82741-9

FILED
COURT OF APPEALS
DIVISION II
08 OCT -9 AM 10: 58
STATE OF WASHINGTON
BY
DEPUTY

NO. 37409-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TRACFONE WIRELESS, INC.,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,

Respondent.

DEPARTMENT OF REVENUE'S RESPONSE BRIEF

ROBERT M. MCKENNA
Attorney General

DAVID M. HANKINS
Senior Counsel
WSBA #19194
BRETT DURBIN
Assistant Attorney General
WSBA #35781
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

10-8-08

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ISSUES PRESENTED 2

III. COUNTER STATEMENT OF THE CASE 3

IV. SUMMARY OF ARGUMENT 7

V. ARGUMENT 8

A. Standard of Review 8

B. All Cell Phone Subscribers Must Pay the E-911 Tax and All Radio Communication Service Companies Must Collect the E-911 Tax. 9

C. The E-911 Tax is Clear and Unambigous. TracFone Must Collect and Remit the E-911 Tax 13

1. TracFone asks this Court to create an implied exemption from collecting and remitting the E-911 tax. 14

2. The provisions in chapter 82.14B RCW regarding billing statements do not create an implied exemption from the tax 16

a. RCW 82.14B.040 does not compel the collection of the E-911 tax exclusively through a billing statement. 17

b. The Department has no duty to advise TracFone how to conduct its business to comply with the law. 19

c. The remote possibility of criminal penalties does not render TracFone's obligation to collect the E-911 tax unconstitutionally vague.....21

d. Requiring TracFone to collect the E-911 tax does not violate the equal protection requirements of the federal and state constitutions.....22

e. The statutory framework to collect the E-911 tax described in the unpublished Michigan decision does not apply in Washington.....23

3. TracFone can calculate the flat rate of the E-911 tax ($.20) per month and collect the tax from its subscribers.....26

4. TracFone's prepaid wireless services are not excluded from the statutory definition of "place of primary use" under the MTSA in the E-911 tax statute.....29

5. The statutory language is clear and is not ambiguous.....32

D. The E-911 Tax is Imposed on Wireless Service Providers Not on General Merchandise Retailers.....33

VI. CONCLUSION.....37

APPENDIX 1 - *TracFone Wireless, Inc. v. Dep't of Treasury,* Nos. 275065, 275942, 2008 WL 2468462 (Mich. Ct. App. June 19, 2008)

TABLE OF AUTHORITIES

Cases

Alpha Therapeutic Corp. v. Franchise Tax Bd.,
84 Cal. App. 4th 1, 100 Cal. Rptr. 2d 548, (2000) 16

Belas v. Kiga,
135 Wn. 2d 913, 959 P.2d 1037 (1998) 15, 16

Canteen Service, Inc. v. State,
83 Wn.2d 761,522 P.2d 847 (1974) 17

Cerrillo v. Esparza,
158 Wn.2d 194, 142 P.3d 155 (2006) 32

Columbia Irrigation Dist. v. Benton County,
149 Wash. 234, 270 P. 813 (1928) 15

Dep't of Ecology v. Campbell & Gwinn, L.L.C,
146 Wn.2d. 1, 43 P.3d 4 (2002) 33

East Wind Express Inc. v. Airborne Freight Corporation,
95 Wn. App. 98, 974 P.2d 369, *review denied*, 138 Wn.2d 1023 (1999) 8

Heiner v. Colonial Trust Co.,
275 U.S. 232, 48 S. Ct. 65 72 L. Ed. 256 (1927) 16

Int'l Brotherhood of Elec. Workers, Local No. 46 v. Trig Electric Construction Co.,
142 Wn.2d 431, 13 P.3d 622 (2000) 8

Morrison-Knudsen Co. Inc. v. Dep't of Rev.,
6 Wn. App. 306, 493 P.2d 802 (1972) 22

Parkridge Associates, Ltd v. Ledcor Industries, Inc.,
113 Wn. App. 592, 54 P.3d 225 (2002) 13

Redding v. Virginia Mason Medical Center,
75 Wn. App. 424, 878 P.2d 483 (1994) 9

State v. Westling,
145 Wn. 2d 607, 40 P.3d 669 (2002) 13

TracFone Wireless, Inc. v. Dep't of Treasury,
Nos. 275065, 275942, 2008 WL 2468462 (Mich. Ct. App. June 19, 2008) 23, 24, 28

United States Trust Co. of New York v. Helvering,
307 U.S. 57, 59 S. Ct. 692, 83 L. Ed. 1104, (1939) 16

Wash. Public Port Ass'n. v. Dep't. of Rev.,
148 Wn. 2d 637, 62 P.3d 462 (2003) 33

Washington Public Port Ass'n v. Dep't of Rev.,
148 Wn.2d 637, 62 P.3d 462 (2003) 34

Western Telepage, Inc.,v. City of Tacoma, Department of Financing,
140 Wn. 2d 599, 998 P.2d 884 (2000) 31

Wright v. Jeckle,
158 Wn.2d 375, 144 P.3d 301 (2006) 33

Statutes

47 U.S.C. § 253(b) 20

Laws of 1981, ch. 160 9

Laws of 1981, ch. 160, § 3 9

Laws of 1981, ch. 160, § 4 9

Laws of 1991, ch. 54, § 11 9

Laws of 1991, ch. 54, § 12 10

Laws of 1994, ch. 96, § 1 10

Laws of 2002, ch. 341, § 8 10

Laws of 2007, ch. 54, § 16 31

Laws of 2007, ch. 6, §§ 1002, 1009, 1023 12

Mobile Telecommunications Sourcing Act, Pub. L. No. 106-252, 114 Stat. 626 (2000) 29, 30

RCW 38.52.501 ..... 11, 26

RCW 82.04.065 ..... 25, 31

RCW 82.04.065(2) 12

RCW 82.04.065(3) 12

RCW 82.08.050(1) 20

RCW 82.08.050(3) 34

RCW 82.08.055 20

RCW 82.14B 15, 16

RCW 82.14B.020(5) 1

RCW 82.14B.020(8) 12

RCW 82.14B.020(9) 25, 30

RCW 82.14B.030 13

RCW 82.14B.030(2) 12

RCW 82.14B.030(4) ..... passim

RCW 82.14B.040 ..... passim

RCW 82.14B.042 ..... 21, 28

RCW 82.14B.042(1) 12, 14, 21, 32

RCW 82.14B.042(2) 14, 21, 32, 35

RCW 82.14B.042(3) 22

RCW 82.14B.160 15

RCW 82.14B.200 ..... 8, 35

RCW 82.16.010 12

RCW 82.29A.050(2) 34

RCW 82.32A 19

RCW 82.32A.020(1)-(6) 19

RCW 82.32A.020(5) 19

Rules

MI. APP. R. 7.215(C)(1) (2008) 24

Other Authorities

H.B. Rep. on H..B. 1381, 60th Leg. (Wash. 2007) 31

H.B. Rep. on H.B. 2595, 57th Leg. Reg. Sess. (Wash. 2002) 1

I. INTRODUCTION

The State of Washington requires wireless telephone subscribers to pay an excise tax of twenty cents per month to fund the Enhanced 911 ("E-911") emergency communications system throughout the state.[1] Wireless telephone companies, known as "radio communications service companies," are required to collect and remit the tax to the State to fund the E-911 system. TracFone, a radio communications service company, seeks a refund of amounts assessed for failing to collect the E-911 tax from its subscribers.

The plain and unambiguous language of the statute imposes an E-911 tax on "all radio access lines whose place of primary use is located within the state in an amount of twenty cents per month for each radio access line." RCW 82.14B.030(4). A radio access line means a "telephone number assigned to or used by a subscriber for two-way local wireless voice service." RCW 82.14B.020(5). TracFone provides a radio access line to its subscribers and therefore has an obligation to collect and remit the E-911 tax to the state. The trial court's order granting the Department summary judgment should be affirmed.

[1] Enhanced 911 services refers to the ability of the emergency call center to identify the location of the calling party. CP 494-509 (H.B. Rep. on H.B. 2595, 57th Leg. Reg. Sess. (Wash. 2002)).

II. ISSUES PRESENTED

1. Washington State imposes an E-911tax on all "radio access lines" defined as wireless telephone numbers whose place of primary use is located in the state of Washington. Radio communications service companies are obligated to collect the tax from their subscribers and remit the tax to the State. TracFone as a radio communications service company provides wireless telephone services by selling cell phones and prepaid airtime cards through retailers and selling through its own website cell phones and wireless telephone service. TracFone does not send a bill to its subscribers nor does it collect the necessary information to send its subscribers a bill. Is TracFone exempt from collecting the E-911 tax, when the statute clearly and unambiguously imposes the tax on all radio access lines in Washington?

