

IN THE SUPREME COURT OF OHIO

AT&T COMMUNICATIONS OF )  
 OHIO, INC., )  
 )  
 Plaintiff-Appellant, )  
 )  
 vs. )  
 )  
 NASSIM M. LYNCH, )  
 )  
 Defendant-Appellee. )

Case No: 2011-0337

On Appeal from the Cuyahoga  
 County Court of Appeals,  
 Eighth Appellate District

Court of Appeals  
 Case No. CA-09-094320

MEMORANDUM IN RESPONSE TO APPELLEE/CROSS-APPELLANT'S MEMORANDUM IN  
 SUPPORT OF JURISDICTION FOR THE CROSS-APPEAL

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 APR 28 2011  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

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THE CROSS-APPEAL DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION  
NOR AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST

"When you have neither the law nor the facts on your side, bang on the table and shout." Jonathan Wallace, *The World of Lawyering: Why I Left the Law*, 22 Legal Stud. F. 789, 791 (1998). That quote perfectly describes the cross-appeal, which only concerns the statute of limitations and whether it had run on a claim. No constitutional question or issue of public or great general interest is raised.

This is a tax refund case where the cross-appeal concerns taxpayer, AT&T Communications of Ohio, Inc.'s ("AT&T") request for refund for tax year ("TY") 1999. There is no question that "[c]laims for refund of municipal income taxes must be brought within" "three years after the tax was due or the return was filed, whichever is later." R.C. 718.12(A); 718.12(C). Here, AT&T filed its claim for refund on October 18, 2000. Therefore, the statute of limitations began to run on that date and expired on October 18, 2003.

While AT&T's 1999 refund claim was filed within the 3-year period on October 18, 2000, that claim was denied on February 6, 2001. The claim was denied because AT&T refused to give the Central Collection Agency ("CCA" or "Agency") information it requested so that the return could be audited to determine if the request was correct. When AT&T did re-file the 1999 claim more than 3 years later, on March 26, 2004, it was beyond the 3-year statute of limitations which lapsed on October 18, 2003.

While AT&T would like this Court to believe that the cross-appeal is about everything but the statute of limitations, the cross-appeal is only about the statute of limitations and whether AT&T met it.

AT&T does not complain that it did not receive the February 6, 2001 letter denying the 1999 refund claim. In fact, it freely admits receiving such letter. What AT&T purports to dispute is whether the February 6, 2001 letter was an "effective" denial. AT&T claims that the February 6, 2001 denial letter was not effective since it was a form letter issued by an income tax auditor never meant to be a "final decision." Therefore, according to AT&T, the statute remained "open."

AT&T's complaints about what the February 6, 2001 denial letter meant is not reasonable since (as both courts below noted) the letter "expressly states" that the TY1999 refund claim was "denied." It did not state "preliminarily denied," "conditionally denied," "maybe denied" or anything else that would lead a reasonable person to believe it meant anything other than what it said. "Denied" simply means "denied." And the fact that the denial letter was a form letter does not diminish the fact that the claim was denied nor does use of a form letter make the denial any less effective. Further, neither does the fact that an Agency tax auditor issued the denial letter since the Tax Administrator can clearly utilize such employees to perform such tasks.

Both the common pleas court and the court of appeals properly found the denial to be effective. Both courts further observed that AT&T could have re-filed the claim providing the information requested at anytime before the statute lapsed on October 18, 2003. This was because the February 6, 2001 denial notice had no res judicata effect since it was not a denial of the merits of the claim.

The problem here is clear: for more than 2½ years from February 6, 2001 to October 18, 2003, AT&T just sat and allowed the statute of limitations to lapse.

