

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
NEW CINGULAR WIRELESS PCS LLC : ORDER ON REMAND
for Revision of a Determination or for Refund of Sales : DTA NO. 825318
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period November 1, 2005 through September 30, :
2010. :

Petitioner, New Cingular Wireless PCS LLC, filed an exception to the determination of the Administrative Law Judge issued on July 17, 2014. Petitioner appeared by Wilson Law Group LLC, previously Wilson Agosto LLP (Margaret C. Wilson, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert Maslyn, Esq., of counsel). The Tax Appeals Tribunal rendered its decision on February 16, 2016.

Petitioner then filed a petition for judicial review pursuant to Civil Practice Law and Rules Article 78 with the New York State Supreme Court, Appellate Division, Third Department. On August 3, 2017, the court in *Matter of New Cingular Wireless PCS LLC v Tax Appeals Trib. of State of N.Y.* (153 AD3d 976 [3d Dept 2017]) modified our decision by: (1) annulling that portion of our decision that denied petitioner's motion to reopen the record; (2) granting petitioner's motion to reopen the record; and (3) remanding the matter to the Commissioner of Taxation and Finance for further proceedings not inconsistent with its decision. Thereafter, the Commissioner of Taxation and Finance moved for resettlement of judgment, requesting that the matter be remanded to the Tax Appeals Tribunal rather than the Commissioner of Taxation and

Finance. By decision and order on motion decided and entered on December 1, 2017 (resettlement order), the Court granted such motion.

We begin by: (1) reversing the order of Administrative Law Judge issued on December 4, 2014 denying petitioner's motion to reopen the record; (2) granting petitioner's motion to reopen the record; and (3) admitting into evidence in this matter the affidavit of Damien Daley, Assistant Vice President, U.S. Bank National Association (U.S. Bank) regarding an escrow agreement between U.S. Bank and petitioner and the funding of the escrow by petitioner (the Escrow Funding Affidavit).

Next, we address the finding of the court that additional administrative proceedings are necessary for the reason that:

“having upheld the denial of petitioner's motion to reopen the record, the Tribunal never reached the overarching question of whether petitioner's funding of the pre-refund escrow account in compliance with the terms of the global settlement agreement and the ensuing clarifying agreement indeed would constitute repayment of the improperly collected taxes within the meaning of Tax Law § 1139 (a)” (*Matter of New Cingular Wireless PCS LLC v Tax Appeals Trib. of State of N.Y.* at 980).

The Administrative Law Judge also did not reach this question. In consonance with our two-stage tax appeals process, this matter is remanded to the Administrative Law Judge for consideration of the issue of whether petitioner's funding of the pre-refund escrow account constitutes repayment to petitioner's customers as required by Tax Law § 1139 (a) (*Matter of United States Life Ins. Co.*, Tax Appeals Tribunal, March 24, 1994 [“The fullest possible development of an issue occurs in our two-stage hearing/exception process when the Administrative Law Judge renders a determination on an issue stating a complete rationale for

the conclusion and the litigants debate the correctness of the Administrative Law Judge's rationale and conclusion on exception"].

Had the original determination of the Administrative Law Judge been made after a hearing or submission instead of in response to the Division of Taxation's (Division's) motion for summary determination, this matter would have been remanded to the Administrative Law Judge for a supplemental determination on the above legal question only. However, in this case, the original determination of the Administrative Law Judge granted the Division's motion for summary determination based upon the legal conclusion that petitioner had not made any repayment to its customers of the tax erroneously collected. In so doing, the Administrative Law Judge necessarily determined that there were no material or triable issues of fact (20 NYCRR 3000.9 [b] [1]). We find that the admission into evidence of the Escrow Funding Affidavit raises material and triable issues of fact. At the very least, remaining at issue is the accuracy of the amount of the refund claim. We note that comments on remand received from both parties support this conclusion.¹ The Division specifically states that "the amount of the refund claim has not been, and is not resolved or determined" (Division's comments on remand). Petitioner argues, based upon facts not in the record regarding a similar refund claim, that "[T]here is no reason why the Department should not be able to similarly stipulate to the correct dollar amount of the sales tax refund claim" (Petitioner's comments on remand, p 1). By asserting that the Division should stipulate to the amount of the refund claim, petitioner is in effect acquiescing to the conclusion reached herein that the amount of the refund claim is still in issue.

¹ Because of the absence of any discussion of the issue of the accuracy of the refund claim in either the decision in *Matter of New Cingular Wireless PCS LLC v Tax Appeals Trib. of State of N.Y.*, or the resettlement order, the Tribunal requested comments from the parties as to whether this issue should also be the subject of the remand.

Accordingly, we hereby nullify the determination of the Administrative Law Judge issued on July 17, 2014, deny the Division's motion for summary determination and order that this matter be scheduled for hearing.

We are fully cognizant of the additional time a hearing on remand will add to the time it takes to reach an ultimate decision in this case, a process that has already taken far too long. The court recognized this issue when it held:

“While resolution of that issue awaits further administrative proceedings, we acknowledge that the Division - consistent with the terms of the statute and its accompanying regulations - indeed may adopt a mechanism and process for evaluating and resolving refund claims such as the one advanced by petitioner. To our thinking, however, it would be inconsistent with both the statutory purpose and the underlying public policy considerations, i.e., avoiding unjust enrichment and ensuring that petitioner's customers are in fact made whole, for that process to be implemented in a manner that resulted in either a windfall to the Division or further (and unnecessary) delay in tendering the long overdue refund to which petitioner's 2,100,027 customers are entitled” (*Matter of New Cingular Wireless PCS LLC v Tax Appeals Trib. of State of N.Y.* at 980-81).

However, as recognized by the court, further administrative proceedings are necessary and we cannot allow such proceedings to be based upon the granting of the Division's motion for summary determination when the admission into the record of additional evidence raises material and triable issues of fact (20 NYCRR 3000.9 [b] [1]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The order of Administrative Law Judge issued on December 4, 2014 denying petitioner's motion to reopen the record is reversed; petitioner's motion to reopen the record is granted; and the Escrow Funding Affidavit is admitted into evidence;
2. The determination of the Administrative Law Judge issued on July 17, 2014 is nullified and the Division's motion for summary determination granted therein is denied; and

3. This matter is remanded to the Supervising Administrative Law Judge for assignment to an Administrative Law Judge² and should be scheduled for hearing as soon as practicable.

² The author of the determination and order, Administrative Law Judge Joseph W. Pinto, Jr., subsequently retired from service with the Division of Tax Appeals.

DATED: Albany, New York
March 8, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner