DECATUR RSA LP 11760 US HWY 1, WEST TOWER, STE. 600 NORTH PALM BEACH, FL 33408,	§	STATE OF ALABAMA ALABAMA TAX TRIBUNAL
		DOCKET NOS. S. 13-414
AT&T MOBILITY II LLC 11760 US HWY 1, WEST TOWER, STE. 600 NORTH PALM BEACH, FL 33408,	§	S. 13-415
Petitioners,	§	
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

These consolidated appeals involve denied refunds of State mobile telecommunications service tax jointly requested by the above Petitioners and various of their Alabama customers for November 2005 through September 2010.

The parties agreed at an October 3, 2013 hearing that the Administrative Law Division, now the Tax Tribunal, would decide the case in two stages. Stage one involved the issue of whether the Petitioners and their Alabama customer class members properly filed joint refund petitions in accordance with Alabama's uniform refund statute, Code of Ala. 1975, §40-2A-7(c)(1). An Opinion and Preliminary Order (Stage One) was entered on April 2, 2014 holding that the joint refund petitions were filed in accordance with §40-2A-7(c)(1).

This Final Order addresses the stage two issues, i.e., the computation of the refunds due, and when and to what party or parties should the Department issue the refunds.

The Stage One Order directed the Petitioners to provide the Department with the records necessary to compute/verify the amount of the refunds due. It also directed the

Department to notify the Administrative Law Division, now the Tax Tribunal, of the results of its audit/review.

The Petitioners subsequently provided the Department with various records and other information. The Department responded that the Petitioners should provide the social security or employer identification numbers for each of their customer class members seeking a refund. The Petitioners agreed to do so, "subject to entering into an expanded Protective Order. . . ."[1]

The Tribunal subsequently received a proposed Amended, Agreed Protective Order from the Petitioners. The Tribunal signed the Order on February 24, 2015 with the understanding that the Department had agreed to the language in the Order. The Department notified the Tribunal that it had not agreed to the language in the Order.

The Tribunal voided the Amended, Agreed Protective Order, but also indicated that another amended protective order would later be issued, if appropriate. The Tribunal also identified a dispute between the parties concerning the refund offset provision at Code of Ala. 1975, §40-2A-7(c)(4). The Tribunal directed the parties to file briefs and reply briefs concerning (1) the offset issue, and (2) the language to be included in an amended protective order. Those briefs and reply briefs have now been submitted.

Issue (1). The Refund Offset Provision.

Section 40-2A-7(c)(4) reads in pertinent part – "If the department determines that a refund is due, the amount of overpayment plus accrued interest may first be credited by the department against any outstanding final tax liabilities due and owing by the taxpayer to the department, and the balance of any overpayment shall, subject to the setoff

[1]The Tribunal had entered a prior Protective Order on October 31, 2013.

provisions of Article 3 of Chapter 18, be refunded to the taxpayer."

Both parties agree that the refunds can only be issued after a final, unappealed or unappealable court order is entered in the case. They also agree that any refund amounts determined to be due can be offset pursuant to §40-2A-7(c)(4) by any final outstanding tax liability owed by a customer class member, and also setoff to pay any debt owed by a customer class member to a claimant agency pursuant to Code of Ala. 1975, §40-18-100, et seq.[2]

The parties disagree, however, concerning the next step in the process. The Petitioners assert that once a final court order is issued, and the Department has offset the refunds with any then existing outstanding final tax liability and any debt setoff pursuant to §40-18-100, et seq., the Department is then required to issue the net refunds due.

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[2] The phrase "outstanding final tax liability" has been defined as follows:

> The phrase "outstanding final tax liability" is not defined by Alabama law. But the term may reasonably be construed as an accrued liability in the form of a final assessment from which a statutory appeal is no longer allowed, or a liability that has been affirmed on appeal by the Administrative Law Division or by a circuit or appellate court in Alabama and from which no further appeal can be taken. The Department can thus reduce or offset a refund otherwise due a taxpayer by any outstanding final assessment or court judgment amount owed by the taxpayer from which no further appeal can be taken.
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> And because §40-2A-7(c)(4) specifies that an otherwise due refund can only be offset by an "outstanding final tax liability," it necessarily follows that the refund cannot be offset by a contingent liability that the Department claims may be due.