2. When a statute clearly and unambiguously imposes a tax on "all radio access lines", does the fact that TracFone offers subscribers prepaid wireless telephone service that would not require a monthly billing statement or collection of the monthly tax create an implied exemption from collection of the E-911 tax?

3. TracFone sells its cell phones and airtime cards to retailers nationwide. These retailers do not provide wireless telephone service or sell radio access lines. TracFone sells the wireless telephone service

including the radio access lines. Is TracFone exempted from the responsibility to collect the E-911 tax, when the retailer does not provide wireless telephone service and the responsibility to collect the tax is on the radio communications service company?

III. COUNTER STATEMENT OF THE CASE

TracFone sells cell phones and prepaid wireless telephone services. CP 162, CP 369-74. TracFone is the largest prepaid wireless service provider in its industry. CP 169. TracFone does not own or operate any wireless network facilities. CP 162. TracFone contracts with other radio communication service companies to provide wireless telephone service and radio access lines. CP 176-202 (Wireless Service Purchase Agreement). As of 2004, TracFone provided wireless services by reselling the service offered by more than 35 licensed wireless network operators across the United States. CP 162.

TracFone offers its prepaid wireless telephone services and handsets (cell phones) to subscribers through more than 70,000 retail locations throughout the United States. CP 167. Consumers may purchase a cell phone and TracFone airtime cards at the various retail locations or may purchase cell phones and wireless telephone services directly from TracFone via its internet site, www.tracfone.com. CP 205. TracFone sells approximately 30,000 cell phones a month through its

website. CP 168. The retail store does not operate as the radio communications service company, but sells TracFone cell phones and airtime cards for use with a TracFone cell phone. CP 162, CP 370. "The airtime cards have no value, until they become activated . . . by the retailer when they go to sell it to the subscriber." CP 170 (Deposition of Richard Dandrea, Executive Vice-President Sales and Marketing).[2] Upon the sale of the airtime card, the retailer pays TracFone. CP 170. The TracFone wireless service must be activated by accessing TracFone's website or by calling an 800 number to speak to a TracFone operator. CP 205-06.

To activate a TracFone cell phone, a subscriber must provide TracFone with the phone's serial number and the zip code in which the subscriber will primarily use the phone. CP 206. TracFone then chooses the appropriate underlying carrier for that home area and a code is sent to the cell phone that will program the phone with the correct home area, phone number, and rating information. CP 206. Once the cell phone is activated, TracFone retains the right to modify or cancel the service at any time and for any reason. CP 219-226 (TracFone Terms and Conditions).

To add airtime minutes to an existing and active TracFone cell phone, the subscriber purchases airtime minutes cards of various minute increments from 30 minutes to 400 minutes and enters a 15 digit pin

[2] A photocopy of an airtime card is at CP 250.

number into the "redeem airtime" or "add airtime screen" on the cell phone. CP 220, 250. The subscriber can also add airtime minutes by contacting TracFone on a 1-800 number or by accessing TracFone's website and adding the additional time. The TracFone cell phone also has a "Service End Date." The airtime minutes must be used prior to the expiration of that date or the minutes expire. CP 220. If the minutes are not used and no new minutes are added to the cell phone prior to the expiration of the service date, the TracFone service is deactivated.[3] CP 220.

Contrary to TracFone's assertion in its Statement of the Case that "prepaid airtime does not expire in an active handset," TracFone's Br. at 3, airtime does in fact expire based upon the Terms and Conditions of its contract with its subscribers. As indicated in TracFone's Terms and Conditions, "Each TRACFONE Prepaid Wireless Airtime card comes with a number of minutes and a service period that begins to run from the day you add airtime to your TRACFONE." CP 220. The service period for a 60 minute card is 90 days. CP 220. If the subscriber does not add airtime or purchase airtime prior to the Service End Date, the phone is deactivated:

[3] The subscriber has 60 days from the end of the service date to purchase and add airtime to keep any existing minutes available for use, but the subscriber is assigned a new phone number. If the subscriber waits longer than 60 days from the end of the service date, the subscriber loses the airtime minutes on the phone. CP 221.

> If you do not purchase and add airtime prior to the Service End Date, which is the date displayed on your TracFone screen and is the last day of your service period, your TRACFONE Service will be deactivated on the Service End Date and you will lose your TRACFONE phone number, even if you have minutes remaining. To prevent this from occurring, please keep your TRACFONE Service active by purchasing and adding one or more airtime cards before the Service End Date.

CP 220 (emphasis added).

Additionally, TracFone contacts its subscribers to remind them that their service end date is approaching, "At times TracFone sends reminder notices to persons whose service end date is approaching or after their service end dates have passed. At times, TracFone sends information about special offers and promotions." CP 214.

In April 2004, TracFone requested a letter ruling from the Department relieving it of any obligation to collect the E-911 excise tax. It argued that prepaid wireless telephone services were not subject to E-911 excise tax. CP 162. The Department issued a letter ruling concluding that TracFone is liable for collecting the E-911 tax from its subscribers. CP 226-228. The Department's Taxpayer Account Administration Division also assessed TracFone for uncollected E-911 tax. TracFone subsequently appealed the letter ruling and the Department's assessment for uncollected E-911 taxes to the Department's Appeals Division. The

Department issued a final determination upholding the letter ruling and the assessment. CP 229-40.

TracFone paid the assessment and filed a complaint in the Thurston County Superior Court seeking a refund. CP 5-10. Both parties moved for summary judgment. CP 137-159, 254-270. The trial court granted the Department's summary judgment motion and denied TracFone's summary judgment motion.[4] CP 531-32.

IV. SUMMARY OF ARGUMENT

The E-911 excise tax is imposed on all radio access lines (telephone numbers) located in the state of Washington. TracFone provides access lines to subscribers, not the retailers through which TracFone sells TracFone cell phones and airtime cards. TracFone is responsible for collecting the E-911 tax and is personally liable for collecting the tax. RCW 82.14B.040 provides only that the "amount of the tax shall be stated separately on the billing statement which is sent to

[4] TracFone asserts that "The trial Court also failed to address TracFone's claim challenging its liability for uncollected tax on wholesale sales under RCW 82.14B.200." TracFone Br. at 7. TracFone's assertion is inaccurate. After the trial court had made its ruling, counsel for TracFone, beginning on page 43 of the Report of Proceedings, argued with the court that TracFone was not secondarily liable for the E-911 tax under the applicable taxes and asked the trial court to make a ruling. RP at 45. The trial court responded and rejected counsel's argument saying, "[I] guess plainly I don't buy your argument in that regard. . ." RP at 45. Therefore, the trial court did in fact rule on this issue. See RP 45-48. Regardless, as this matter was decided on summary judgment, this Court reviews the matter *de novo*. See *Int'l Brotherhood of Elec. Workers, Local No. 46 v. Trig Electric Construction Co.*, 142 Wn.2d 431, 435, 13 P.3d 622 (2000); *Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

the subscriber." This does not change TracFone's obligation to collect the tax.

TracFone's construction of the E-911 tax statute requires the court to create an implied exemption from collection of the E-911 tax. Courts do not construe tax statutes to include implied exemptions. The Legislature must clearly and explicitly provide for any exemption. When the Legislature intended to provide an exemption in the E-911 tax chapter, it did so explicitly. TracFone does not qualify for that exemption.

TracFone is not obligated to collect the tax on the airtime cards it sells to general merchandise retailers. RCW 82.14B.200 does not relieve TracFone of its obligation to collect the tax because it provides radio access lines to subscribers.

V. ARGUMENT

A. Standard of Review

The appellate court conducts the same inquiry as the trial court when it reviews a summary judgment order. *East Wind Express Inc. v. Airborne Freight Corporation,* 95 Wn. App. 98, 102, 974 P.2d 369, *review denied*, 138 Wn.2d 1023 (1999). Because the standard of review is *de novo*, this Court may affirm the trial court's summary judgment order on any basis supported by the record, including on a basis not decided by the trial court. See *Int'l Brotherhood of Elec. Workers, Local No. 46 v. Trig*

Electric Construction Co., 142 Wn.2d 431, 435, 13 P.3d 622 (2000); *Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

B. All Cell Phone Subscribers Must Pay the E-911 Tax and All Radio Communication Service Companies Must Collect the E-911 Tax.

