[Cite as *AT&T Communications of Ohio v. Lynch*, 2010-Ohio-6159.]

[Vacated opinion. Please see 2011-Ohio-302.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94320

AT&T COMMUNICATIONS OF OHIO

PLAINTIFF-APPELLANT

vs.

NASSIM M. LYNCH

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-608252

BEFORE: Boyle, J., Kilbane, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: December 16, 2010

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MARY J. BOYLE, J.:

{¶ 1} Appellant, AT&T Communications of Ohio, Inc. ("AT&T Ohio"), appeals from the trial court's judgment entry affirming in part and reversing in part a decision of the city of Cleveland Board of Income Tax Review ("the

Board"). This case involves a dispute over AT&T Ohio's municipal income tax refund for tax years 1999-2002. AT&T Ohio contends that Nassim Lynch, the tax administrator, improperly denied its request for a refund for tax year ("TY") 1999, and otherwise improperly calculated the amount of refund for TY 2000-2002. For the reasons discussed below, we affirm in part and reverse in part — we affirm the trial court's decision upholding the Board's determination that the tax administrator properly denied AT&T Ohio's refund request for TY 1999, but we reverse the trial court's decision as to any modification of the Board's decision below.

Procedural History and Facts

{¶ 2} The pertinent facts are set forth in the trial court's November 3, 2009 journal entry and opinion as follows:

{¶ 3} "The basis for AT&T Ohio's refund claims for [the 1999 through 2002] tax years was that the estimated tax payment made by AT&T Ohio exceeded the tax shown due on each yearly return. For 1999, AT&T Ohio reported a tax due of $253,350, but made estimated quarterly payments totaling $4,331,618; therefore, AT&T Ohio requested a refund of $4,078,268. For 2000, AT&T Ohio reported a tax due of $144,913 on its return, but made estimated quarterly payments totaling $2,330,030; therefore, AT&T Ohio requested a refund of $2,185,117. In 2000, AT&T also claimed a credit carry-forward for the $4,078,268 overpayment claimed on its 1999 return. For 2001, AT&T Ohio

reported a tax due of $62,685, but made estimated quarterly payments totaling $63,710; therefore, AT&T Ohio requested a refund of the $1,025 overpayment. AT&T Ohio also included the credit carry-forward of $4,078,268 for 1999 and the $2,185,117 overpayment claimed on its 2000 return. The basis of the claim for the 2002 tax year was that the credit carry-forwards from the 1999 and 2000 overpayments exceeded the $149,774 tax due shown on the return.

{¶ 4} "In his decision, the Tax Administrator denied the overpayment claim for 1999 in full and denied a portion of the overpayment claims for 2000 through 2002. In denying the refund claim for 1999, the Administrator found that the claim had previously been denied by the income tax auditor in a letter dated February 6, 2001. The Administrator determined that the March 25, 2004 submission of information by AT&T Ohio constituted a new refund claim for 1999 and this claim was filed after the limitation period had run.

{¶ 5} "The partial denial of the 2000 through 2002 claims was based on the Administrator's disallowance of AT&T Ohio's deduction of interest income in computing its net profits subject to the city's income tax. The Administrator also applied $57,344.97 of the refund allowed for the 2000 through 2002 tax years to a withholding tax liability of AT&T's parent corporation (AT&T Corporation).

{¶ 6} "AT&T Ohio appealed the Administrator's decision to the Board. The Board affirmed the Administrator's decision denying the 1999 refund claim and reversed the Administrator's partial denial of the 2000-2002 refund claims

based on the disallowance of AT&T Ohio's deduction of interest income from its parent corporation and the Administrator's offset against AT&T Ohio's refund for the withholding tax assessment against the parent corporation."

{¶ 7} Following the Board's decision, AT&T Ohio filed a timely notice of appeal in the court of common pleas. The tax administrator subsequently filed a brief in opposition to AT&T Ohio's appellate brief and filed two cross-assignments of error, challenging (1) the Board's finding that AT&T Ohio was entitled to deduct interest from its parent company for tax years 2000-2002, and (2) the Board's reversal of the administrator's application of an offset to tax years 2000-2002 for a withholding tax obligation of AT&T Ohio's parent company.