The two main purposes of a statute of limitations is to encourage parties to be diligent in exercising their rights and to establish finality. Nowhere are these twin purposes more important than in the area of tax administration. Consider the consequence if Cleveland (or any other taxing authority) was required to allow refund claims to remain pending until taxpayers "felt like" providing information to resolve the claim. Both courts correctly noted that "AT&T[] was made aware as early as December 22, 2000, that the Agency needed additional information to process the refund request." See Opinion and Judgment dated January 27, 2011, slip op. at 10; Opinion and Judgment dated November 3, 2009, slip op. at 4. And by not re-filing the claim until late March 2004, AT&T simply *blew* the statute of limitations.

The real questions AT&T cannot answer are why did it ignore the February 6, 2001 denial letter? Why didn't AT&T contact the Agency after receiving it back in 2001 if it had any questions as to what the notice meant? Why didn't AT&T simply re-file the 1999 refund claim providing the information requested back in 2001? Why did it take AT&T more than three years after receiving the denial letter to re-file the 1999 refund claim? Why? AT&T's witness said it best—the local tax was not a "priority" for it.

AT&T raises no legitimate due process claim either where it is clear that it had plenty of opportunity to preserve its rights but simply allowed the statute to lapse.

The purpose of the due process clause is to protect people from the government; it is not designed to ensure that the government protect people from themselves. *DeShaney v. Winnebago County Dept. of Social Services* (1989), 489 U.S. 189. Both courts correctly recognized that AT&T was free to re-file its TY1999 refund claim

following the February 6, 2001 denial letter. AT&T therefore was not deprived of any property interest by such denial and has no due process claim. In effect, AT&T is claiming that when the Agency issued the February 6, 2001 denial letter, the Agency had an obligation to (i) calculate when the statute of limitations was going to expire and (ii) advise AT&T that it had until such date to re-file the claim. No taxing authority is required to do that. Of course, AT&T could have made that calculation for itself.

AT&T also seeks to avoid the required conclusion that it simply *blew* the statute of limitations by arguing that the February 6, 2001 denial letter was void for its failure to comply with the notice requirement mandated by R.C. 718.11.

Section 718.11 provides that when tax administrators issue decisions that may be appealed to municipal boards of income tax review, taxpayers should be notified of their right to appeal and the manner thereof. As noted, the February 6, 2001 denial letter was not a decision on the merits and had no res judicata effect. The refund was denied because AT&T failed to provide information necessary to audit the tax return to determine if the request for refund was correct. After the refund claim was denied, AT&T was completely free to re-file such claim. The problem was, again, that following such denial AT&T waited more than 3 years to do so. To claim that the denial letter was void because it did not contain the notice requirement mandated by R.C. 718.11 is a red herring and a blatant disregard of the facts in this case.

In sum, the cross-appeal is nothing but a desperate attempt by AT&T to excuse its own behavior. It does not raise any legitimate constitutional question or issue of public or great general interest.

## STATEMENT OF THE CASE AND FACTS

This case arises from a decision issued by the Board of Review for the City of Cleveland ("Board"). It is a tax refund case where the issue before the Board was AT&T's city income tax liability for tax years 1999-2002.

Each year for tax years 1999 through 2002, AT&T filed net profit tax returns for Cleveland tax purposes with the Central Collection Agency and made estimated tax payments for these years of what it expected its total tax liability would be. Estimated tax payments are made based on a taxpayer's prior year tax liability.

AT&T filed its TY1999 return with the Agency on October 18, 2000, requesting a refund of certain estimated tax paid for that year. In order to audit the return and to determine if the refund request was correct, by letter dated December 22, 2000, the Agency requested certain information from AT&T. Although AT&T was instructed to forward the information within ten days, AT&T never responded and eventually the Agency, by letter dated February 6, 2001, would deny the refund claim since AT&T failed to respond to the request for information.

For more than eight months, no contact from AT&T occurred until October 16, 2001, when it filed its TY2000 tax return. The TY2000 return also requested a refund. It also reported the amount of the TY1999 denied claim as a prior-year credit.

By letter dated November 20, 2001, the Agency contacted AT&T. That letter advised AT&T that the Agency never received a response to the December 22, 2000 request for information for the TY1999 return (enclosing a copy of the letter). The

November 20, 2001 letter requested substantially the same information for TY2000 that the Agency requested for TY1999 and instructed AT&T to submit the information.

