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IN THE INDIANA TAX COURT

CINCINNATI SMSA LIMITED PARTNERSHIP and NEW CINGULAR WIRELESS PCS, LLC, as successor to Indiana Cellular, LLC, Kentucky CGSA, LLC, Westel-Indianapolis, LLC, Indiana 8, LLC, and Westel-Milwaukee, LLC,	)	
Petitioners,[1]	)	Cause No. 49T10-0409-TA-45
v.	)	
INDIANA DEPARTMENT OF STATE REVENUE,	)	
Respondent.	)	

ORDER ON PETITIONERS' MOTION FOR SUMMARY JUDGMENT

NOT FOR PUBLICATION
August 21, 2009

FISHER, J.

[1] Initially, the caption of the Petition identified the Petitioners as: Cincinnati SMSA Limited Partnership, Indiana Cellular LLC, KY CGSA LLC, Westel-Indianapolis, LLC for itself and as successor to Indiana 8, LLC, and Westel-Milwaukee, LLC. (Pet. for Original Tax Appeal at 1.) The caption was subsequently altered because all of the Petitioners, with the exception of Cincinnati SMSA, merged with New Cingular Wireless PCS, LLC. (*See* Pet'rs Notice of Mergers and Change to Caption, Oct. 30, 2007; Pet'rs Des'g Evid. Ex. 1 ¶ 2.)

Cincinnati SMSA Limited Partnership and New Cingular Wireless PCS, LLC, as successor to Indiana Cellular, LLC, Kentucky CGSA, LLC, Westel-Indianapolis, LLC, Indiana 8, LLC, and Westel-Milwaukee, LLC (hereinafter, "CSLP") appeal the Indiana Department of State Revenue's (Department) denial of their claims for refund of gross retail tax (sales tax) paid during the 2000 and 2001 calendar years (calendar years at issue). The matter is currently before the Court on CSLP's motion for summary judgment. The Court consolidates and restates the issues for review as:

I. Whether the original and supplemental affidavits of Robert Landau and Mark Mercer should be disregarded pursuant to the *Blinn*/*McCullough* Rule; and

II. If not, whether CSLP has demonstrated that the Department erred in concluding that they were not entitled to a refund of Indiana sales tax for the calendar years at issue.[2]

FACTS AND PROCEDURAL HISTORY

The following facts are undisputed. During the calendar years at issue, CSLP was in the business of providing a variety of services for mobile phone subscribers within all or a portion of Indiana. To that end, CSLP sold "bundled" calling plans (such as the "Cingular Nationwide 100" plan) to some of their Indiana customers. CSLP's customers, under the terms of these plans, received a pre-determined number of airtime minutes, including long-distance and roaming[3] for a monthly flat fee. If the customer

[2] CSLP also argues that the Department's final determination violates the Commerce Clause of the United States Constitution. The Court, however, need not address this issue at this time, given its disposition of CSLP's summary judgment motion.

[3] A customer was said to be "roaming" when she "use[d] the facilities of [a] cell telephone carrier with which [she] ha[d] no relationship" in order to facilitate a cellular telephone call. (Resp't Am. Resp. Br. Opp'n Pet'rs Mot. Summ. J. (hereinafter, "Resp't Br.") at 6 (footnote omitted).)

exceeded the allotted number of airtime minutes additional charges would apply.

In order to provide seamless cellular telephone coverage to their customers, both within and without the state, CSLP executed several "Intercarrier Roamer Service Agreements" (roaming agreements) with other cellular service providers.[4] The roaming agreements generally required another cellular service provider ("the Foreign Carrier") to provide cellular coverage (i.e., roaming services) for CSLP's customers when they used their cell phones outside of CSLP's coverage areas, but within the coverage areas of the Foreign Carriers. (*See* Pet'rs Des'g Evid. Ex. 1 ¶ 5.) (*See also* Resp't Am. Br. Opp'n Pet'rs Mot. Summ. J. (hereinafter, "Resp't. Br.") at 6-7.) In exchange, CSLP agreed to bill their customers for the roaming charges, which included all applicable state and local taxes; collect the payments from their customers; and then remit those payments to the Foreign Carrier.[5]

On or about November 1, 2002, CSLP filed claims with the Department seeking a total refund of $1,753,586.51 (plus interest) in sales tax they had remitted to the Department on their Indiana customer's in-state and out-of-state roaming cellular telephone calls. In early August of 2004, the Department issued two final

[4] Cellular service providers are licensed to provide mobile phone services in some, but not all, geographic service areas within the United States. As a result, the providers routinely executed roaming agreements to facilitate the provision of nationwide cellular phone service for their customers. (*See* Pet'rs Des'g Evid. Ex. 1 ¶¶ 3-4; Resp't Br. at 6-7.)