{¶ 8} AT&T Ohio moved to strike the tax administrator's cross-assignments of error on the grounds that he had not filed a notice of appeal. The trial court denied the motion and considered both parties' assignments of error.

{¶ 9} The trial court ultimately found in favor of the tax administrator on all issues, thereby affirming the Board's decision finding that the TY 1999 request for refund was time-barred and reversing the Board's decision related to the administrator's partial denial of AT&T Ohio's claims for TY 2000-2002.

{¶ 10} AT&T Ohio appeals, raising nine assignments of error.[1] Because some of the assignments of error involve the same application of facts and law, we will address them together where appropriate.

Standard of Review

{¶ 11} Our standard of review in this R.C. Chapter 2506 appeal is "more limited in scope" than the standard applied by the trial court when reviewing the decision of the Board. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433. We "review the judgment of the common pleas court only on 'questions of law,' which does not include the same extensive power to weigh 'the preponderance of substantial, reliable and probative evidence,' as is granted to the common pleas court." Id. (citations omitted). "The trial court's application of law to undisputed facts involves a 'question of law' that we may review under R.C. Chapter 2506." *Wardrop v. Middletown Income Tax Rev. Bd.*, 12th Dist. No. CA2007-09-235, 2008-Ohio-5298, ¶14, citing *Henley* at 148. Similarly, we may consider whether the trial court abused its discretion in applying the law to the facts. Id.

{¶ 12} With these standards in mind, we turn to the issues before us.

Statute of Limitations

{¶ 13} AT&T Ohio's first six assignments of error address the same critical issue: whether the trial court properly determined that AT&T Ohio's TY 1999

[1] The assignments of error are set forth in the appendix.

claim for refund was time-barred. Arguing that the statute of limitations had not lapsed, AT&T Ohio's primary argument is that its claim for refund filed on October 18, 2000 for TY 1999 had not been properly denied and that the trial court erred in finding that AT&T Ohio's later submission of documentation constituted a new, separate claim for refund for TY 1999. It contends that the trial court wrongly concluded that the February 6, 2001 letter of the Central Collection Agency ("CCA" or "Agency") was a final denial of its TY 1999 claim for refund. According to AT&T Ohio, it could not have been a final denial because the letter did not contain the requisite notice, and the Agency's income tax auditor lacked the authority to issue a final denial of its refund claim. AT&T Ohio further argues that the Agency's handling of the claim further evidences that it did not treat the February 2001 letter as a final denial. We find AT&T's arguments, however, unpersuasive.

{¶ 14} Initially, we note that the statute of limitations for filing a claim for refund is three years "after the tax was due or the return was filed, whichever is later." R.C. 718.12(A) and (C). Here, because AT&T filed its claim for refund for TY 1999 on October 18, 2000, the statute of limitations began to run on that date and expired on October 18, 2003.

{¶ 15} Before addressing the merits of AT&T Ohio's claim, we find it important to recognize the function of the statute of limitations. As recognized by the Ohio Supreme Court, "[s]tatutes of limitations seek to prescribe a

reasonable period of time in which an injured party may assert a claim, after which the statute forecloses the claim and provides repose for the potential defendant." *Liddell v. SCA Servs. of Ohio, Inc.* (1994), 70 Ohio St.3d 6, 10, 635 N.E.2d 1233. Despite the fact that a plaintiff may otherwise be precluded from recovering on a valid claim, "sound policy" favors the adherence to a limitations period, which includes the following: "to ensure fairness to defendant; to encourage prompt prosecution of causes of action; to suppress stale and fraudulent claims; and to avoid the inconvenience engendered by delay, specifically the difficulties of proof present in older cases." Id., citing *O'Stricker v. Jim Walter Corp*. (1983), 4 Ohio St.3d 84, 88, 447 N.E.2d 727. And while certain exceptions exist that toll the running of statute of limitations, a plaintiff's failure to act and "sitting on his rights" will not bar the application. Id. at 13.