AT&T did not respond to the request for information and there was no contact from AT&T until October 17, 2002, more than eleven months later, when it filed its TY2001 tax return. The TY2001 return also requested a refund and reported the amounts of the TY1999 denied claim and TY2000 claim as prior-year credits.

Having received no response to *any* of the requests for information, AT&T was sent a letter dated May 3, 2003 stating that its TY1999-TY2001 refund requests were denied, enclosing copies of the December 22, 2000 and November 21, 2001 requests for information letters.

Again, AT&T never responded to the requests for information letters. The Agency would have no contact from AT&T until October 20, 2003, more than five months after the Agency's May 3, 2003 letter, when it filed its TY2002 tax return. The TY2002 return requested a refund and reported the amounts of the TY1999-2001 denied claims as prior-year credits.

The Agency, by letter dated January 6, 2004, requested the same kind of information requested for TY1999-2001 for purposes of auditing the TY2002 return. AT&T again ignored the request for information. Consequently, the Agency denied the TY2002 refund claim, by letter dated March 8, 2004.

*All* of AT&T's original refund claims were denied for each of the relevant years for the same reason—failure to provide information necessary to audit the tax returns.

Eventually, on March 24, 2004, AT&T contacted the Agency to discuss the denied refund claims and on March 26, 2004, re-filed the TY1999-2002 refund claims providing some of the information previously requested. By letter dated April 30, 2004, the Agency requested additional information. AT&T responded to that request for information almost eight months later, by letter dated December 16, 2004.

Although AT&T would initially be advised (in error) that its re-filed claims for all four years were approved with certain adjustments, the Agency quickly notified AT&T that its re-filed refund claim for TY1999 was untimely and therefore denied.

After the Agency denied the re-filed refund claim for TY1999 as untimely, on September 1, 2005, AT&T requested a ruling from Appellant, Nassim M. Lynch, the city of Cleveland's Tax Administrator, challenging that decision.

The Tax Administrator issued his Ruling on February 7, 2006, finding that the refund claim for TY1999 was untimely since it was brought beyond the statute of limitations.

Thereafter, AT&T appealed the Tax Administrator's Ruling to the Board. The Board issued a decision that affirmed the Tax Administrator's Ruling as to the statute of limitations issue.

AT&T then appealed the Board's Decision to the Common Pleas Court for Cuyahoga County. The Common Pleas Court below entered a judgment and opinion affirming the Board's decision finding the TY1999 refund claim was time-barred. Specifically, the Common Pleas Court found that "the Board correctly denied AT&T's request for refund for tax year 1999 because the statute of limitations period for filing

the refund claim had expired.” See Judgment Entry and Opinion dated November 3, 2009, slip op. at 5.

After AT&T appealed, the Eighth District Court of Appeals affirmed the Common Pleas Court’s judgment as to the statute of limitations issue finding that AT&T’s “own inaction is what ultimately resulted in its claim being time-barred.” See Judgment Entry and Opinion dated January 27, 2011, slip op. at 10.

The Board, the Common Pleas Court and the Court of Appeals all correctly ruled that the TY1999 refund claim was beyond the statute of limitations.

#### ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: No legal authority exists to pay a tax refund claim where such claim is presented beyond the statute of limitations.

A. Refund claims must be filed within three years.

Under R.C. 718.12, refund claims must be filed within three years after the tax was due or the return was filed whichever is later. Absolutely nothing in that statute permits a longer timeframe. Timely filing then is a jurisdictional requirement to receive a refund. See *Internatl. Business Machines Corp. v. Zaino* (2002), 94 Ohio St.3d 152, 761 N.E.2d 20.