QHG of Gadsden, Inc., Docket S. 10-115 (Admin. Law Div. 7/8/2010) at 4 – 6.

The Department argues that after the gross refund amount is determined by a final court order, and the amount is offset by any outstanding final tax liability and the debt setoff statute, it may still hold the refunds pending any possible or contingent liability that may later become a final liability owed by a customer class member.

In its Response Brief of Department to Taxpayer Asserted Issues Regarding Refund Payments at 4, the Department sets out its proposed procedure for issuing the refunds. In Step (1), the gross refund amount is established per an unappealable court order. Steps (3) and (4) involve the application of the final tax liability offset and debt collection setoff procedures discussed above. Step (5) reads in part – "The Department will notify the (customer) if it is holding the refund as a credit against possible liabilities in compliance with §40-2A-13(c)."[3] The Department further asserts in Step (5) that it may "ultimately" use the refund to offset a future fixed liability owed by a customer class member.

I disagree with proposed Step (5). As explained below, once the amount of the refund is determined to be due by final court order, and the amount is reduced by the §40-2A-7(c)(4) offset and the §40-18-100, et seq. debt setoff provisions, if applicable, the Department is then required by Alabama law to issue the net refund due.

After a refund is reduced by any final outstanding tax liability and any debt owed to a State agency by the taxpayer, §40-2A-7(c)(4) then provides that "the balance of any overpayment shall, . . ., be refunded to the taxpayer." [4] Use of the affirmative "shall"

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[3] The scope of §40-2A-13(c) is discussed below.

[4] Section 40-2A-7(c)(4) actually specifies that "[i]f the *department* determines that a refund is due," then the offset and setoff provisions apply. The Department has not determined that a refund is due in this case, but to the contrary, strongly contends that a refund is not due. Consequently, if the wording in §40-2A-7(c)(4) is strictly (footnote continued)

requires the Department to issue the refunds after the net amount is finally determined, in this case by an unappealed or unappealable court order, and the refunds are subsequently offset and/or setoff, if applicable. Consequently, contrary to the Department's proposed Step (5), the Department cannot continue to hold the refunds "as a credit against possible (future) liabilities." If that was the law in Alabama, the Department would be authorized to hold all otherwise due refunds indefinitely because all Alabama taxpayers may in the future owe a final tax liability to the Department.

The Department also cites Code of Ala. 1975, §40-2A-13(c)(iii) in support of its position. That section addresses when the Department may conduct a second examination of a taxpayer's books and records, and provides that the Department may do so to "verify a direct or joint refund claim and to determine if there is any offsetting tax liability to be credited against or that may exceed the refund claim."

Section 40-2A-13(c)(iii) clearly allows the Department to audit a taxpayer to determine if a claimed refund is due. The Department's Administrative Law Division, now the Tax Tribunal, interpreted the statute as allowing the Department to audit a taxpayer,

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interpreted, any refund determined to be due by final court order would not be subject to the §40-2A-7(c)(4) offset and §40-18-100, et seq. setoff provisions.

The Legislature arguably intended for the setoff and offset provisions to apply only when the Department determines that a refund is due because in the first sentence in §40-2A-7(c)(4), the Legislature specified that "[i]f . . . the department, the Alabama Tax Tribunal, or a court otherwise determines that a refund is due," the refund must be paid by the governmental entity that received the overpaid tax. Arguably, if the Legislature had intended for the setoff and offset provisions to also apply when a disputed refund is determined to be due by the Tax Tribunal or a court, it would have used the words "Alabama Tax Tribunal, or a court" in the second sentence of §40-2A-7(c)(4), as it did in the first sentence. It did not do so.