In 1981, the Legislature authorized counties to impose an excise tax on the use of telephone access lines to fund emergency communication services. Laws of 1981, ch. 160. The tax was imposed on "the use of telephone access lines in an amount not exceeding fifty cents per month for each telephone access line." Laws of 1981, ch. 160, § 3. The tax was imposed on the user:

> A county imposing a tax under this chapter shall require collection of the tax from the user by the telephone company providing the access line. The telephone company shall state the amount of the tax separately on the billing statement which is sent to the user.

Laws of 1981, ch. 160, § 4.

In 1991, Washington voters approved Referendum 42, which imposed a uniform state wide tax not to exceed twenty cents per-month on each switched access telephone line (landline telephone service) to support statewide coordination and management of the E-911 system. Laws of 1991, ch. 54, § 11; CP 476-487, CP 489-492.

The Legislature continued to require the user of the service to pay the tax and the telephone company providing the access line to collect the tax:

> The state enhanced 911 tax and the county enhanced 911 tax created in this chapter shall be collected from the user by the local exchange company providing the switched access line. The local exchange company shall state the amount of the taxes separately on the billing statement which is sent to the user.

Laws of 1991, ch. 54, § 12.

In 1994, the Legislature expanded the county E-911 tax to cell phone lines, because the Legislature found:

> (b) Users of cellular communication systems and other similar wireless telecommunications systems do not use switched access lines and are not currently subject to these excise taxes; and (c) The volume of 911 calls by users of cellular communications systems and other similar wireless telecommunications systems has increased in recent years.

Laws of 1994, ch. 96, § 1.

In 2002, the Legislature increased the county excise tax on radio access lines and expanded the state excise tax to include a tax of twenty cents per month on radio access lines. Laws of 2002, ch. 341, § 8 (House Bill 2595). The House Bill Report on House Bill 2595 details the evolving change in the cellular industry and jurisdictional problems posed by concurrent regulation by the county, state, and federal governments. CP 489-492. This report explains the reasons for taxing all cell phones

because of the widespread use and the problems wireless 911 calls created. It provided the following example:

> In central Washington, a 911 call might be answered by a dispatcher in Okanogan, Grant, or Chelan County. There are instances where emergency assistance has been dispatched to Long Beach when the incident is really in Ocean Park. Technology is available to pin down the location of the caller.
>
> Cellular calls to 911 centers take three times as long to process to determine the location of the caller under our current systems. But cellular use is increasing; 36 percent of 911 calls come from cell phones. As the number of these calls increase, and as the number of wire line calls decrease, revenues are declining.

CP 491-92.

The Legislature created a state E-911 tax on radio access lines to promote public safety and to ensure there would be adequate funding to support enhanced 911 services:

> The legislature finds that statewide enhanced 911 has proven to be a lifesaving service and that routing a 911 call to the appropriate public safety answering point with a display of the caller's identification and location should be available for all users of telecommunications services, regardless of the technology used to make and transmit the 911 call. The legislature also finds that it is in the best public interest to ensure that there is adequate ongoing funding to support enhanced 911 service.

RCW 38.52.501.

This law became effective on January 1, 2003, and imposed a county and state E-911 tax on "all radio access lines whose place of

primary use is located within the state." RCW 82.14B.030(2),(4) . The pertinent parts of the statute provide:

> A state enhanced 911 excise tax is imposed on all radio access lines whose place of primary use is located within the state in an amount of twenty cents per month for each radio access line. The tax shall be uniform for each radio access line. The tax imposed under this section shall be remitted to the department of revenue by radio communications service companies, including those companies that resell radio access lines, on a tax return provided by the department. . .

RCW 82.14B.030(4) (emphasis added).

A person or business that uses a telephone or a cell phone must pay the E-911 tax. "The state enhanced 911 excise taxes imposed by this chapter must be paid by the subscriber . . . ." RCW 82.14B.042(1).[5] Every "local exchange company" and every "radio communications service company" must collect the E-911 tax from their subscribers and remit the tax to the Department. TracFone and other wireless telephone providers have an obligation under the statute to collect the E-911 tax.

[5] During the tax periods at issue, RCW 82.14B.020(8) defined "subscriber" as "the retail purchaser of telephone service" under RCW 82.04.065(3), which included "access to a telephone network, telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a telephone network, toll line or channel, cable, microwave, or similar communication or transmission system." RCW 82.04.065(2). RCW 82.14B.020(8) was amended in 2007 to incorporate the definition of "telephone service" under RCW 82.16.010, but the definition of telephone service did not materially change. Laws of 2007, ch. 6, §§ 1002, 1009, 1023.

C. The E-911 Tax is Clear and Unambigous. TracFone Must Collect and Remit the E-911 Tax

TracFone argues that under the "plain meaning" rule of statutory construction, it has no obligation to collect the tax and in essence that its subscribers have no obligation to pay the tax. TracFone Br. at 8-9. To the contrary, the plain language of the statute directly refutes TracFone's arguments.

The statutory language of RCW 82.14B.030 and .040 is clear and unambiguous. All subscribers of telephone service, whether from a telephone or a cell phone must pay the state E-911 tax. Furthermore, under the plain meaning of the statutes, as a "radio communications service company" TracFone[6] has an obligation to collect the E-911 tax. The Washington State Legislature plainly intended to tax all radio access lines.

There is no ambiguity in the phrase "all radio access lines" in RCW 82.14B.030(4). See *Parkridge Associates, Ltd v. Ledcor Industries, Inc.,* 113 Wn. App. 592, 602, 54 P.3d 225 (2002) ("all" means "every" and "any whatsoever"); cf. *State v. Westling,* 145 Wn. 2d 607, 611, 40 P.3d 669 (2002) ("any" means "every" and "all"). Therefore, "all radio access

[6] See CP at 369-70 TracFone provides "prepaid wireless telephone service by purchasing airtime from companies that own and operate wireless telephone facilities and reselling that airtime under its own brand name in the form of prepaid wireless airtime cards."

lines" does not mean only certain radio access lines, but each and every radio access line.

Moreover, the tax "shall be uniform for each radio access line." RCW 82.14B.030(4). Uniformity requires that it apply equally and without discrimination to all radio communication service companies that provide radio access lines, "including those companies that resell radio access lines[.]" Id. So, all "radio communications service companies," including TracFone have an obligation to collect the E-911 tax from their subscribers. The Legislature reiterated this collection obligation under RCW 82.14B.042(1): "The state enhanced 911 excise taxes required by this chapter to be collected by the local exchange company or the radio communications service company are deemed to be held in trust by the local exchange company or the radio communications service company until paid to the Department." The Legislature also plainly imposed a personal liability obligation on the radio communications service company for failing to collect and remit the tax to the State. RCW 82.14B.042(2).

1. TracFone asks this Court to create an implied exemption from collecting and remitting the E-911 tax.

TracFone seeks to elude its responsibility to collect the E-911 tax from its subscribers by essentially asking this Court to find an implied exemption for prepaid wireless service. TracFone asserts that chapter

82.14B RCW does not apply to it or to its subscribers. TracFone Br. at 7, 9, 12, 14, 19, 24. However, the E-911 tax applies to all radio access lines and requires all radio communications service companies to collect the tax. RCW 82.14B.030(4). In determining whether an exemption in a tax statute exists, our courts have long held that, "taxation is the rule and exemption is the exception, and where there is an exception, the intention to make one should be expressed in unambiguous terms." *Columbia Irrigation Dist. v. Benton County,* 149 Wash. 234, 240, 270 P. 813 (1928).

In applying this maxim of statutory construction, the Washington Supreme Court in *Belas v. Kiga,* 135 Wn. 2d 913, 959 P.2d 1037 (1998) required an exemption to be plainly and expressly stated in a statute and rejected the concept of implied exceptions. The Court held that any exemption from taxation must be clear from the language of the statute:

> Where one relies on exemption from taxation, both the power to exempt and the intention to exempt must be clear. No presumption or intendment in favor of exemptions will be made unless plainly and unmistakably warranted by the letter and spirit of the law granting the exemption.

Id. at 934.

Where the Legislature intended to provide an exemption from the E-911 tax, it did so in "clear and explicit" language. RCW 82.14B.160 provides: "The taxes imposed by this chapter do not apply to any activity that the state or county is prohibited from taxing under the Constitution of

this state or the Constitution or laws of the United States." TracFone does not qualify for this exemption nor has it ever argued that it qualifies for this exemption.