B. The three-year deadline is absolute.

In examining an analogous limitations period in the tax context, this Court observed that “[t]he three-year deadline is absolute.” *General Motors Corp. v. Limbach* (1993), 67 Ohio St.3d 90, 92, 616 N.E.2d 204. This principle is well-settled for meeting the goals of a statute of limitations which this Court has stated are “certainty and finality in tax planning and tax collection.” *McLean Trucking Co. v. Lindley* (1982), 70 Ohio St.2d

106, 112, 435 N.E.2d 414, 418. Likewise, the United States Supreme Court has recognized that "a statute of limitations is an almost indispensable element of fairness as well as of practical administration of an income tax policy." *Rothensies v. Elec. Storage Battery Co.* (1946), 329 U.S. 296, 301.

C. Untimely refund claims must be denied.

For more than 3 years, AT&T was advised that *all* of its original refund claims were denied. When AT&T re-filed those claims on March 26, 2004, the TY1999 claim was already barred by the statute of limitations. Because R.C. 718.12 is a special statutory provision "creating and qualifying a given right if exercised within a given time, the time limitation is an inherent part of the statute, so that after the time runs the right is extinguished." *Village of McDonald v. Humeniuk*, Trumbull App. No. 2004-T-0036, 2004-Ohio-1566 at ¶¶20-21 citing *Cincinnati v. Bossert Machine Co.* (1968) 14 Ohio App.2d 35, 236 N.E.2d 216. Since the statute had lapsed, AT&T had no legal right to receive the refund (assuming it was entitled to such) and the Tax Administrator had no legal authority to pay it.

D. Taxpayers cannot extend the statute of limitations.

AT&T's refund claim for TY1999 was denied by letter dated February 6, 2001. While that claim could be re-filed, it was not subject to amendment. Once a refund claim has been denied, rejected or disallowed, it is not subject to amendment; only pending claims can be amended (otherwise, claims could be amended indefinitely). See *United States v. Memphis Cotton Oil Co.* (1933), 288 U.S. 62 (filed claim may be amended at anytime before it is rejected); *United States v. Andrews* (1938), 302 U.S.

517, 524-525 (to be valid, amendments must relate to original claim and be presented before original claim has been resolved). Likewise, AT&T's purported "carrying-forward" of the amount of the denied 1999 refund claim and reporting it as a credit does not render a denied refund a valid credit nor extend the statute of limitations. "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." *Allstate Insurance Co. v. United States* (Ct. Cl. 1977), 550 F.2d 629, 633. Nor does a re-filed or second claim "relate" back to the date of an original claim for purposes of tolling the statute of limitations where (as here) the original claim has been denied. *Kaiser Engineers v. Limbach* (1990), 70 Ohio App.3d 550, 591 N.E.2d 807 at 808-809 (a second claim could not relate back to the first for purposes of the statute of limitations).

E. Employees cannot extend the statute of limitations.

AT&T complains that the February 6, 2001 denial letter was not a final decision since it eventually received letters (in error) from an Agency employee *in 2005*, after the statute of limitations had already lapsed, stating that the refund had been approved. While not using the words, AT&T is making a disguised "waiver/estoppel" claim, a claim for which it is well aware, cannot be asserted against a taxing authority.

This Court has long held that estoppel claims cannot be asserted against a state (taxing authority) as to taxing statutes. *General Motors*, 67 Ohio St.3d 90 at 92, 616 N.E.2d at 207 ("[The equitable principle of] estoppel does not apply to the State of Ohio as to a taxing statute.") (brackets original) (quoting *Recording Devices v. Bowers* (1963), 174 Ohio St. 518, 520, 190 N.E.2d 258 syllabus). See also *American Handling*