The Petitioners concede, however, that any refund due can be offset and setoff pursuant to §§40-2A-7(c)(4) and 40-18-100, et seq., respectively. Consequently, I will assume that those offset and setoff provisions apply for purposes of this case.

presumably a second time, for the type of tax and tax period involved in a refund petition, to determine if any or all of the claimed refund is due. "Having carefully reviewed the statute, and specifically §40-2A-13(c)(iii), it is clear that the Alabama Legislature intended or envisioned that if a taxpayer petitions for a refund, the Department is authorized to audit the taxpayer and offset or eliminate the refund if it is determined that the taxpayer otherwise owes additional tax for the applicable period . . . . As discussed above, if a taxpayer petitions for a refund, the Department is authorized to audit the taxpayer for the type of tax and period involved in the petition to determine the amount of refund due, if any." *QHG of Gadsden* at 2, 3.

The Department construes §40-2A-13(c)(iii) as allowing it to hold a taxpayer's otherwise due refund until it audits and determines if the taxpayer is liable for any other type tax for any period.[5] I disagree.

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[5] The Department apparently indicated to the Petitioners at some point that it intended to hold the refunds in issue until it audited all of the customer class members and determined if those members owed Alabama income tax. A January 13, 2015 letter from the Petitioners' attorney to the Department's attorneys includes the following statements – ". . .I am writing in response to your recent communication regarding the offsetting of refunds with tax liabilities and for holding refunds against contingent liabilities . . . we do not find support for the proposition that the Department of Revenue (the "Department") can hold a sales tax refund based on the potential for finding an income tax offset . . . The Department claims that it can offset the sales tax refund with a yet to be determined income tax liability." The Petitioners' Brief on Refund Offsets at 3, also asserts that "the Department claims that it cannot finalize the approvable amount of the refund until it engages in individual audits of customers to determine if the customers might have any personal income tax liabilities the Department can use to offset the transaction tax refunds." Also in the same brief at 5, the Petitioners state that "[t]he Department claims it can offset the transaction tax refund with yet to be determined personal income tax liabilities."

The Department now denies that it ever indicated to the Petitioners that it intended to audit the customer class for income tax. "The Petitioners (sic) assertions regarding the Department doing an income tax audit to take a $5 telecommunications tax refund are nothing more than fanciful. I would not see the Department taking such steps even though I think it could." Reply to Petitioners' Brief on Refund Offsets at 7. As (footnote continued)

When a taxpayer petitions for a refund of a particular type of tax and tax period, §40-2A-13(c)(iii), when read in context, authorizes the Department to audit the taxpayer to determine the amount of refund due, if any, for the type of tax and specific tax period involved in the petition. As discussed below, the Department has in fact audited the Petitioners' records for the refund period in issue and has determined per the audit the total refund due the Petitioners and their customer class members. And having determined the total refund due, the Department is otherwise allowed by §40-2A-7(c)(4) to offset the refund by any outstanding final tax liability (for any type tax and tax period) owed by a customer class member to the State. Section 40-2A-13(c)(iii) does not, however, give the Department carte blanche authority to hold the refund indefinitely while it conducts audits for any and all other tax types to which the customer class members may be subject. And even if §40-2A-13(c)(iii) is construed as allowing the Department to offset the refund with another type tax owed by a class member, the provision must still be read in para materia with §40-2A-7(c)(4), which, as discussed, allows the Department to offset a refund only if the taxpayer owes an outstanding *final* tax liability.

The Department is, of course, entitled to audit each and every customer class member for income tax, or for any other type tax that a member may be subject to. It may also thereafter assess the class member for any additional tax found to be due. But it must do so pursuant to the assessment procedures set out in the Uniform Revenue Procedures Act, Code of Ala. §40-2A-7(b). And as discussed, neither §40-2A-13(c)(iii) nor any other statute allows the Department to hold the otherwise due refunds pending the results of those audits. Rather, once a final, unappealed or unappealable court order

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discussed below, I agree that the Department could audit the customer class members for income tax, but it cannot hold the refunds in issue indefinitely pending those audits.

is entered, the Department is required, i.e., "shall," subject to the §40-2A-7(c)(4) offset and §40-18-100, et seq. debt setoff provisions, issue refunds for the net amounts due. If a Department audit of a customer class member results in an outstanding final tax liability before a final, unappealed or unappealable court order is entered, then the offset provision will apply and the refunds can be reduced accordingly. But the refunds cannot be offset by any contingent liability existing when the refunds are due to be issued.