The Court in *Belas v.Kiga* concluded that there was no evidence from the face of the statute that the Legislature intended to create an exemption and explicitly endorsed the statutory construction principle that "exemptions may not be created by implication." Id. at 935. This principle has long been recognized by the United States Supreme Court and other jurisdictions. See e.g., *United States Trust Co. of New York v. Helvering,* 307 U.S. 57, 60, 59 S. Ct. 692, 83 L. Ed. 1104, (1939); *Heiner v. Colonial Trust Co.,* 275 U.S. 232, 235, 48 S. Ct. 65 72 L. Ed. 256 (1927); *Alpha Therapeutic Corp. v. Franchise Tax Bd.,* 84 Cal. App. 4th 1, 5, 100 Cal. Rptr. 2d 548, 551 (2000).

2. The provisions in chapter 82.14B RCW regarding billing statements do not create an implied exemption from the tax.

TracFone attempts to elude its responsibility to collect the tax by arguing that the tax is not imposed on its prepaid wireless subscribers, only on subscribers of traditional, billed wireless services. TracFone Br. at 10. To the contrary, RCW 82.14B.030(4) plainly states that a state enhanced 911 excise tax is imposed on "all radio access lines whose place of primary use is located within the state[.]" RCW 82.14B.040 plainly

states that the state enhanced 911 tax "shall be collected from the subscriber by the radio communications service company providing the radio access line to the subscriber."

a. RCW 82.14B.040 does not compel the collection of the E-911 tax exclusively through a billing statement.

TracFone argues that RCW 82.14B.040 requires "a single, exclusive method for collection of E-911 from subscribers: 'The amount of the tax shall be stated separately on the billing statement which is sent to the subscriber.'" TracFone Br. at 9. TracFone contends that this sentence demonstrates that the Legislature did not intend to include "prepaid wireless in its 2002 expansion of the E-911 tax" because TracFone does not send a billing statement to its subscribers and therefore is not required to collect the tax. TracFone Br. at 10.

The statute does not mandate that the exclusive method of collecting the E-911 tax is through a billing statement. The incidence of the tax and the collection obligation do not change, merely because a radio communications service company fails to send out a billing statement or fails to separately state the E-911 tax on the billing statement. "The legal incidence of a tax falls upon the person or entity that has the legal obligation to pay the tax." *Canteen Service, Inc. v. State,* 83 Wn.2d 761,762, 522 P.2d 847 (1974).

TracFone argues that if it were to send out a monthly "billing statement" to its subscribers, the postage costs alone would exceed the amount of the tax collected from its subscribers. TracFone Br. at 11. TracFone has an obligation to collect the E-911 tax regardless of whether it sends out a billing statement. TracFone can collect the tax by requiring its subscribers to provide a credit card to deduct the E-911 tax, increase the cost of the airtime card to recoup the E-911 tax, deduct a number of units, or send a bill to the subscriber. A bill could be sent via a text message or TracFone could send a bill to its subscribers by requiring the subscriber, when they activate the phone, to provide their residential or business address. The fact TracFone does not send bills to its subscribers does not relieve them of the obligation to collect the tax.

TracFone's interpretation would lead to an absurd result. Radio communications service companies could simply stop mailing billing statements to their subscribers and than argue that they no longer have an obligation to collect the tax.[7] Indeed, TracFone could send out statements to its subscribers by text messages setting forth the amount of E-911 tax to be charged or could establish an account for each subscriber based upon

[7] A wireless company could contractually require its subscribers to provide a credit card so the company could automatically deduct the amounts owed, but not mail out a bill. If a subscriber wanted to see its charges, it could access its account on-line or receive a text message. There is nothing explicit or implied that the billing statement must be in paper form.

the subscriber's radio access line on TracFone's website and have the subscriber check his or her account on the website.[8]

b. The Department has no duty to advise TracFone how to conduct its business to comply with the law.

Citing RCW 82.32A.020(5), TracFone asserts that the Department violated its "statutory duty" to provide "clear instructions" on how to comply with its tax obligations. TracFone Br. at 11. The Department has no legal obligation to explain to TracFone how it should conduct its business in order to comply with its E-911 tax collection obligation. The Taxpayer's Rights and Responsibilities Act, chapter RCW 82.32A requires the Department to advise taxpayers on whether they owe the tax, the amount and at times, if there is a deficiency. RCW 82.32A.020(1)-(6). The Department complied under the Act and advised TracFone it had an obligation to collect the tax and so fulfilled its statutory duty. CP at 226-228 (Department's letter ruling); CP at 229-240 (Department's Determination).

Alternatively, TracFone could pay the tax itself based upon those active radio access lines used primarily in the state of Washington. TracFone argues that paying the tax itself "flatly contradicts the plain

[8] 99 percent of the handsets sold by TracFone have the ability to send and receive text messages. CP at 212 (Answers to Interrogatories).

language of the statute. . ." TracFone Br. at 12. TracFone's argument lacks merit.

A retailer can legally entice consumers to purchase its goods by advertising that the retailer will pay the retail sales tax for the consumer. RCW 82.08.055. Just like the E-911 tax, the retail seller has an obligation to collect the retail sales tax: "The tax hereby imposed shall be paid by the buyer to the seller, and each seller shall collect from the buyer the full amount of the tax payable in respect to each taxable sale. . ." RCW 82.08.050(1) (emphasis added). Therefore, as a retailer can pay the retail sales tax on behalf of its customers to comply with its obligation under the statute to collect the retail sales tax, likewise, TracFone could pay the E-911 tax on behalf of its subscribers to comply with its obligation to collect the E-911 tax.

TracFone also argues that paying the E-911 tax on behalf of its subscribers when other radio communications service companies do not, violates the competitive neutrality requirement of the federal Telecommunications Act, 47 U.S.C. § 253(b). TracFone Br. at 13. TracFone fails to provide any explanation of how paying a tax on behalf of its subscribers would violate this federal act. To the contrary, TracFone's construction of the E-911 statute arguably could violate this federal act, because it would provide a competitive advantage to TracFone

compared to its competitors, who are required to collect and remit the E-911 tax.

c. The remote possibility of criminal penalties does not render TracFone's obligation to collect the E-911 tax unconstitutionally vague.

TracFone argues that because RCW 82.14B.042 subjects the radio communications service company to criminal penalties, the Department's failure to explain to TracFone how to conduct its business so that it can fulfill its legal obligation renders the statute unconstitutionally vague. TracFone Br. at 12. TracFone's argument lacks merit.

First, RCW 82.14B.042(1) only subjects the "seller" to criminal penalties, if the "seller" collects the tax and converts the tax for its own use. See RCW 82.14B.042(1). TracFone's assertion that if TracFone paid the tax on behalf of the subscriber would subject it and the subscriber to criminal penalties is false. TracFone Br. at 13. The only "penalty" against a radio communications services company for failing to collect the E-911 tax is to become personally liable for the tax. "If any . . . radio communications service company fails to collect the state enhanced 911 excise tax or, after collecting the tax, fails to pay it to the department . . . is personally liable to the state for the amount of the tax. . ." RCW 82.14B.042(2).

The only circumstances in which a radio communications service company would be subjected to a criminal penalty are when the company collects the tax and appropriates or converts the tax for its own use or when it intentionally fails to collect the tax to gain some advantage or benefit under RCW 82.14B.042(3). It provides:

> (3) Any local exchange company or radio communications service company that fails or refuses to collect the tax as required with intent to violate the provisions of this chapter or to gain some advantage or benefit, either direct or indirect, and any subscriber who refuses to pay any tax due under this chapter is guilty of a misdemeanor. . . .

RCW 82.14B.042(3).

Even in circumstances where the seller has failed to collect the tax, the remedy has been to assess the tax against the seller and not seek criminal penalties. *Morrison-Knudsen Co. Inc. v. Dep't of Rev.,* 6 Wn. App. 306, 312-13, 493 P.2d 802 (1972) (Department of Revenue could proceed to collect the retail sales tax either from the seller, Morrison-Knudsen that failed to collect the tax or from the buyer, the Department of Highways that failed to pay the tax.).

d. Requiring TracFone to collect the E-911 tax does not violate the equal protection requirements of the federal and state constitutions.

TracFone asserts that if the Court were to conclude that TracFone had an obligation to collect the E-911 tax, it would violate the equal

protection requirements of the federal and state constitution. TracFone Br. at 13. TracFone's argument lacks merit. If TracFone does not have to collect the tax, it would have a competitive advantage compared to its competitors who must collect the tax from their subscribers. TracFone subscribers would not have to pay for a service that they would have at their disposal. By requiring TracFone to collect the E-911 tax, the Department treats all of the radio communications service companies the same by requiring them all to collect the E-911 tax from its subscribers. Therefore, the Department does not violate the equal protection requirements of both the state and federal constitutions.

e. The statutory framework to collect the E-911 tax described in the unpublished Michigan decision does not apply in Washington.

