VERIZON AMERICAS, INC. 999 18TH STREET SOUTH TOWER, SUITE 1750 DENVER, CO 80202, Taxpayer, v. STATE OF ALABAMA DEPARTMENT OF REVENUE.	§ § § § § §	STATE OF ALABAMA ALABAMA TAX TRIBUNAL DOCKET NO. BIT. 16-582-JP

OPINION AND PRELIMINARY ORDER

This appeal involves the denial by the Alabama Department of Revenue of requests for refunds of income tax. The Taxpayer previously was known as Vodafone Americas, Inc. ("Vodafone"), but later became Verizon Americas, Inc. ("Verizon").

Vodafone, which was a Delaware corporation, was domiciled outside of the State of Alabama. However, Vodafone owned a 45% interest in Cellco Partnership, and that partnership conducted business in Alabama (and other states). For these reasons, Cellco was required by Alabama law to file a composite income tax return on behalf of Vodafone and any other nonresident members, and to pay income tax on the nonresident members' distributive shares of Cellco's income sourced to Alabama. *See* Ala. Code § 40-18-24.2(b)(1). Any member that was included in a Cellco composite return could file its own Alabama income tax return for that period, and such a member would have been credited with any tax that had been paid on its behalf by Cellco. § 40-18-24.2(b)(2).

In April 2012, Cellco filed a calendar-year 2011 composite income tax return on behalf of its nonresident members. Concerning Vodafone, Cellco made a composite tax payment of $4,399,000.

For its fiscal year beginning April 1, 2011, and ending March 31, 2012 (FYE 2012),

Vodafone filed an Alabama corporate income tax return in November 2012. Its return was filed timely, but Vodafone did not claim the $4,399,000 composite payment by Cellco as a credit on Vodafone's return.

Later, in March 2013, Vodafone filed an amended FYE 2012 return, claiming a credit for the $4,399,000 composite payment made on Vodafone's behalf by Cellco. The amended return requested a refund of $4,399,000. The Department failed to grant Vodafone's refund within a six-month period, so the request was denied by operation of law in September 2013. *See* § 40-2A-7(c)(3). Vodafone had two years from the September 2013 denial date to appeal the denial to either the Tax Tribunal or to circuit court. *See* § 40-2A-7(c)(5). Vodafone did not appeal the denial.

Instead, in October 2015, Vodafone apparently filed a second refund petition with the Department for FYE 2012. In that petition, Vodafone again requested a refund of the $4,399,000 composite payment that was made on Vodafone's behalf by Cellco. Vodafone also requested, for the first time, an additional amount of $10,090 that was attributable to an IRS audit change that recently had been finalized. Thus, the total refund requested in Vodafone's second refund petition was $4,409,090.[1]

As stated, Vodafone filed its original FYE 2012 return timely. When a taxpayer files its return timely, Alabama law allows that taxpayer to file a refund petition for that period within three years from the date that the original return was filed (or two years from the date of payment of the tax, whichever is later). *See* § 40-2A-7(c)(2)a. Here, Vodafone's second refund petition was filed (in October 2015) within three years from the date of filing

[1] The Department disputes whether the second refund petition actually was filed by Vodafone. Nevertheless, for purposes of this ruling, it is presumed that the petition was

of its original FYE 2012 return (in November 2012). And, as with Vodafone's first refund petition, the Department failed to grant the second refund petition within the immediately-following six-month period. Thus, Vodafone considered its second refund petition to have been denied by operation of law in mid-April 2016. One month later, Verizon, as successor to Vodafone, appealed to the Tax Tribunal from the deemed denial of the second refund petition.

ISSUE

Vodafone's first refund petition requested a refund of the $4,399,000 composite payment made on Vodafone's behalf by Cellco. After the first petition had been denied and was not appealed, the second refund petition restated Vodafone's request for a refund of the $4,399,000 composite payment. What legal effect, if any, did Vodafone's second refund petition have?

ANALYSIS

The Department argues that Vodafone's second refund petition is not properly before the Tribunal for consideration because the second petition was not a "new" claim for refund. Instead, the second petition constituted an untimely amendment of the first petition, or the second petition was null and void because of its redundancy.

Verizon argues that there is nothing in the applicable refund statute or Department rule that prohibits a taxpayer from filing a second refund petition after the first petition has been denied, if the second petition is filed within the applicable three-year time limit for requesting a refund. Here, Vodafone's second refund petition was filed within the three-

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received by the Department in October 2015.

year statutory time limit, and thus, according to Verizon, was timely. And Verizon's appeal to this Tribunal from the denial of the second petition was filed within the two-year period for appealing refund denials.

According to case law, however, Vodafone's second refund petition was a nullity as to Vodafone's restated request for a refund of the $4,399,000 composite payment. Therefore, the Tribunal lacks jurisdiction to consider that aspect of Verizon's appeal.