[5] Each Foreign Carrier established the rates for roaming services. (*See* Pet'rs Des'g Evid. Ex. 1 ¶ 5.)

determinations denying some, but not all, of CSLP's claims.[6]

On September, 24, 2004, CSLP timely initiated an original tax appeal. CSLP filed their motion for summary judgment on October 30, 2007. The Court held a hearing on the motion on September 22, 2008. Additional facts will be supplied as necessary.

STANDARD OF REVIEW

Summary judgment is proper only when the designated evidence demonstrates that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). A genuine issue of material fact exists when facts concerning an issue which would dispose of the case are in dispute or when the undisputed material facts support conflicting inferences as to that issue. *See Scott Oil Co. v. Indiana Dep't of State Revenue*, 584 N.E.2d 1127, 1129 (Ind. Tax Ct. 1992).

When this Court reviews a motion for summary judgment, it must construe all properly asserted facts and reasonable inferences drawn therefrom in favor of the nonmoving party. *See id.* at 1128-29 (citation omitted). Accordingly, if there is any doubt as to what conclusion the Court could reach, it will conclude that summary judgment is improper, given that the motion is neither a substitute for trial nor a means for resolving factual disputes or conflicting inferences following from undisputed facts. *See Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905, 909 (Ind. 2001) (citations omitted); *Scott Oil*, 584 N.E.2d at 1128 (citations omitted).

[6] Specifically, the Department denied the claims of Indiana Cellular and Kentucky CGSA. (*See* Pet'rs Des'g Evid. Ex. 1 at Exs. B, C.) The Department did not render any decision on CSLP's remaining claims; thus, they were deemed denied on or about April 30, 2003. *See* IND. CODE ANN. § 6-8.1-9-1(c)(3) (West 2000).

ANALYSIS AND ORDER

I. Whether the original and supplemental affidavits of Robert Landau and Mark Mercer should be disregarded pursuant to the *Blinn*/*McCullough* Rule[7]

The *Blinn/McCullough* Rule militates against the granting of summary judgment when "'a reasonable trier of fact could choose to disbelieve the movant's account of the facts.'" *Insuremax Ins. Co. v. Bice*, 879 N.E.2d 1187, 1190 (Ind. Ct. App. 2008) (quoting *McCullough v. Allen*, 449 N.E.2d 1168, 1172 (Ind. Ct. App. 1983)), *trans. denied*. Specifically, when the evidence before a court raises a genuine issue as to the affiant's credibility, it would be improper "'to base summary judgment solely on a party's self-serving affidavit[.]'" *Id.* (citation omitted). "Inconsistencies and evasive language within the movant's designated evidence may form a basis for denying summary judgment." *Id.* "When the facts are peculiarly in the knowledge of the movant's witnesses, there should be an opportunity to impeach them at trial, and their demeanor may be the most effective impeachment." *Id.* (citing *Blinn v. City of Marion*, 390 N.E.2d 1066, 1069 (Ind. Ct. App. 1979)).

The Department maintains that this case is ripe for the application of the *Blinn/McCullough* Rule, as the Court can reasonably choose to disbelieve these "self-serving" affidavits. (*See* Resp't Am. Br. Mot. Strike, (hereinafter, "Resp't Strike Br.") at 27-29.) Indeed, the Department asserts that the affidavits contain inconsistencies as to both of the affiant's employment histories and their statements on CSLP's refund calculations. (*See* Resp't Strike Br. at 28 (referring to Pet'rs Des'g Evid. Ex. 1 ¶¶ 1, 7,

[7] The original and supplemental affidavits of Robert Landau and Mark Mercer were designated as evidence by CSLP. Landau was CSLP's Director of State and Local Taxation during a portion of the calendar years at issue; Mercer is a Tax Managing Director with KPMG LLP. (*See* Pet'rs Des'g Evid. Ex. 1 ¶ 1; Ex. 2 ¶ 1.)

13; Ex. 2 ¶¶ 1, 3).) In addition, the Department asserts that the affiants are evasive because they "carefully" avoided: 1) identifying the other cellular service providers that "supposedly" collected another state's tax; 2) identifying what other states they allegedly paid tax to; and 3) specifying what type of tax was paid in these "unnamed states." (*See* Resp't Strike Br. at 28-29 (referring to Pet'rs Des'g Evid. Ex. 1 ¶¶ 6, 9).) The Court, however, disagrees.