To support its argument that the exclusive method to collect the tax is through the billing statement, TracFone cites to an unpublished Michigan Court of Appeals decision. *TracFone Wireless, Inc. v. Dep't of Treasury,* Nos. 275065, 275942, 2008 WL 2468462 (Mich. Ct. App. June 19, 2008) attached as Appendix 1.[9] TracFone Br. at 14, 15.

[9] GR 14.1(b) permits citation of unpublished opinions, "only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. The party citing the opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited." MI. APP. R. 7.215(C)(1) (2008) seems to allow citation of unpublished opinions. Counsel failed to comply with this Court's rule in filing and serving a copy of the unpublished opinion with his brief.

First, the Michigan courts do not recognize it as "precedentially binding" and therefore this Court should give it little or no weight. MI. APP. R. 7.215(C)(1) (2008) ("An unpublished opinion is not precedentially binding under the rule of stare decisis."). Second, Michigan's E-911 statute differed from Washington's statute by specifically imposing the Michigan "service charge" only on radio access lines with a billing address in Michigan. The statute before the Michigan court read:

> Until 2 years after the effective date of this section, a CMRS (commercial mobile radio services) supplier or a reseller shall include a service charge of 55 cents per month for each CMRS connection that has a billing address in this state. Beginning 2 years after the effective date of this section, a CMRS supplier or a reseller shall include a service charge of 52 cents per month for each CMRS connection that has a billing address in this state. The CMRS supplier or reseller shall list the service charge as a separate line item on each bill. The service charge shall be listed on the bill as the "emergency 9-1-1 charge."

TracFone Wireless, Inc. v. Dep't of Treasury, 2008 WL 2468462 at *2 (emphasis added).

The Michigan court reasoned that since the term "billing address" was not defined it would look to how it was defined in other statutes. Id. at *3. It then concluded that since TracFone did not send bills to its subscribers it would not be obligated to collect the service charge under the Michigan statute. Id. at *4.

In contrast, Washington's statute imposes the State E-911 tax on "all radio access lines" that have a "place of primary use" located in Washington. RCW 82.14B.030(4). "Place of Primary Use" is defined as the "street address representative of where the subscriber's use of the mobile telecommunications service primarily occurs, which must be (A) the residential street address or the primary business street address of the subscriber; and (B) within the licensed service area of the home service provider." RCW 82.04.065. See RCW 82.14B.020(9).[10]

TracFone can require the subscriber to provide the necessary information such as the residential or business street address in order to collect the tax. It simply chooses not to do so. The subscriber's billing address does not dictate the imposition and collection of the Washington E-911 tax. The tax is imposed upon the radio access line whose place of primary use is located in Washington. TracFone has an obligation to collect the E-911 tax based upon the primary place of use of the radio access line and not based upon the billing address.

Regardless of whether TracFone sends out a bill, the E-911 statute requires TracFone to collect the tax. The goal is to ensure funding of this important service by collecting the necessary excise tax as recognized in

[10] In 2007, the legislature made technical changes to the laws relating to tax or tax programs and clarified the definition in RCW 82.14B.020(9) of "primary place of use" as defined in RCW 82.04.065. House Bill Report on House Bill 1381, 60th Leg. (2007); Laws of 2007, ch. 54, § 16.

RCW 38.52.501. The fact a radio communications service company does not send out a billing statement does not change the radio communications service companies' obligation to collect the tax or the subscribers' obligation to pay the tax.

3. TracFone can calculate the flat rate of the E-911 tax ($.20) per month and collect the tax from its subscribers.

TracFone argues that it cannot calculate the flat rate of the E-911 tax and therefore cannot collect the E-911 tax. TracFone Br. at 16. It is not the responsibility of the Department to come up with ways TracFone can comply with the law, but TracFone can comply with its obligation.

TracFone can assess the tax based upon the subscriber's service period. The TracFone phone has a "Service End Date," where the airtime minutes must be used prior to the expiration of that date or the minutes expire. CP 220. If the minutes are not used and no new minutes are added to the cell phone prior to the expiration of the service date, the TracFone service is deactivated.[11] CP 220.

Contrary to TracFone's assertion in its brief that "prepaid airtime does not expire in an active handset," or "those minutes do not expire on an active handset," airtime does in fact expire. TracFone's Br. at 3, 17.

[11] The subscriber has 60 days from the end of the service date to purchase and add airtime to keep any existing minutes available for use, but the subscriber is assigned a new radio access line. If the subscriber waits longer than 60 days from the end of the service date, the subscriber loses the airtime minutes on the cell phone. CP 221.

Based upon the Terms and Conditions of its contract with its subscribers, "Each TRACFONE Prepaid Wireless Airtime card comes with a number of minutes and a service period that begins to run from the day you add airtime to your TRACFONE." CP 220. A subscriber who purchases a 60 minute airtime card has 90 days to use the minutes. The subscriber must purchase and add more airtime prior to the expiration of the 90 days to extend the service date. CP 220. If the subscriber does not add airtime or purchase airtime prior to the Service End Date, the phone is deactivated:

> If you do not purchase and add airtime prior to the Service End Date, which is the date displayed on your TracFone screen and is the last day of your service period, your TRACFONE Service will be deactivated on the Service End Date and you will lose your TRACFONE phone number, even if you have minutes remaining. To prevent this from occurring, please keep your TRACFONE Service active by purchasing and adding one or more airtime cards before the Service End Date.

CP 220 (emphasis added).

Further, it is not necessary that the tax be collected on a monthly cycle, but calculated on a monthly basis.[12] Even the unpublished Michigan case cited by TracFone applied this reasoning, "We find it irrelevant that plaintiff does not have a monthly billing cycle. The plain language of the statute requires the fees to be computed on a monthly basis, but not necessarily collected on a monthly basis." *TracFone*

[12] See RCW 82.14B.030(4) "A state enhanced 911 tax is imposed . . . in an amount of twenty cents per month for each radio access line." (emphasis added).

Wireless, Inc. v. Dep't of Treasury, 2008 WL 2468462 at *3. And neither does the wording in RCW 82.14B.040 or RCW 82.14B.042 require the tax to be collected on a monthly cycle.

Additionally, TracFone contacts its subscribers to remind them that their service end date is approaching, "At times TracFone sends reminder notices to persons whose service end date is approaching or after their service end dates have passed. At times, TracFone sends information about special offers and promotions." CP at 214. TracFone assigns a radio access line and the use of that line is assigned a 90 day service period to the cell phone.[13] TracFone could assess the subscriber three months of the E-911 tax based upon the service period. The rate can be calculated and the tax can be collected.

TracFone currently deducts minutes from its subscribers for certain fees. It could similarly deduct the number of minutes to collect the tax. TracFone already deducts minutes from a subscriber's phone when the person purchases "data services."[14] CP at 222. Data Services are additional services offered by TracFone and there is an additional charge or debit of minutes/units for use of such services. CP at 222. TracFone

[13] TracFone assigns a 45 day service period to a 30 minute airtime card, and 365 days to a "one year service card" and "Double Minute Prepaid Plan Card." All other airtime cards are assigned a 90 day service period. CP at 220.

[14] TracFone defines "data services" as ringtones, graphics, and Information Services, which are news, weather and sports, and multi-media services. CP at 222.

has established a "Dollar-to-Minute Conversion" chart for Data Services it deducts from the phone, when a subscriber purchases such services. CP at 223. It could employ this same technology to calculate the E-911 tax and collect the tax.

4. TracFone's prepaid wireless services are not excluded from the statutory definition of "place of primary use" under the MTSA in the E-911 tax statute.

TracFone argues that the E-911 tax does not apply to pre-paid wireless service because under the federal Mobile Telecommunications Sourcing Act, ("MTSA") Pub. L. No. 106-252, 114 Stat. 626 (2000), place of primary use is not applicable to prepaid wireless. TracFone Br. at 19.

