 40-21-121(k). The Department argued that, based on that failure, the Alabama AT&T customers had not invoked the jurisdiction of the tax tribunal, thereby rendering its order directing the Department to issue the refunds void. Because an appeal will not lie from a void order, the Department contended that the circuit court lacked jurisdiction to consider the merits of the Department's appeal. On May 17, 2016, the circuit court denied the motion to dismiss. The Department filed its petition for a writ of mandamus on June 28, 2016. In its petition, the Department requests that this court issue an order requiring the circuit court to dismiss its appeal for lack of subject-matter jurisdiction.

Discussion

Section 40-21-121(k) provides:

> "If a customer believes that an amount of tax, charge, or fee or an assignment of place of primary use or taxing jurisdiction included on a billing is erroneous, the customer shall notify the home service provider in writing. The customer shall include in this written notification the street address for the customer's place of primary use, the account name and number for which a customer seeks a correction, a description of the error asserted by the customer, and any other information that the home service provider reasonably requires to process the request. Within 60 days of receiving a notice under this section, the home service provider shall review its records to determine the customer's taxing jurisdiction. If this review shows that the amount of tax, charge, or fee or assignment of place of primary use or taxing jurisdiction is in error, the home service provider shall correct the error and refund or credit the amount of tax, charge, or fee erroneously collected from the customer for a period of up to two years. If this review shows that the amount of tax, charge, or fee or assignment of place of primary use or taxing jurisdiction is correct, the home service provider shall provide a written explanation to the customer. The procedures in this section shall be the first course of remedy available to customers seeking correction of assignment of place of primary use or taxing jurisdiction, or a refund of or other compensation for taxes, charges, and/or fees erroneously collected by the home service provider, and no cause of action based upon a dispute arising from such taxes, charges, or fees shall accrue until a customer has reasonably exercised the rights and procedures set forth in this section."

By its plain language, see IMED Corp. v. Systems Engineering Associates Corp., 602 So. 2d 344, 346 (Ala. 1992)

("Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning."), § 40-21-121(k) provides that a customer who claims that he or she has been erroneously charged a tax must notify his or her home-service provider in writing of the alleged error. Within 60 days, the home-service provider must review its records and determine whether an error has been committed. If the home-service provider determines that it erroneously collected a tax, the home-service provider must correct the error to prevent further collection and must refund the tax collected for up to two years. No cause of action against the home-service provider for a refund or any other compensation accrues until a customer "has reasonably exercised" the foregoing procedure.

The materials before us indicate that the Alabama AT&T customers did not follow the procedure set out in § 40-21-121(k) before filing their class action against AT&T. Based on that fact, the Department argues that the Alabama AT&T customers could not claim a refund for the Internet tax that AT&T had erroneously collected from them and, therefore, Decatur and AT&T Mobility II could not petition for a refund on their behalf. We disagree.

The Alabama Legislature amended § 40-21-121 in 2001 by, among other things, adding subsection (k) in response to the passage of the federal Mobile Telecommunications Sourcing Act ("the federal MTSA"), 4 U.S.C. § 116 et seq. See Title to Act No. 2001-1090, Ala. Acts 2001. The federal MTSA addresses the problem encountered by mobile-telecommunications providers in determining which state and local taxes they should collect by "creating uniform methods of 'sourcing,' which is the process of determining where a transaction is taxable." T-Mobile South, LLC v. Bonet, 85 So. 3d 963, 981 (Ala. 2011). Although the federal MTSA does not contain notice and cure provisions, Alabama elected to join other jurisdictions in providing mobile-telecommunications providers who collect taxes on behalf of the state additional protection from lawsuits arising from their tax-collecting function, which can be complicated. See, e.g., Alaska Stat. § 29.45.750(c); Ariz. Rev. Stat. § 42-5034.01; Ark. Code Ann. § 26-52-315(c)(2)(A); Colo. Rev. Stat. § 29-1-1002(3); Del. Code. Ann. tit. 30, § 5508(b); D.C. Code § 47-3922(e); Ga. Code Ann. § 48-8-13(c); Ky. Rev. Stat. Ann. § 65-7640; Mont. Code Ann. § 15-53-131(4); N.H. Rev. Stat. Ann. § 82-A:4-b(V); Okla. Stat. tit. 68, § 55001(D)(7); Tenn. Code Ann. § 67-6-532(c)(1); and Wyo. Stat.

Ann. § 39-15-109(g). In adopting this measure, the Alabama Legislature intended that consumers could not maintain a civil action against a "home service provider" based on an erroneous tax collection before first notifying the provider of the error and giving the provider an opportunity to timely cure the error. See Miller v. Sprint Spectrum L.P. (No. C07-59JLR, Dec. 6, 2007) (W.D. Wash. 2007) (not reported in F. Supp. 2d) (construing Wash. Rev. Code § 35.21.873).

Section 40-21-121(k) does create certain procedures that a consumer must follow before obtaining a tax refund directly from a home-service provider, but it does not provide that a failure to follow those procedures acts as a forfeiture of the consumer's rights to a tax refund from the Department. Section 40-21-121(k) does not even refer to tax-refund claims against the Department or establish any procedures that must be followed before a petition for a tax refund can be filed against the Department. Those procedures are contained exclusively in the Taxpayers' Bill of Rights and Uniform Procedures Act ("the TBOR"), Ala. Code 1975, § 40-2A-1 et seq. The Department has not cited a single provision of the TBOR that requires compliance with § 40-21-121(k) before a tax-refund petition can be filed by or on behalf of a consumer

from whom a home-service provider has erroneously collected taxes.

Moreover, even if § 40-21-121(k) could be construed as requiring a consumer to follow the notice and cure provisions before filing a tax-refund petition against the Department, which we do not hold, the Department has not demonstrated that those provisions are jurisdictional in nature. "Subject-matter jurisdiction concerns a court's power to decide certain types of cases." Ex parte Seymour, 946 So. 2d 536, 538 (Ala. 2006). Section 40-2B-2(g)(1), Ala. Code 1975, gives the tax tribunal jurisdiction over appeals from the denial of a petition for a tax refund. The Department has not explained how noncompliance with § 40-21-121(k), which the Department considers to be a bar to the Alabama AT&T customers' substantive right to a tax refund, deprived the tax tribunal of jurisdiction to decide Decatur and AT&T Mobility II's appeal. See Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31, 46 (Ala. 2013) (explaining difference between issues affecting a party's cause of action and issues implicating a party's standing and the court's subject-matter jurisdiction).

Mandamus is an extraordinary remedy and should not be granted unless the petitioner's right to relief is clear. Ex parte Army Aviation Ctr. Fed. Credit Union, 477 So. 2d 379 (Ala. 1985). The Department has not shown that the tax tribunal lacked subject-matter jurisdiction to adjudicate the appeal filed by Decatur and AT&T Mobility II from the denial of the tax-refund petition filed on behalf of the Alabama AT&T customers. The tax tribunal issued a valid order from which an appeal would lie to the circuit court. See § 40-2B-2(m), Ala. Code 1975. The circuit court did not err in denying the Department's motion to dismiss.

PETITION DENIED.

Thomas and Donaldson, JJ., concur.

Thompson, P.J., concurs in the result, without writing.

Pittman, J., recuses himself.