Finally, the Department asserts that "the most important issue involved at this stage in the appeals is how will the Alabama Tax Tribunal order the Department to make the refund payments." Reply to Petitioners' Brief on Refund Offsets at 2.

As discussed in the Opinion and Preliminary Order (Stage One), the Petitioners and their customers from which the Petitioners collected the overpaid tax agreed per the class action settlement agreement that the Petitioners would act as the customers' agents in obtaining refunds in the various states, including Alabama, and that the refund amounts should be paid into the appropriate escrow account for the benefit of the customers. If, however, a state refunded the money to the Petitioners instead of into an escrow fund, the Petitioners would be required to remit the funds to the appropriate escrow fund.

The Department argues that while a taxpayer may direct the Department to pay any refund due to another party, it is not required to do so – ". . . there is no Alabama law that *requires the Department* to give the taxpayer's refund to anyone other than the taxpayer." Reply to Petitioners' Brief on Refund Offsets at 4. It thus takes the position that it will pay the refunds directly to the individual customer class members, and not to the Petitioners or into an escrow account.

Throughout its above-cited reply brief, the Department refers to the customer class members as the "taxpayers." It argues that it is required by Alabama law at §40-2A-7(c) to pay any refund due directly to each individual class member/taxpayer. I disagree. In the context of a joint refund petition, Alabama law designates the person or entity that collected and remitted the tax to the Department, the Petitioners in this case, as the "taxpayer," and the person or entity that paid the tax to the taxpayer, the customer class members, as the "consumer/purchaser." Code of Ala. 1975, §40-2A-7(c)(1) specifies that "[i]n the case of a petition for refund of . . ., public utilities taxes pursuant to Chapter 21 (of Title 40), . . . the petition shall be filed jointly by the taxpayer who collected and paid over the tax to the department and the consumer/purchaser who paid the tax to the taxpayer." As discussed, §40-2A-7(c)(4) further provides that "[i]f a petition is granted, . . . the overpayment shall be refunded to the taxpayer by the state, . . ."

Reading §§40-2A-7(c)(1) and (4) in para materia, Alabama law is clear that a refund of tax erroneously collected by a taxpayer from a customer must be refunded to the taxpayer that remitted the tax to the Department, the Petitioners in this case.[6] Alabama law thus requires the Department to issue the refunds to the Petitioners, not the individual customer class members. The Petitioners, together with the customer class members, have requested that the Department issue the refunds into an escrow fund for the benefit of the class members. There is no legal or practical reason the Department should not do so.

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[6] "Taxpayer" is defined at Code of Ala. 1975, §40-2A-3(23), in part, as follows – "Any person (as broadly defined at §40-2A-3(13) to include all entities) subject to or liable for any state . . . tax; any person required to file a return with respect to, or to pay . . . any state . . . tax . . . ." The Petitioners were required to file returns and remit the tax in issue to the Department during the period in issue, and thus were clearly "taxpayers" as defined by Alabama law.

The Department strongly objects to paying the refunds into an escrow account, arguing that doing so "would prejudice the Taxpayers of Alabama and effect the efficient operation of the Department."