First, the E-911 tax does not incorporate all of the provisions of the MTSA and create an exemption for TracFone from collecting and remitting the E-911 tax. Second, the definition of "place of primary use" in the E-911 statute does not exclude prepaid wireless services. As previously explained, the state enhanced 911 excise tax is imposed on "all radio access lines whose place of primary use is located within the State . . ." RCW 82.14B.030(4). Under former RCW 82.14B.020(9) it referred to the definition in the federal act, "place of primary use has the meaning ascribed to it in the federal mobile telecommunications sourcing act, P.L. 106-252." In Section 124 of the MTSA, it defines "place of primary use" as:

> (8) PLACE OF PRIMARY USE.—the term 'place of primary use' means the street address representative of where the customer's use of the mobile telecommunications service primarily occurs, which must be—
> (A) The residential street address or the primary business street address of the customer; and
> (B) within the licensed service area of the home service provider.

See CP 248.

While under Section 116(c)(1) of the MTSA "prepaid calling services" are not subject to the MTSA, this does not mean that prepaid calling services are not included in the definition of "place of primary use." By incorporating the MTSA's definition of "place of primary use," into the E-911 tax statute, Washington did not adopt other exceptions and restrictions that apply to the entire MTSA. Applying such an interpretation would render the reference to "place of primary use" in former RCW 82.14B.020(9) meaningless because the MTSA does not apply to taxes such as the monthly E-911 tax that is not determined on a transactional basis. Since the Washington E-911 tax is not determined on a transactional basis (the use of a radio access line, not the sale) the MTSA does not apply at all regardless of whether or not the telephone service is provided on a prepaid or postpaid basis. Furthermore, the Legislature specifically clarified RCW 82.14B.020(9) as a technical change to specifically incorporate the definition of primary place of use in RCW

82.04.065. See House Bill Report on House Bill 1381, 60th Leg. (2007); Laws of 2007, ch. 54, § 16.[15]

TracFone also attempts to defeat summary judgment as inappropriate because it asserts the trial court erred because there are genuine issues of material fact because the E-911 statute requires a street address or business address as "primary place of use" for the radio access line. TracFone Br. at 22. TracFone does not require the subscriber to use a street address, but a zip code to activate the TracFone cell phone. CP at 371. Hence, TracFone argues this is not a "primary place of use" as defined under the E-911 statute and the trial court erred in concluding that a radio access line with a Washington zip code would be a "primary place of use." TracFone Br. at 22. TracFone attempts to create an issue of fact that does not exist. TracFone chose not to collect the necessary information, such as a residential street address or business address. CP at 206; TracFone Br. at 22. TracFone cannot defeat its obligation to collect the E-911 tax, by simply stating it does not collect the information. In

[15] TracFone attempts to support its argument that the Legislature did not intend to cover prepaid by citing to the Department's Legislative liaison's comment regarding the legislature's existence of prepaid wireless. TracFone Br. at 20, n.6. The court does not discern legislative intent from the opinions or musings of either lobbyists or from a single legislator, let alone a single Department of Revenue employee. *Western Telepage, Inc.,v. City of Tacoma, Department of Financing,* 140 Wn. 2d 599, 611, 998 P.2d 884 (2000).

fact, TracFone collects the necessary information, when a subscriber purchases directly from TracFone. CP at 370.

Further, TracFone admits that during the period in question "more than 85% of the units of prepaid airtime subscribers loaded onto TracFone handsets" were assigned Washington area codes.[16] CP at 370. Thus radio access lines in Washington State subject to the E-911 tax. Therefore, the trial court correctly concluded that radio access lines in Washington were subject to E-911 tax.

5. The statutory language is clear and is not ambiguous.

TracFone argues that "at best the statute would be ambiguous" and would require the court to construe the statute in its favor. TracFone Br. at 23. The court should reject its argument, because in construing the E-911 statute as a whole, the E-911 tax is imposed on all radio access lines and requires all radio communication service companies, including TracFone, to collect the E-911 tax. RCW 82.14B.030(4), .040, 042(1)(2). The court looks to the language first to determine the meaning of a statute and gives effect to the plain language if the statute is not ambiguous. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). If a statute's

[16] Disturbingly, the same Associate Vice President-Corporate Taxation for the appellant who signed the answers to the Department's discovery could provide this information in his declaration submitted in opposition to the summary judgment, but could not provide this same information to the Department in discovery and indicated the information was not relevant to the issues in this case. CP 207.

meaning is plain on its face, courts give effect to that plain meaning as an expression of legislative intent. *Wash. Public Port Ass'n. v. Dep't. of Rev.,* 148 Wn. 2d 637, 645, 62 P.3d 462 (2003) (citing *Dep't of Ecology v. Campbell & Gwinn, L.L.C,* 146 Wn.2d. 1, 9-10, 43 P.3d 4 (2002).

Construing the statute as suggested by TracFone would lead to an absurd or strained result. Based upon TracFone's reasoning; all local exchange and radio communications service companies could stop collecting the E-911 tax by setting up an automatic debit payment system and not sending a bill to their subscribers. Courts do not construe a statute to lead to a strained or absurd result. *Wright v. Jeckle*, 158 Wn.2d 375, 379-80, 144 P.3d 301 (2006).

Construing the statutes as a whole unambiguously makes clear that by providing wireless service, radio communications service companies must collect the tax and if they fail to collect the tax, they become personally liable for the tax. Otherwise, TracFone's construction of the statute leads to an impermissible exemption that was not created by the Legislature on the face of the statute.

D. The E-911 Tax is Imposed on Wireless Service Providers Not on General Merchandise Retailers.

TracFone argues that since it sells its cell phones and airtime cards to retailers at wholesale, it is not liable to collect the tax. TracFone Br. at

26. Nowhere does the E-911 tax statute impose the tax on retail businesses that sell phones or airtime cards, nor does the statute impose an obligation on retail businesses to collect the tax. The retail store that sells TracFone's phones and airtime cards do not provide radio communications services. The retailers do not provide the radio access lines and are not liable for collecting the tax. If a subscriber has a problem with the TracFone wireless telephone service, retailers are trained to have the subscriber contact TracFone. CP at 175. Beyond selling the cell phone and the airtime card, the retailer does not have a relationship with the subscriber of the wireless phone service.

The legislature imposed the responsibility and liability for collecting the E-911 tax on the radio communications service company such as TracFone, just as it imposes the responsibility and personal liability on retailers to collect the sales tax and lessors of public property to collect the leasehold excise tax. See RCW 82.08.050(3) ("in case any seller fails to collect the tax herein . . . he or she shall, nevertheless be personally liable to the state for the amount of the tax. . ."); RCW 82.29A.050(2) ("The lessor shall be fully liable for collection and remittance of the tax"). TracFone's argument is no different than the argument the Public Port Association made in *Washington Public Port Ass'n v. Dep't of Rev.*, 148 Wn.2d 637, 62 P.3d 462 (2003) that it was not

liable for unpaid or uncollected leasehold excise tax. Id. at 648. The Supreme Court rejected its argument:

> It is the responsibility of the public lessor or the seller to collect the necessary taxes from the lessee or the buyer. Further, under both statutes, the public lessor and the seller are each responsible for sending or transferring the necessary taxes to DOR. RCW 82.29A.050 is clear and unambiguous in that it holds the public lessor completely liable for the collection and the remittance of the LET (including any that is uncollected or unpaid.)

Id. at 649.

The E-911 tax statute makes it clear and unambiguous that TracFone is personally liable for collecting and remitting the E-911 tax to the Department. The retail store that sells TracFone's cell phones and airtime cards do not provide radio communications service and are not liable for collecting the tax. TracFone misapplies RCW 82.14B.042(2) and RCW 82.14B.200 to claim an exemption for failing to collect the E-911 tax.

TracFone also argues that since it does not make retail sales of its cell phones and airtime cards, it does not have a collection obligation for uncollected E-911 tax. TracFone Br. at 25. TracFone relies on the exception from personal liability in RCW 82.14B.042(2), which exempts radio communications service companies who have "taken" from the buyer in good faith a properly executed resale certificate under RCW 82.14B.200." The statutory exemption does not apply. TracFone provides

radio access lines to its subscribers by purchasing radio access lines from companies that own and operate their own wireless telephone infrastructure and reselling those radio access lines under its own brand name. CP at 176-202, 370. TracFone is not selling radio access lines to the retailers. While TracFone distributes its cell phones and airtime cards through various mass market retailers,[17] TracFone itself provides the use of a radio access lines to the subscribers of TracFone's wireless service. As a radio communications service company, TracFone is responsible for activating the cell phone and assigning the radio access line. When subscribers purchase the cell phone, if there are problems with the wireless service, the retailers are trained to have the subscriber contact TracFone. CP at 171-75. TracFone provides the radio communications service and not the retailer.

Furthermore, TracFone's agreement with network service providers who provide access to cellular radio service requires TracFone to provide the network carriers with resale certificates and to pay all applicable taxes. CP at 176-202. Therefore, TracFone is liable for the assessed E-911 tax.