*Co. v. Kosydar* (1975), 42 Ohio St.2d 150, 153 326 N.E.2d 660 (estoppel does not apply to confusing or misleading statements made by the State Tax Commissioner or his agents); *Staubitz Sheet Metal Works, Inc. v. Zaino* (May 17, 2002), Ohio Bd. Tax App. No. 2002-V-80, 2002 WL 1033521 at \*3 (equitable estoppel based on detrimental reliance does not lie against the state even when an employee makes a misleading statement). Likewise, courts have consistently held that the statutory three-year filing requirement for refund claims cannot be waived. *Missouri Pacific R.R. Co. v. United States* (Ct. Cl. 1977), 558 F.2d 596, 599 (rejecting taxpayer's argument that IRS waived the statute of limitations); *Melchior v. United States* (Ct. Cl. 1956), 145 F Supp 193 (even where the IRS considered the taxpayer's claim on the merits and engaged in "considerable audit activity" regarding the claim before determining claim was not timely made, the statutory period was not waived); *Pala Inc. Employees Profit Sharing Plan and Trust Agreement v. United States* (DC La 1999), 234 F.3d 873, 897 citing *Angelus Milling v. Commissioner*, 325 U.S. 293 (IRS cannot waive statutory time limits for filing refund claims). Public employees also have no authority to waive the statute of limitations with regard to such claims. *Overhauser v. United States* (7th Cir. 1993), 45 F.3d 1085, 1088 ("Government officials have no general power to waive statute of limitations in tax cases[.]"); *United States v. Garbutt Oil Co.* (1938), 302 U.S. 528, 533-534 ("no officer of the government has power to waive the statute of limitations").

Addressing AT&T's argument, the Eighth District correctly noted that the letters "did not (nor could they) alter the applicable statute of limitations. Indeed, at the time

that the letters were sent, the statute of limitations had already run." See Opinion and Judgment dated January 27, 2011, slip op. at 14.

F. Constitutional challenges cannot extend the statute of limitations.

Even where (as here) taxpayers assert purported constitutional claims in an attempt to avoid the timely filing requirement, this Court and others have consistently held that even constitutional challenges cannot extend the statute of limitations.

*General Motors*, 67 Ohio St.3d at 92, 616 N.E.2d at 207 (denying "a refund claim under a constitutional claim because [] taxpayer had not filed its refund application timely"); *Block v. North Dakota ex rel. Bd. of Univ. & School Lands* (1983), 461 U.S. 273, 292 (holding "[a] constitutional claim can become time-barred just as any other claim can").

Proposition of Law No. 2: The Due Process Clause does not require an endless number of opportunities for one to assert ones rights.

Contrary to what AT&T would have one believe, this cross-appeal does not raise any actionable due process claim. Any claim for denial of due process at ones own hand is not actionable. *Verdon v. Consolidated Rail Corp.* (S.D.N.Y. 1993), 828 F. Supp. 1129. Further, it is clear that the due process clause does not require an endless number of opportunities for one to assert ones rights. *Silas v. Babbitt* (9th Cir. 1996, 96 F.3d 355. As the Eighth District correctly noted, "[t]he February 6, 2001 denial letter did not foreclose AT&T[s] [] ability to refile the refund claim with the requested necessary information before the statute of limitations expired. AT&T[] therefore was not deprived of any property interest by such denial." See Opinion and Judgment dated January 27, 2011, slip op. at 9-10. See also Common Pleas Court Opinion and

Judgment dated November 3, 2009, slip op. at 4 (the February 6, 2001 "letter did not foreclose AT&T[]'s ability to refile the refund claim").

In short, AT&T simply chose to do nothing for more than 2½ years after its 1999 refund claim was denied and allowed the statute of limitations to lapse. "AT&T[] was made aware as early as December 22, 2000 that the Agency needed additional information in order to process the request." *See* Court of Appeals Opinion and Judgment dated January 27, 2011, slip op. at 10. Any denial of due process here (assuming such exists) was purely self-inflicted.

Proposition of Law No. 3: There was no requirement that the February 6, 2001 denial letter comply with the notice requirement of R.C. 718.11.

AT&T seeks to avoid the required conclusion that it simply *blew* the statute of limitations by arguing that the February 6, 2001 denial letter was void for its failure to comply with the notice requirement set forth in R.C. 718.11. This argument too is to no avail.