Verizon is correct that § 40-2A-7(c) does not expressly prohibit a taxpayer from filing a second refund petition after a prior petition has been denied. But the statute does not expressly permit such a filing either. In fact, the statute is silent on the matter. Instead, the statute simply states that "[a]ny taxpayer may file a petition for refund with the department for any overpayment of tax . . ." § 40-2A-7(c)(1). And sub-paragraph (c)(2)a. states that "[a] petition for refund shall be filed with the department" within a certain time period. Likewise, the remainder of the statute refers only to "a petition for refund" or "the petition for refund," and makes no mention of duplicate claims. The Department's rules on refund petitions also do not mention duplicate claims. *See* Ala. Admin. Code r. 810-14-1.18 and r. 810-14-1-.19.

In *Allstate Ins. Co. v. U.S.*, 550 F.2d 629 (Fed. Cir. 1977), Allstate sought a recovery of overpaid federal income tax and interest for the year 1969. On September 15, 1970, Allstate filed its 1969 income tax return with the IRS showing tax due of more than $10.5 million. Allstate already had paid approximately $10.9 million for that year, so the company claimed a refund of $363,098.66. That refund was issued to Allstate.

In March 1973, the IRS asserted that Allstate had an income tax deficiency for 1969 totaling $1,579,444.64. Allstate paid that amount in July and filed a claim for refund on September 7, 1973, for $1,594.422.22. The refund claim included the deficiency payment of $1,579,444.64, plus other amounts that arose outside the context of the asserted deficiency. The refund claim was filed within three years of the filing of Allstate's 1969 income tax return (on September 15, 1970). The IRS denied Allstate's refund claim in full.

In October 1973, Allstate filed suit in the U.S. Court of Claims concerning its refund petition for $1,594,422.22. More than eight months later, in June 1974, Allstate filed a second refund claim with the IRS for 1969, asserting a new ground for refund; *i.e.*, an investment credit of $112,929.60, which was unclaimed on its 1969 return.

In its second refund claim, Allstate also restated all grounds that formed the basis of its first refund claim for $1,594,422.22. That first claim already was pending in court. The second claim filed with the IRS aggregated the two refund requests for a total of $1,707,351.82, which consisted of the first claim amount of $1,594,422.22 plus the second claim amount of $112,929.60. Allstate's second claim (filed in June 1974) was filed more than three years after its 1969 return was filed (in September 1970), but within two years of its July 1973 deficiency payment to the IRS.

One week after the filing of the second refund claim, the IRS denied the claim. Allstate then amended its lawsuit to incorporate the new part of its second refund claim, which brought the total refund requested by Allstate in its lawsuit to $1,707,351.82.

In court, the government argued that Allstate's refund was limited by the time and amount limitations in Internal Revenue Code § 6511. Specifically, the government asked the court to view the second refund claim as one total claim without regard to the existence

of Allstate's first (and separate) refund claim. Therefore, the government argued that Allstate's second claim was limited in amount by IRC § 6511(b) because the second claim was filed more than three years after the initial filing of Allstate's return.

Allstate countered by characterizing its second claim as consisting of two separate claims – the first claim (which was merely repeated) and the additional claim that had been incorporated into Allstate's legal challenge of the denial of its first refund claim. Thus, Allstate argued that each of its two separate claims had its own limitations period and that none of its refund was barred.

First, the court noted that IRC § 6511(a) contains time limitations concerning the filing of refunds, and that IRC § 6511(b) contains amount limitations. Concerning the time limitations in IRC § 6511(a), the government argued that Allstate's second claim (incorporating the first claim and the new issue) was the starting point for statute-of-limitations purposes. The court rejected that argument, as follows:

> In actuality, the repetition by Allstate in its second claim, of the first claim's allegations, was a nullity. It is a rule of long standing that once a refund claim has been disallowed, it is not subject to amendment. … Solomon v. United States, 57 F.2d 150 (2d Cir. 1932). Similarly, repetition of the identical grounds set forth in the disallowed claim in a new and subsequent refund claim is a nullity. It would be a curious rule of law which refused to allow the filing of an amended claim after rejection, but allowed an identically restated claim after rejection. Allstate's second claim, therefore, is viable only as to its new portion ($112,929.60).
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> The statute of limitations for the first claim remains with the first claim and is not transported to the second merely because the latter reasserts the former. The court recognized this principle in Charlson Realty Co. v. United States, 384 F.2d 434, 181 Ct.Cl. 262 (1967). In Charlson, the plaintiff filed a refund claim, followed by a second claim which repeated the first claim and alleged other grounds for recovery as well. When suit was filed in this court, it was clear that the first claim was time-barred. Had the second claim been a mere repetition of the first claim, it too would have been time-barred. The court determined that the two refund claims were not identical, however, holding:

> The second claim was not a mere repetition of the first claim, but is based upon new grounds, and, therefore, constitutes a separate claim which is entitled to independent treatment with reference to the statute of limitations. Charlson Realty Co., supra, 384 F.2d at 440, 181 Ct.Cl. at 270.

Allstate, 550 F.2d at 633 (some citations omitted).

The language and holding in *Allstate* are directly on point here. Vodafone filed its original FYE 2012 return timely, and then filed its first refund petition (requesting a refund of the composite payment) within three years of the date of filing of the original return. However, Vodafone did not appeal the denial of its first refund petition (unlike the taxpayer in *Allstate*, who timely appealed the denial of its first refund claim to the Court of Claims). Instead, Vodafone filed a second refund petition with the Department in October 2015, after the appeal period for the first refund petition had expired but prior to the expiration of three years from the filing of Vodafone's original return. That second petition restated Vodafone's claim to a refund of the $4,399,000 composite payment, and added a new claim for $10,090 resulting from an IRS audit adjustment.