---

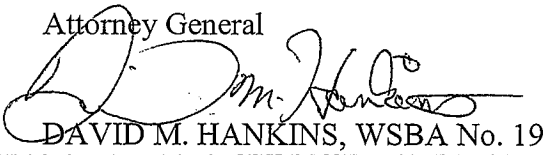
[17] K-Mart, Radio Shack, Rite Aid, Safeway, Target, QFC, Wal-Mart, Walgreens. CP at 370.

VI. CONCLUSION

The trial court properly construed the E-911 tax statute to require TracFone, a radio communications service company, to collect the E-911 tax from its subscribers that use a radio access line in the State of Washington. No exemption, whether implied or explicit excuses TracFone from its obligation to collect the E-911 tax. The court should affirm the trial court's decision granting the Department's summary judgment.

RESPECTFULLY SUBMITTED this 8th day of October, 2008.

ROBERT M. MCKENNA
Attorney General



DAVID M. HANKINS, WSBA No. 19194
Senior Counsel
BRETT DURBIN, WSBA No. 35781
Assistant Attorney General
Attorneys for Respondent

APPENDIX 1

Westlaw.
Not Reported in N.W.2d
Not Reported in N.W.2d, 2008 WL 2468462 (Mich.App.)

Tracfone Wireless, Inc. v. Department of Treasury
Mich.App.,2008.
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
UNPUBLISHED
Court of Appeals of Michigan.
TRACFONE WIRELESS, INC., P laintiff/ Counter-Defendant-Appellee/Cross-Appellant,
v.
DEPARTMENT OF TREASURY and Emergency Telephone Service Committee, Defendants/ Cross-Plaintiffs-Appellants/Cross-Appellees.
Docket Nos. 275065, 275942.

June 19, 2008.

Court of Claims; LC No. 06-000028-MZ.

Before: DAVIS, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

***1** This appeal arises out of the trial court's orders holding that the provisions of the Emergency Telephone Service Enabling Act (ETSEA), MCL 484.1101 *et seq,* do not apply to providers of prepaid wireless cellular telephone services like plaintiff, but also holding that a portion of the fees plaintiff erroneously remitted pursuant to the ETSEA was not recoverable because it was outside the applicable limitations period, and awarding judgment in plaintiff's favor in the amount of $231,432.76.[FN1] We affirm in part and reverse in part.

> FN1. The trial court also granted summary disposition in plaintiff's favor on defendants' counterclaim, and defendants have not appealed that order.

Plaintiff is a provider of "commercial mobile radio services" (CMRS) in the form of prepaid, "pay as you go," wireless cellular telephones that are purchased "off the shelf" by consumers at various retail establishments. Plaintiff therefore does not invoice its customers or enter into monthly service contracts with them. In relevant part, the ETSEA requires CMRS providers and retailer to collect a monthly fee from their customers for "each CMRS connection that has a billing address in this state."MCL 484.1408(1). In the years 2000, 2001, 2002, and 2003, plaintiff remitted to defendants a total of $541,574.33 pursuant to that requirement. However, plaintiff contends that it paid its own funds and did so by accident. Plaintiff argues that because it does not have billing addresses or monthly bills for its customers, the 9-1-1 fee does not apply, so it was not required to collect or remit the fees. When plaintiff discovered the mistake, it informed defendants that it wished the monies refunded. Plaintiff was ultimately informed that it could only obtain a refund by filing the instant suit in the Court of Claims, which plaintiff then did.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v. Rozwood,* 461 Mich. 109, 118;597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the nonmoving party. *Id.,* 119.Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8).*Id.,* 119-120.Likewise, under MCR 2.116(C)(9), all of the defendant's well-pleaded allegations are accepted as true, and summary disposition is appropriate only "when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery."*Slater v. Ann Arbor Public Schools Bd of Ed,* 250 Mich.App 419, 425-426;648 NW2d 205

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

(2002). Under MCR 2.116(C)(10), we consider all evidence submitted by the parties in the light most favorable to the non-moving party and grant summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden, supra* at 120.

*2 This Court also reviews de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v. Toledo Engineering Co, Inc,* 467 Mich. 344, 347;656 NW2d 175,amended on other grounds468 Mich. 1216 (2003). The goal of statutory interpretation is to determine and give effect to the intent of the Legislature, with the presumption that unambiguous language should be enforced as written. *Gladych v. New Family Homes, Inc,* 468 Mich. 594, 597;664 NW2d 705 (2003). If the language is unambiguous, "the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case." *Veenstra v. Washtenaw Country Club,* 466 Mich. 155, 159-160;645 NW2d 643 (2002). Equitable determinations are also reviewed de novo, although the factual findings underlying those determinations are reviewed for clear error. *Blackhawk Development Corp v. Village of Dexter,* 473 Mich. 33, 40;700 NW2d 364 (2005).

We first address defendants' contention that plaintiff lacks standing. "Whether a party has standing is a question of law that we review de novo." *Nat'l Wildlife Federation v. Cleveland Cliffs Iron Co,* 471 Mich. 608, 612;684 NW2d 800 (2004). In the absence of a particularized injury, no genuine case or controversy can exist between the parties, and therefore the courts lack any power to exercise over those parties. *Id.* Plaintiff must allege and prove that it did or will suffer some kind of actual harm as a consequence of defendants' conduct. *Id.,* 629-631.

Defendants contend that plaintiff has failed to show actual harm because the plain language of the statute requires plaintiff to collect the applicable fees from its customers, not pay the fees itself. However, plaintiff has alleged that it paid the fees out of its own funds by accident, and it has submitted an interrogatory response stating that it did not collect the funds from its customers. The evidence in the record fails to show any indication to the contrary. Plaintiff's injury in fact is the loss of certain monies that plaintiff alleges it was not required to remit. Plaintiff has provided allegations and evidence tending to prove this injury, and defendant has not cast any doubt thereon. We therefore find that plaintiff has standing.

The primary issue in this case is whether, as a pure matter of law, the requirements of MCL 484.1408 apply to prepaid cellular telephone services. At the times relevant to this action,[FN2] the pertinent provisions of that statute provided as follows:

> FN2. The supplied statutory language is the language as enacted in 1999 PA 78, which was the Public Act that added this section to the Emergency Telephone Service Enabling Act by 1999 PA 78. Subsection (1) underwent some minor changes, such as in wording, date references, and amount of money to be charged, but it has remained the same in substance. Subsection (6) was eventually renumbered, and a specific target date inserted, but again substantially unmodified. It is clear that none of the changes are material to the outcome of this appeal, and neither party suggests otherwise.

(1) Until 2 years after the effective date of this section, a CMRS supplier or a reseller shall include a service charge of 55 cents per month for each CMRS connection that has a billing address in this state. Beginning 2 years after the effective date of this section, a CMRS supplier or a reseller shall include a service charge of 52 cents per month for each CMRS connection that has a billing address in this state. The CMRS supplier or reseller shall list the service charge as a separate line item on each bill. The service charge shall be listed on the bill as the "emergency 9-1-1 charge".

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

* * *

*3 (6) A CMRS supplier or reseller shall implement the billing provisions of this section not later than 120 days after the effective date of this section.

The ETSEA further provides the following relevant definitions in MCL 484.1102:

(c) "Commercial mobile radio service" or "CMRS" means commercial mobile radio service regulated under section 3 of title I and section 332 of title III of the communications act of 1934, chapter 652, 48 Stat. 1064, 47 USC 153 and 332, and the rules of the federal communications commission or provided under the wireless emergency service order. Commercial mobile radio service or CMRS includes [among other things, cellular telephone service].

* * *

(h) "CMRS connection" means each number assigned to a CMRS customer.

* * *

(x) "Person" means an individual, corporation, partnership, association, governmental entity, or any other legal entity.

* * *

(gg) "Service supplier" means a person providing a communication service to a service user in this state.

(hh) "Service user" means a person receiving a communication service.

Plaintiff asserts that it is not a "reseller," but by its own concession it is a "provider," so it is a "supplier" and potentially obligated to collect and remit the fees under MCL 484.1408(1). Significantly, the ETSEA does not define what constitutes a "billing address."

We find it irrelevant that plaintiff does not have a monthly billing cycle. The plain language of the statute requires the fees to be computed on a monthly basis, but not necessarily collected on a monthly basis. There is no inherent restriction on having only one bill, or having a billing cycle of either longer or shorter than one month. The plain language of the statute does mandate at least one "bill," but most importantly, it requires a "billing address."