> I can say that to the best of my knowledge that, other than by offset, the Department has never made a refund to anyone other than the Taxpayer directly even though it is sometimes requested to make the payment to the Taxpayer's representative or to the Taxpayer and their representative jointly. Allowing the Taxpayer to assign the benefits of their refund (even through a class action) by judicial rule might seem innocuous on its face but upon close examination, such a rule would prejudice the Taxpayers of Alabama and affect the efficient operation of the Department in its important official functions as a governmental agency. There are many legitimate state purposes in permitting the Department to make the refund to the taxpayer rather than allowing the taxpayer to designate how the Department makes its refund payments. If the State were required to do that, it would constantly have to check for UCC assignments, rights of trustees in bankruptcy, rights under divorce agreements, and claims of exemption asserted by the taxpayer to these liens, judgments, verification of lien balances, processing lien claims and making priority determinations, etc. on a routine basis. Those requirements would place an unreasonable administrative and legal burden on the state that is clearly not contemplated by the TBOR. Instead, the TBOR simply allows the Department to refund tax overpayments "to the taxpayer" and contains no provision authorizing a taxpayer to name any other designees or otherwise bind the Department to any other designations for the payment of the refund.
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> Likewise, a judicial requirement to make a refund to a class or a designee of the Taxpayer- where the TBOR requires that the refund be made "to the taxpayer" – is outside of the terms of the TBOR and would therefor violate the agencies sovereign immunity as set forth herein.

Response Brief of Department to Taxpayer Asserted Issues Regarding Refund Payments at 5.

To begin, the Petitioners and the customer class members are not attempting to assign the refund "by judicial rule." As joint petitioners, they have simply asked the Department to pay the refunds into an escrow fund for the benefit of the customer class

members. That is no different than a taxpayer requesting that a refund be remitted to the taxpayer's representative or to the taxpayer and the representative jointly, which the Department concedes it sometimes does.

I also disagree that issuing the refunds into an escrow account would place an administrative burden on the Department. To the contrary, making a single or two payments into an escrow account would be a simple method of payment versus the Department's proposed method of issuing separate refund checks to the tens of thousands of customer class members, which would itself be administratively burdensome and cost the State tens of thousands of dollars in mailing preparation and postage charges alone. And frankly, I do not understand the Department's assertion that if required to remit the refunds into an escrow account, "it would constantly have to check for UCC assignments, rights of trustees in bankruptcy, rights under divorce agreements, . . ." etc. It would simply be required to issue a check or two checks to the escrow account. No further action would be necessary.

Ordering the Department to issue the refunds to the Petitioners, or to a dedicated escrow account at the direction of the Petitioners and the customer class members, also will not violate the State's (or the Revenue Department's) sovereign immunity. Issuing refunds to the Petitioners, i.e., the "taxpayers," is clearly allowed, albeit required, by the refund procedures at §40-2A-7(c), and as conceded by the Department, there is nothing in Alabama law preventing the Department from issuing the refunds into an escrow account.[7]

[7] The Department presumably objects to issuing the refunds into an escrow account because the attorneys that represent the Petitioners and/or the customer class members may receive a percentage of or be paid from the fund. In an undated Department motion received by the Tribunal on March 9, 2015, the Department states – (footnote continued)

Finally, the Department attorney claims that he has never known the Department to make a refund to anyone other than the taxpayer, although he concedes that it does sometimes make payments as requested by a taxpayer to a representative or to a taxpayer and a representative, jointly, which, as discussed, is no different than paying the refunds in issue into an escrow fund at the request of the Petitioners and their joint petitioners/customer class members.

I agree that refunds are generally paid to the taxpayer that overpaid the tax. For example, an individual taxpayer will generally directly receive a refund check for an income tax refund claimed on his or her individual return. This case can, however, be distinguished because it involves a joint refund by the Petitioners, the taxpayers that collected and remitted the tax to the Department, and their customer class members that paid the tax. Having been a Revenue Department employee for 38 plus years, I have personal knowledge that when the Department grants a joint refund petition concerning sales, use, lodgings, or, as in this case, public utility tax, the Department makes the refund

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"their attorney fees are calculated on the total amount of refunds paid to the class-action escrow account. This is where the rubber meets the road. If the refunds are paid to the people of Alabama directly, all of this money goes to the 'little taxpayers' rather than class counsel." And in the Department's Response Brief at 2, it asserts that "[i]f the refunds are paid directly to the Alabama taxpayers . . . they (presumably the attorneys) can't put the money into some special slush account controlled by a overreaching federal judge in the Northern District of Illinois. . . ."