First, any inconsistencies with respect to the employment histories in Landau and Mercer's original affidavits have been rectified by their supplemental affidavits. Second, and contrary to the Department's claim, the affidavits do not contain inconsistencies with respect to CSLP's refund calculations. Indeed, a careful reading of the affidavits indicates that CSLP used the TCE software to calculate their initial claims for refund; KPMG later "refined" the TCE generated results. (*Cf.* Pet'rs Des'g Evid. Ex. 1 ¶¶ 12-13 *with* Pet'rs Des'g Evid. Ex. 2. ¶ 3.) Finally, the mere fact that the affidavits do not contain all of the information desired by the Department does not necessarily mean that the affiants were evasive. In fact, such a decision may reflect nothing more than CSLP's trial strategy; in other words, CSLP presented only those facts that they believed were relevant to the issue before the Court.[8] Accordingly, the Court finds that the *Blinn/McCullough* Rule is inapplicable in this case.

II. Whether CSLP has demonstrated that the Department erred in concluding that they were not entitled to a refund of Indiana sales tax for the calendar years at issue

Indiana imposes an excise tax, known as the state sales tax, on retail

[8] To the extent the Department believed that the "omitted" information was vital to the matter at hand, the Department – not CSLP – was responsible for getting the information before the Court. The Department could have accomplished this through a variety of discovery tools.

transactions made within the state. IND. CODE ANN. § 6-2.5-2-1(a) (West 2009). Thus, during the calendar years at issue, Indiana levied sales tax on the purchase of intrastate telecommunication services, meaning "the transmission of messages or information by or using wire, cable, fiber optics, laser, microwave, radio, satellite, or similar facilities." IND. CODE ANN. § 6-2.5-4-6(a), (b) (West 2000) (amended 2007). Consequently, only those transmissions that originated and terminated within Indiana were subject to Indiana sales tax under Indiana Code § 6-2.5-4-6. *See id.* at (b). *See also Grand Victoria Casino & Resort, LP v. Indiana Dep't of State Revenue*, 789 N.E.2d 1041, 1045 (Ind. Tax Ct. 2003).

CSLP argues that they are entitled to summary judgment because as a matter of law, they remitted too much sales tax to the Department during the calendar years at issue. According to CSLP, their invoices for the "bundled" calling plans contained charges for two different time frames: (1) charges in advance, for the pre-set number of airtime minutes; and (2) charges in arrears, for airtime minutes used beyond those provided under the plans. (Pet'rs Reply Br. at 1-2.) CSLP explains that the Department's desire to have its sales tax "up-front" caused each of the CSLP companies to pay sales tax to the Department on the "bundled" plan airtime minutes, in their totality, before the minutes were even used.[9] (*See* Hr'g Tr. at 17-19 (footnote added).) CSLP explains that they paid tax on the same airtime minutes a second time when they paid the Foreign Carriers (on behalf of their customers) for their provision of roaming services. (Brief Supp. Pet'rs Mot. Summ. J. (hereinafter, "Pet'rs Br.") at 11-12;

[9] CSLP also remitted sales tax on their customer's excess airtime minutes. The claims at issue in this case, however, do not involve the taxes remitted for those calls. (*See* Pet'rs Reply Br. at 2 n.2.)

Hr'g Tr. at 18-21.) Consequently, CSLP claims that the Department's final determination is incorrect because: (1) the CSLP companies had no tax liability with respect to their customer's roaming phone calls, as none of the companies were retail merchants making retail transactions under Indiana Code § 6-2.5-4-6 when their customers roamed on other cellular service providers (i.e., the Foreign Carriers) networks; (2) their customer's out-of-state roaming calls were not even subject to Indiana sales tax under Indiana Code § 6-2.5-4-6 because those calls were not intrastate calls;[10] and (3) the Department should have received the applicable sales tax on their customers in-state roaming calls from the Foreign Carriers, rather than CSLP. (*See* Pet'rs Br. at 14-16; Hr'g Tr. at 18-25 (footnote added).)

To establish that they were entitled to a refund of Indiana sales tax, CSLP submitted, among other things, the affidavits of Robert C. Landau, CSLP's Director of State and Local Taxation, and Mark Mercer, a Tax Managing Director with KPMG LLP. (Pet'rs Des'g Evid. Ex. 1 ¶ 1; Ex. 2 ¶ 1.) As mentioned, CSLP initially sought a total refund of $1,753,586.51, but after "refining" their claims, CSLP determined that they were entitled to a total refund of $1,752,192.91 in sales tax. (Pet'rs Des'g Evid. Ex. 1 ¶¶ 12-13; Ex. 2 ¶ 3.) Mercer explained that the refund amounts sought by CSLP were generated via the "Tax Credit Engine" computer software. According to Mercer, the software first used "charm reports" to "analyze[] the millions of individual billings on []

[10] According to CSLP, their customers' out-of-state roaming calls were either "wholly extrastate" calls (i.e., calls that originated and terminated in a state other than Indiana) or interstate calls (i.e., calls that originated in a state other than Indiana and terminated within Indiana). (*See* Brief Supp. Pet'rs Mot. Summ. J. (hereinafter, "Pet'rs Br.") at 15.)