The term "billing address" is not defined by the ETSEA, but a definition does exist in the Michigan Business Tax Act, MCL 208.1101 *et seq.* According to MCL 208.1261(a), " '[b]illing address' means the location indicated in the books and records of the financial institution on the first day of the tax year or on a later date in the tax year when the customer relationship began as the address where any notice, statement, or bill relating to a customer's account is mailed."This is consistent with the dictionary definition of "bill," which in relevant part means either "a statement of money owed for goods or services supplied" or "to send a list of charges to."Random House Webster's College Dictionary, 2001 ed. Given that *billing* is either a present participle or a gerund, "*billing* address" must refer to the *verb* form of "bill." We are persuaded that a "billing address" must in some way pertain to ongoing contact information for a customer. In particular, a "billing address" requires a *physical* location to which some kind of *written* information regarding an "account" could be delivered, and thereby relied on to be received, by a customer with some kind of ongoing relationship with the supplier.

*4 Defendants contend that discovery would reveal that plaintiff's billing practices entail collection of extensive information from its customers, including customers' billing addresses. However, defendants admit that plaintiff "does not enter into monthly service contracts with its customers or invoice its customers."Because the meaning of "billing address" entails actually sending bills on an account

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

to a customer, the fact that plaintiff might know where its customers live does not necessarily mean plaintiff has a "billing address" for those customers. In other words, there can be no billing address if there is no billing. Irrespective of what data plaintiff collects from its CMRS connection customers, if the CMRS connections do not have designated physical addresses for the purpose of receiving information about ongoing accounts, those CMRS connections do not have "billing addresses" within the meaning of MCL 484.1408. Because the CMRS connections in this case do not have "billing addresses," the 9-1-1 service charge need not be collected on them, as the trial court correctly found.

Nevertheless, the parties do not dispute that as a general matter, no Michigan governmental entity is authorized to refund taxes unless expressly permitted to do so by enactment of the Legislature, see *F.M. Sibley Lumber Co v. Dep't of Revenue,* 311 Mich. 654, 661;19 NW2d 132 (1945), and the ETSEA does not expressly provide for a refund of plaintiff's tax payments here. However, plaintiff's refund claim is based on equity. " 'It is a well settled rule that "money got through imposition" may be recovered back; and, as this court has said on several occasions, "the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' " *Blanchard v. Detroit,* 253 Mich. 491, 495;235 NW 230 (1931), quoting *Ward v. Love Co,* 253 U.S. 17, 24;40 S Ct 419 (1920) and cases cited therein.

In *Spoon-Shacket v. Oakland Co,* 356 Mich. 151, 168;97 NW2d 25 (1959), our Supreme Court upheld "the right of taxpayers to equitable relief from the unconscionable effect of crass mistakes of public officials in the field of taxation; mistakes gross enough to constitute fraud."More than sixty years previously, "[t]he right of a party, from whom has been exacted payment of rates of carriage in excess of those fixed by charter or statute, to recover the overcharge, [was] no longer open to serious question."*Pingree v. Mut Gas Co,* 107 Mich. 156, 158;65 NW2d 6 (1895). However, the parties do not actually dispute that plaintiff would be entitled to a refund of any taxes or fees paid due to fraud or coercion by defendants. Rather, defendants contend that plaintiff's payments are not recoverable because they were voluntarily made, with full actual or constructive knowledge of the facts and applicable law.

***5** Some of Michigan's earliest published cases regarded it as a settled, even presumptive, issue that voluntarily-paid monies were simply not recoverable. See *First Nat'l Bank v. Watkins,* 21 Mich. 483, 488-490 (1870); see also, generally, *Thompson v. Detroit,* 114 Mich. 502;72 NW 320 (1897). At common law, actual duress was necessary for a payment to be considered involuntary. *General Discount Corp v. Detroit,* 306 Mich. 458, 465;11 NW2d 203 (1943). But the rule evolved to permit recovery of unnecessary payments in the absence of duress and even without protest, if the payor made those payments "by reason of a mistake or ignorance of a material fact;" ignorance of a fact is equivalent to a mistake of fact, and either will make the payment effectively involuntary. *Pingree, supra* at 159-160.The same may be true even if the payor was negligent in failing to ascertain the true facts, "subject to the qualification that the payment cannot be recalled when the situation of the party receiving the money has changed in consequence of the payment, and it would be inequitable to allow a recovery."*Id.,* 160;*Walker v. Conat,* 65 Mich. 194, 197-198;31 NW 786 (1887).

Nevertheless, a party with "full knowledge of the facts," or even merely on notice of the facts and therefore "chargeable with the knowledge," cannot recover voluntarily-paid money by claiming a mistake. *Montgomery Ward & Co v. Williams,* 330 Mich. 275, 284-285;47 NW2d 607 (1951); see also *Farm Bureau Mut Ins Co of Michigan v. Buckallew,* 471 Mich. 940, 940-941;690 NW2d 93 (2004) ("[p]laintiff had access to all the necessary information, and its error is not excused by its own care-

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

lessness or lack of due diligence."). Where a party is not ignorant of the law, the party's rights under the law, and the facts of the party's situation; and where the recipient of the monies has not infringed on the payor's free will by action, inaction, or mere possession of exclusive knowledge; payment will not be considered to have been made under duress. *Beachlawn Corp v. St Clair Shores,* 370 Mich. 128, 131-133;121 NW2d 427 (1963).

There is no contention or evidence that the payments plaintiff remitted were because of any "artifice, fraud, or deception on the part of the payee, or duress of the person or goods of the person making the payment."*Pingree, supra* at 157.Plaintiff repeatedly emphasizes that the payments were made solely because its tax administration firm made a unilateral mistake, not because of any conduct by defendants. Furthermore, neither party had exclusive knowledge of the applicable law, nor did defendants know anything about plaintiff's factual situation that plaintiff did not also know. Most importantly, it is apparent that the tax administration firm was plaintiff's agent. See *St Clair Intermediate School Dist v. Intermediate Ed Ass'n/Michigan Ed Ass'n,* 458 Mich. 540, 557-558;581 NW2d 707 (1998)."A party is responsible for any action or inaction by the party or the party's agent."*Alken-Ziegler, Inc v. Waterbury Headers Corp,* 461 Mich. 219, 224;600 NW2d 638 (1999). As a consequence, the payments made by plaintiff's tax administration firm are attributable to plaintiff.

***6** We find that plaintiff-through its agent-therefore knowingly remitted the 9-1-1 fees. Moreover, plaintiff did so under "the mistaken factual premise that [plaintiff] was a monthly billing wireless provider instead of a provider that sold prepaid wireless telephones and minutes to customers through retail outlets."In other words, plaintiff asserts that it was under a mistake of fact about *the nature of itself.*But plaintiff must have had full knowledge of the nature of its services at the time it made those payments, and as a consequence, we conclude that its payments were voluntary. See *Farm Bureau Mut Ins Co of Michigan v. Buckallew, supra* at 940-941.This is not analogous to the case of a person inadvertently putting the decimal point in the wrong place on a check, where that person might indeed pay under a misapprehension of fact as to how much he or she was paying. Plaintiff was aware of all of the material facts-the amount and fact of payment, and the nature of itself-at the time it paid. We therefore agree with defendants that, because plaintiff remitted them voluntarily, plaintiff cannot recover the fees.

We affirm the trial court's holding that providers of prepaid wireless telecommunications services like plaintiff are not required to collect or remit the 9-1-1 fees under the ETSEA. However, we reverse the trial court's award of $231,432.76 in plaintiff's favor. In light of our determinations of those issues, we need not address the issues pertaining to the trial court's award of fees, the statute of limitations, or the notice provisions of the Court of Claims Act.

Mich.App.,2008.
Tracfone Wireless, Inc. v. Department of Treasury
Not Reported in N.W.2d, 2008 WL 2468462 (Mich.App.)

END OF DOCUMENT

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

FILED
COURT OF APPEALS
DIVISION II
08 OCT -9 AM 10:38
STATE OF WASHINGTON
BY
DEPUTY

NO. 37409-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TRACFONE WIRELESS, INC.,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Respondent.

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of this Certificate of Service, via Electronic Mail and U.S. Mail, postage prepaid, through Consolidated Mail Services, on the following:

Scott M. Edwards
Perkins Coie
1201 Third Avenue Suite 4800
Seattle, WA 98101-3099
SEdwards@perkinscoie.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of October, 2008, at Tumwater, WA.

Kristin D. Jensen
KRISTIN D. JENSEN, Legal Assistant