

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-001813-MR

AT&T CORPORATION

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE FREDERIC COWAN, JUDGE  
ACTION NO. 11-CI-007292

COMMONWEALTH OF KENTUCKY;  
HON. LORI FLANERY, SECRETARY  
OF THE FINANCE AND ADMINISTRATION  
CABINET (IN HER OFFICIAL CAPACITY);  
AND HON. THOMAS B. MILLER,  
COMMISSIONER OF THE DEPARTMENT  
OF REVENUE (IN HIS OFFICIAL CAPACITY)

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: COMBS, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: AT&T Corporation appeals from an order of the Jefferson Circuit Court dismissing its declaratory judgment action for failing to exhaust its

administrative remedies. We find that the constitutional issue raised by AT&T should not have been dismissed and is ripe for a declaratory action; therefore, we reverse and remand.

This case revolves around certain amendments to Kentucky Revised Statutes (KRS) 139.505(2) which currently states:

Any business whose interstate communications service, subject to the sales tax imposed under KRS Chapter 139 and deducted for federal income tax purposes, exceeds five percent (5%) of the business's Kentucky gross receipts during the preceding calendar year is entitled to a refundable credit if:

(a) The business's annual Kentucky gross receipts are equal to or more than one million dollars (\$1,000,000); and

(b) The majority of the interstate communications service billed to a Kentucky service address for the annual period is for communications service originating outside of this state and terminating in this state.

The amendments to KRS 139.505(2) inserted the word "interstate" and added subparts "a" and "b." The amendments were introduced in the General Assembly's 2002-2004 and 2004-2006 Budget Bills. AT&T filed for the refundable credit for the years 2002 through 2008.

AT&T filed the underlying declaratory action arguing, in part, that the amendments to KRS 139.505 were unconstitutional. AT&T claims that the amendments to the statute decrease the amount of the refund credit it would otherwise be entitled to if the Department of Revenue utilized the pre-amended

version of KRS 139.505. The trial court dismissed the action, finding that “judicial relief is unavailable to AT&T because there are disputed factual questions that must be resolved at the administrative level before the Court can determine whether constitutional adjudication of KRS 139.505 is strictly necessary for a decision in this case.”<sup>1</sup>

“Exhaustion of administrative remedies is not necessary when attacking the constitutionality of a statute or a regulation as void on its face. This is because an administrative agency cannot decide constitutional issues.” *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 626 (Ky. 2001) (citing *Goodwin v. City of Louisville*, 309 Ky. 11, 215 S.W.2d 557 (Ky. 1948)). In the case at hand, one of the issues raised before the trial court was that the amendments to KRS 139.505 violated section 51 of the Kentucky Constitution. That section states:

No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be reenacted and published at length.

KY Const. § 51. This is a constitutional issue that the KBTA cannot decide.

Based on the foregoing, we reverse the order of the Jefferson Circuit Court. On remand, the court will address AT&T’s argument that the amendments to KRS 139.505 violate the Kentucky Constitution. The other claims asserted by AT&T in

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<sup>1</sup> The administrative agency which would determine the factual questions at issue would be the Kentucky Board of Tax Appeals (KBTA).

its declaratory action were properly dismissed because they can be determined at the administrative level by the KBTA.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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