The Department's stated concern that the class members should receive the refunds is ironical, given that while the Department does not dispute that the class members overpaid the tax in issue, it has vigorously fought to deny the refunds to those "little taxpayer" Alabama citizens and businesses. In any case, the fact that the customer class members agreed per the settlement agreement to pay the attorneys from the refund amounts should be of no concern to the Department. As stated in the Opinion and Preliminary Order (Stage One) at 22 – "There is nothing in Alabama law that prohibits those refund recipients from agreeing that all costs and attorney fees associated with the refund claims will be paid out of the refund proceeds."

check payable to both the taxpayer that collected and remitted the tax to the Department and the taxpayer's customer that paid the tax.[8] The Department then mails the check to the taxpayer; that is, to the person or entity that remitted the tax to the Department.[9] The Department is thus correct that the refund must be issued to the "taxpayer," but it erroneously argues that the "taxpayer" in these cases are the individual customer class members. As discussed, the "taxpayers" in these cases for purposes of the joint refund procedures in §§40-2A-7(c)(1) and (4) are the Petitioners that collected and remitted the tax to the Department.

The Department to date has not notified the Tribunal that it has completed its review of the Petitioners' records for purposes of verifying the amount of the gross refunds due. The Petitioners indicate, however, in their Brief on Refund Offsets at 1, that "[i]t is the Petitioners' understanding that the Department has, in fact, completed their audit work. The Department provided the summary worksheet attached as Exhibit A to Petitioners' counsel on December 16, 2014."

The Exhibit A summary worksheet shows that the Petitioners and the customer class members claimed total refunds of $9,960,727.90, whereas the Department has

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[8] The Department is not legally required to make the check out to both parties, but does so as a practical matter to ensure that the customer that paid the tax gets the refund. Two party checks will not be necessary in this case because when the checks are issued to the Petitioners, assuming the Department still refuses to remit the refunds directly into escrow, the Petitioners will be required by the federal court settlement agreement to remit the money into the appropriate escrow account for distribution to the customer class members.

[9] Joe Cowen worked in the Department's Sales and Use Tax Division for over 30 years, including many years as Director of that Division. He recently confirmed my understanding that the Sales and Use Tax Division's longstanding procedure for paying joint refunds is to send the check to the taxpayer that remitted the overpaid tax to the Department.

determined the total overpayments to be $9,886,303.56. The Petitioners apparently agree with the Department's computation because in their Reply Brief at 3, they request "[t]hat the Tribunal finalize the refund amounts already audited and approved by the Department. . . ."

The Department is directed to issue the Petitioners a refund or refunds totaling $9,886,303.56, plus applicable interest, less any currently existing outstanding final tax liabilities owed by a customer class member, up to the amount of the refund due the member, and less any debt owed by a class member for which a claimant agency has filed a claim with the Department pursuant to §40-18-100, et seq.[10] Judgment is entered accordingly.

Issue Two – The Amended Protective Order.

The Petitioners now agree that the language proposed by the Department can be included in an amended protective order. Accordingly, attached to this Final Order is an executed Amended Protective Order that includes the language requested by the Department. The Petitioners should immediately provide the Department with the social security or employer tax identification numbers for the customer class members so that the Department can identify the outstanding final tax liabilities owed by the members, if any, and also any pending debt setoff claims filed by the applicable claimant agencies with the Department pursuant to §40-18-100, et seq. If any amounts are offset pursuant to §40-2A-7(c)(4) or setoff pursuant to §40-18-100, et seq., the Department should so

[10] If this Final Order is appealed, which the parties agree is a certainty, and if the subsequent final, unappealed or unappealable court order affirms that refunds are due, then as discussed, the Department should be allowed to offset the refunds by any final tax liability owed by a class member at that time, or to setoff a class member debt against the refunds pursuant of §40-18-100, et seq.

notify the Petitioners as required by those statutes.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2B-1(m).

Entered May 6, 2015.

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BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr
attachment
cc: Christy O. Edwards, Esq.
David E. Avery, III, Esq.
Margaret C. Wilson, Esq.