roaming telephone calls made by [CSLP's] customers[.]"[11] (Pet'rs Des'g Evid. Mercer Supp'l Aff. ¶ 11 (footnote added).) The software then calculated CSLP's requested refund by taking the lesser of "the per minute Indiana sales tax for service under the [b]undled [p]lan in question," and the per minute tax, as imposed by the applicable jurisdiction, for in-state and out-of-state roaming services. (*See* Pet'rs Des'g of Evid. Ex. 2 ¶ 6.) As a result, CSLP maintains that the Department must now return their $1,752,192.91 overpayment of Indiana sales tax.

The Department admits that only intrastate telecommunication services were subject to Indiana sales tax during the calendar years at issue. (*See* Hr'g Tr. at 34.) The Department contends, however, that CSLP's designated evidence simply does not establish that they are entitled to a sales tax refund of over $1.7 million. (*See, e.g.,* Hr'g Tr. at 41-45; Resp't Br. at 12-14.) To support its contention, the Department presented, *inter alia*, photocopies of one of the CSLP companies' Indiana sales tax returns (the ST-103s) for the 2001 calendar year. (*See* Resp't Des'g Evid. Ex. G.) The Department asserts that these returns clearly indicate that one of the CSLP companies, Cincinnati SMSA, is not entitled to the relief that it seeks and, as a result, the case should proceed to trial. (*See* Resp't Br. at 12-14; Hr'g Tr. at 45.) The Court agrees.

When CSLP filed their claims with the Department, they asserted that Cincinnati SMSA was entitled to a sales tax credit of $259,757 for the 2001 calendar year. (Pet'rs Des'g Evid. Ex. 1 ¶ 12.) After CSLP "refined" their claims, however, they claimed that Cincinnati SMSA was actually entitled to a refund of $291,739. (*See* Pet'rs Des'g Evid.

[11] "Charm reports" are "voluminous reports consisting of the call detail data for each roaming telephone call . . . completed by [CSLP's] customers[.]" (Pet'rs Des'g Evid. Mercer Supp'l Aff. ¶¶ 13-14.)

Ex. 1 ¶ 13; Ex. 2 ¶ 3.) Nevertheless, Cincinnati SMSA's ST-103s demonstrate that Cincinnati SMSA only remitted slightly over $60,000 to the Department during the 2001 calendar year. (*See* Resp't Des'g Evid. at Ex. G.) (*See also* Resp't Br. at 13.) The ST-103s therefore clearly show that Cincinnati SMSA could not have remitted more than $259,757 in sales tax to the Department during the 2001 calendar year.

Moreover, CSLP concedes that there is a "problem" with Cincinnati SMSA's claim for refund. (*See* Hr'g Tr. at 28-29.) Indeed, CSLP explains that "while we haven't gotten all of the facts nailed down, it appears that what happened was that the claim for refund that was computed was actually not with respect to [Cincinnati SMSA], but should have been with respect to Gary Cellular Telephone Company. Well, we didn't file a claim for a refund in the name of Gary Cellular Telephone Company, and we are conceding that we're not entitled to that claim for refund." (Hr'g Tr. at 29.)

The only evidence CSLP has submitted to substantiate their claims of entitlement to a $1.7 million refund is their affiants' testimony. In other words, there are no actual calculations, analyses, reports, or other underlying data to support that number.[12] The reliability of their affiants' testimony, however, has been called into question, given the aforementioned "problem" which demonstrates that at some relatively early point in the process, CSLP's data collection and reconciliation efforts were severely flawed. The magnitude of this mistake, in conjunction with the lack of other evidence on the matter, would lead a reasonable person to question the reliability of the evidence that CSLP did submit. *See Scott Oil*, 584 N.E.2d at 1128-29 (explaining that the Court must draw all

[12] Furthermore, CSLP's invoices to their customers will not shed any light upon their alleged overpayments of tax because CSLP has consistently maintained that the overpayments were made from their own pockets. (*See* Pet'rs Br. at 8-9; Pet'rs Des'g Evid. Ex. 1 ¶ 11.)

reasonable inferences in favor of the non-moving party when resolving motions for summary judgment). Because there is a genuine issue as to the *actual* amount of CSLP's overpayment of tax, CSLP's motion for summary judgment must be denied.

CONCLUSION

For the above stated reasons, the Court DENIES CSLP's motion for summary judgment. The Court shall set a case management conference to discuss the remaining matters for trial by separate order.

SO ORDERED this 21st day of August, 2009.

Thomas G. Fisher, Judge
Indiana Tax Court

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