

DOWNING ENTERPRISES, LLC §  
74531 TALLASSEE HWY. §  
WETUMPKA, AL 36092, §

Taxpayer, §

v. §

STATE OF ALABAMA §  
DEPARTMENT OF REVENUE. §

STATE OF ALABAMA  
ALABAMA TAX TRIBUNAL

DOCKET NO. S. 14-289

### FINAL ORDER

This appeal involves a denied refund of State sales tax requested by Downing Enterprises, LLC (“Taxpayer”) for September 2008 through June 2011. The Revenue Department had assessed the Taxpayer for sales tax for the subject period based on its gross proceeds from the sale of prepaid wireless cellular services during the period. The Taxpayer paid the assessment, but subsequently petitioned the Department for a refund after learning of the decision in *Beauty & More v. State of Alabama*, Docket S. 12-336 (Admin. Law Div. 6/10/2013), Montgomery County Circuit Court Case No. 03-CV-2013-901682.00. That decision held that prepaid cellular services sold by Beauty & More did not involve prepaid calling cards or authorization numbers within the purview of Code of Ala. 1975, §40-23-1(a)(13), and thus were not subject to Alabama sales tax. The Department denied the Taxpayer’s petition, and the Taxpayer timely appealed to the Tax Tribunal.

While *Beauty & More* was pending in Circuit Court, the Alabama Legislature passed and the Governor signed into law Act 2014-336, effective July 1, 2014. That Act amended the sales tax and use tax definitions of “Prepaid Telephone Calling Card” at Code of Ala. 1975, §§40-23-1(a)(13) and 40-23-60(13), respectively, to specify that “the sale of prepaid and wireless 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.”

Section 5 of the Act, specified that “[t]he amendments in this act are intended to clarify existing law and are not substantive changes to the tax law. For that reason, the amendments apply to all open tax periods.”

Section 6 of Act 2014-336 reads as follows:

For transactions that occurred prior to the effective date of this act in which the consumer did not receive from the retailer either an authorization number or a physical card, neither the Department of Revenue nor local tax officials may seek payment for sales tax not collected. This limitation on the authority of the department or local officials shall not apply to audits begun or assessments that were entered prior to the effective date of this act. With regard to such transactions in which sales tax was collected and remitted, neither the taxpayer nor the entity remitting sales tax shall have the right to seek refund of such taxes.

The Administrative Law Division subsequently directed the Taxpayer to notify the Division why Act 2014-336 did not apply. The Taxpayer responded by arguing that the Act should not apply because it violates several provisions in the Alabama and U.S. Constitutions – “We are not asserting that the entire Act is unconstitutional. Instead, we are asserting that various sections of the Act violate the Alabama Constitution of 1901 and are therefore void as to their enforcement.” Taxpayer’s Response to Preliminary Order at 21, 22. The Department responded that the Act is a clarification of existing law, and is constitutional in all respects.

“The Alabama Tax Tribunal . . . shall not have the power to declare a statute unconstitutional on its face.” Code of Ala. 1975, §40-2B-2(g)(6). Because the Taxpayer’s appeal is based on its contention that various sections in Act 2014-336 are unconstitutional, the Tax Tribunal is without jurisdiction to grant the Taxpayer relief. The Taxpayer has preserved the constitutional challenges raised in its appeal to the

Administrative Law Division, now the Tax Tribunal, and may pursue those challenges in an appeal of this Final Order to circuit court.<sup>1</sup>

The Department's denial of the Taxpayer's sales tax refund based on §40-23-1(a)(13), as amended by Act 2014-336, is affirmed. Judgment is entered accordingly.

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

Entered June 2, 2015.

---

BILL THOMPSON  
Chief Tax Tribunal Judge

bt:dr

cc: Christy O. Edwards, Esq.  
Dwight Pridgen, Esq.

---

<sup>1</sup> Although the Tax Tribunal is without authority to declare all or a part of Act 2014-336 unconstitutional, it appears that one or more of the Taxpayer's constitutional claims has merit. This is especially true concerning §6 of the Act, which on its face treats similarly situated taxpayers differently, depending on whether a taxpayer paid or did not pay the tax before the effective date of the Act, and whether the Department did or did not begin an audit of or assess a taxpayer before the effective date of the Act.