Section 718.11 provides that when tax administrators issue decisions, taxpayers should be notified of their right to appeal to the municipal board of appeal and the manner thereof. Tax administrator decisions therefore are "a prerequisite to invoke the jurisdiction of the Board on appeal." *See* Opinion and Judgment, slip op. at 10.

As the Court of Appeals explained, under the Agency's Rules and Regulations, such rulings by the Tax Administrator "are issued *only* upon taxpayer requests." *See id.* (italics original). AT&T never requested a ruling related to the February 6, 2001 denial letter. R.C. 718.11 therefore has no application to such letter.

Moreover, there is no merit to AT&T's claim that the February 6, 2001 denial letter should have advised it regarding requesting a ruling from the Tax Administrator. Again, the simple fact is that the denial had no type of res judicata effect and AT&T was free to re-file such claim. Further, the Agency's Rules clearly advise taxpayers on how to challenge such decisions. AT&T's argument in this regard is not only a red herring but clearly amounts to an "ignorance of the law" claim—not any type of "due process" claim. The old adage that "ignorance of the law" is no excuse seems especially appropriate where (as here) the taxpayer is not an unsophisticated taxpayer but a major corporation with its own tax department. To accept AT&T's excuse would encourage and reward a party who clearly has not been diligent in protecting its rights.

Proposition of Law No. 4: AT&T's complaint about the "authority of tax auditors" is wholly without merit.

Another AT&T argument is that the February 6, 2001 denial letter is not valid since it was issued by a tax auditor. According to AT&T only the Tax Administrator can deny a tax refund claim and any "subdelegation" of that authority requires a "resolution" or "regulation" to be valid.

Rejecting AT&T's argument, the Eighth District found that the "denial letter issued by the income tax auditor" "to be consistent with the administrator's authority to delegate duties to review, investigate and audit returns in connection with requests for refunds." *See id.*, slip op. at 12. Both CCA Article 23:06(A) and 23:07(A) grant authority to the Tax Administrator or any authorized employee to review, investigate, audit and issue decisions regarding any number of tax issues including requests for refunds. *See id.* No separate resolution is required to deny refund claims. *See Luken*

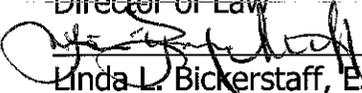
*v. Zaino* (Apr. 30, 2004), Ohio Bd. Tax App. No. 2003-T-1021, 2004 WL 1101920 at \*4 (handwritten signature and seal of state tax commissioner not required in making income tax determinations and assessments to be valid); *McCracken v. Zaino* (July 9, 2004) Ohio Bd. Tax App. No. 2003-A-1756, 2004 WL 1574847 (no basis in statute or otherwise to support claim that state tax commissioner must sign an assessment in order for it to be considered legal action); *Beier v. Zaino* (July 23, 2004) Ohio Bd. Tax App. No. 2003-T-1789, 2004 WL 1698441 (state tax commissioner can utilize his employees to perform various functions of his office). The Eighth District correctly found that there is “no basis to conclude that the tax administrator is the sole person with authority to deny a request for refund[.]” See Opinion and Judgment dated January 27, 2011, slip op. at 12.

The cross-appeal is not about whether tax auditors have authority to issue decisions denying refund claims; the cross-appeal is about whether AT&T met the statute of limitations. It did not.

#### CONCLUSION

For the reasons discussed above, this Court should decline to accept jurisdiction over the cross-appeal since no constitutional question or issue of public or great general interest is raised—AT&T simply *blew* the statute of limitations.

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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum In Response To Appellee/Cross-Appellant's Memorandum In Support of Jurisdiction For The Cross-Appeal was sent by ordinary U.S. mail to counsel for appellee/cross-appellant, AT&T Communications of Ohio, Inc., Richard C. Farrin, Esq. and Thomas M. Zaino, Esq., McDonald Hopkins, LLC, 41 S. High Street, Suite 3550, Columbus, Ohio 43215 on April 27, 2011.

  
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