Citing Ala. Code § 40-2A-7(c), Verizon argues that its appeal is properly before the Tribunal because the second petition was filed within the three-year period following the filing of its original return. But Verizon is correct only as to its refund request for the $10,090 related to the IRS adjustment. As in *Allstate*, Vodafone's restatement of its $4,399,000 refund claim in its second petition was a nullity. Thus, concerning the $4,399,000 claim, it was Vodafone's first refund request against which the statute of limitations in § 40-2A-7(c) must be measured. As stated, the time limit for Vodafone to appeal the denial of that request expired before Vodafone filed an appeal. So, the Tribunal

lacks jurisdiction to consider the refund request for the $4,399,000 composite payment.

The $10,090 refund request was raised for the first time in Vodafone's second refund petition, and is not a nullity. Instead, that request was a "new claim." Because the appeal of the denial of that request was timely, the request is properly before the Tribunal for consideration.

In addition to Alabama's refund statute, Verizon relies on other authorities to support its position concerning the $4,399,000 refund request. Verizon cites *Solomon v. U.S.*, 57 F.2d 150, 152 (2nd Cir. 1932), as follows: "With all the freedom of amendment modern conceptions of just procedure permit, there can be no right to amend after the claim has been denied. Then the claimant, unless he still has time to file a new claim within the statutory period or the Commissioner sees fit to reconsider, must seek relief elsewhere on the basis of his claim as it was when rejected." (emphasis added) Verizon also cites *Saltzman & Saltzman*: IRS Procedural Forms & Analysis, ¶ 5.03[5], which states that, "if the original [refund] claim has been rejected but the period of limitations has not expired, there is no reason why an entirely new claim for a refund may not be filed." (emphasis added)

Obviously, Verizon's point is that its second refund petition was a "new claim" which was filed within the statutory period for requesting a refund. But *Allstate* (which cited *Solomon*) directly rejects that point by stating that a duplicate refund claim is a nullity. Certainly, a claim that is null cannot constitute a "new claim" for purposes of filing a subsequent refund petition. And the statement in *Allstate* has been cited with approval numerous times. *See*, *e.g.*, *Smith v. U.S.*, 539 F.Supp. 137, 141 (U.S.D.C. D. Neb. 1982)

(stating that, "[i]t is well established that a second claim for a refund asserting the same grounds as the first does not extend the two-year period in which a suit must be filed"); *Justice v. U.S.*, 616 F.Supp 829, 832 (U.S.D.C. S.D. W.Va. 1985) (stating that the government "cites ample authority for the proposition that a refiling of a second refund claim on the same basis as an earlier denied claim does not extend the two year statute of limitations period. This point of law advanced by the Government is well taken"); and *In the Matter of the Appeal of Rossiter*, 82-SBE-014 (Cal. State Bd. of Equalization, Jan. 5, 1982) (stating that, "[i]t is well settled that once a claim for refund is denied, the filing of an identical second claim is a nullity. . . . Therefore, respondent's action in denying the second claim, which was substantially the same as the first claim, was without legal significance. . . . Consequently, we lack jurisdiction over this matter. . . . In effect, appellant's entitlement to relief from this board, if any, was extinguished when he allowed the denial of his first claim for refund to become final without perfecting an appeal"). It also is noteworthy that neither *Solomon* nor the Saltzman & Saltzman treatise cites any authority for their statements, nor do they discuss what constitutes a "new claim."

Also, Verizon cites § 40-2A-2(1)a. to support its position that Alabama's refund statute should be read to allow the consideration on appeal of its second refund petition. Section 40-2A-2(1)a. states that the chapter in which Alabama's refund statute is located "shall be liberally construed to allow substantial justice." But the outcome here does not deny the Taxpayer of substantial justice. The Taxpayer had the opportunity – by statute – to file a refund petition regarding the $4,399,000 composite payment. And the Taxpayer did, in fact, timely file such a petition. The Taxpayer then had the right – again by statute –

to appeal the denial of that refund petition, and had two years within which to file an appeal. For whatever reason, the Taxpayer did not do so.

Again, the appeal of the portion of Vodafone's second refund petition that concerns the $4,399,000 composite payment was not filed timely. Therefore, the Tribunal lacks jurisdiction to decide that issue. The portion of the appeal that concerns the $10,090 refund resulting from the IRS adjustment was filed timely and will be considered on its merits in due course, if the parties cannot agree on whether the refund should be granted in light of this ruling. The Tribunal will arrange a status conference with the parties soon to discuss any remaining issues.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days, pursuant to Ala. Code § 40-2B-2(m).

Entered October 23, 2017.

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JEFF PATTERSON
Chief Judge
Alabama Tax Tribunal

jp:dr
cc: Bruce P. Ely, Esq.
James E. Long, Jr., Esq.
David E. Avery, III, Esq.