{¶ 16} We now turn to the relevant facts related to AT&T Ohio's argument. The record reveals that after AT&T Ohio filed its TY 1999 claim for refund on October 18, 2000, the Agency sent a letter approximately 60 days later, dated December 22, 2000, requesting that AT&T Ohio provide additional specifically listed information within ten days. The additional information was necessary to determine the validity of the requested refund. According to the Agency, AT&T Ohio's October 18, 2000 filing was not considered to be a complete return due to the missing requisite information.

{¶ 17} AT&T Ohio, however, failed to timely respond and provide the requested information. Consequently, the Agency issued a letter to AT&T Ohio on February 6, 2001, denying its refund request due to its failure to respond and provide the requested information. Over three years later, and after AT&T Ohio's subsequent filings for TY 2000-2002 were also denied for failing to provide information necessary to audit the tax returns, on March 25, 2004, AT&T Ohio finally submitted the requested information in support of its TY 1999 claim for refund. The Agency treated this submission as a new claim for refund and denied it as time-barred.

{¶ 18} While AT&T Ohio urges this court to ignore the effect of the February 6, 2001 denial letter, we refuse to do so. Contrary to AT&T Ohio's position, we fail to see how this letter could be treated as anything other than a denial of its refund request. As noted by the trial court, "the letter expressly states that the refund request had been denied."

Due Process and Notice

{¶ 19} Relying on several cases dealing with procedural due process requirements, AT&T Ohio contends that the February 6, 2001 letter is void because it failed to notify AT&T Ohio "that it was a final decision or that AT&T was required to do anything to preserve its right to a refund or right to appeal." But AT&T Ohio ignores a critical distinction between this case and the cases that it cites. The February 6, 2001 denial letter did not foreclose AT&T Ohio's ability

to refile the refund claim with the requested necessary information before the statute of limitations expired. AT&T Ohio therefore was not deprived of any property interest by such denial. Indeed, AT&T Ohio was made aware as early as December 22, 2000 that the Agency needed additional information in order to process the refund request — AT&T Ohio could have immediately refiled a claim for refund for TY 1999 after being denied. But it simply chose to ignore the denial letter, and its own inaction is what ultimately resulted in its claim being time-barred.

{¶ 20} We further must emphasize the procedural requirements involved in decisions of the Agency. Under CCA's Rules and Regulations, final administrative rulings by the tax administrator are issued *only* upon taxpayer requests. See former Articles 23:03(B) and 25:03 (these were the rules in effect for the TY 1999-2001 returns) and Articles 13:03(B), 15:03(1), and 15:04. Further, a tax administrator's final administrative ruling is a prerequisite to invoke the jurisdiction of the Board on appeal. See Cleveland Codified Ordinances 191.2503; R.C. 718.11.

{¶ 21} Notably, AT&T Ohio did not challenge the constitutionality or validity of these administrative regulations below. Indeed, AT&T Ohio did in fact request a final ruling from the tax administrator on September 1, 2005, thereby evidencing its knowledge of this requirement. But unfortunately for AT&T Ohio, its request was made beyond the statutory period for its TY 1999 claim.

{¶ 22} As for AT&T Ohio's claim that the denial letter failed to comply with the notice requirements of R.C. 718.11, we also find this argument lacks merit. The statute provides in relevant part:

{¶ 23} "Whenever a tax administrator issues a decision regarding a municipal income tax obligation that is subject to appeal as provided in this section or in an ordinance or regulation of the municipal corporation, the tax administrator shall notify the taxpayer in writing at the same time of the taxpayer's right to appeal the decision and of the manner in which the taxpayer may appeal the decision."

{¶ 24} The statute, therefore, applies solely to rulings by the tax administrator. Notably, after AT&T Ohio requested a final administrative ruling on September 1, 2005, the tax administrator issued the same on February 7, 2006. This written ruling, which is subject to the statute, expressly sets forth the taxpayer's notice of appeal rights and the manner in which to appeal.

Authority and Actions of Agency

{¶ 25} AT&T Ohio also contends that the denial of its claim for refund for TY 1999 was invalid because the decision was not rendered by the tax administrator but rather an income tax auditor of the Agency, who allegedly lacked the authority to issue a final decision. It cites several cases for the proposition that "final adjudicatory authority may not be subdelegated" and therefore, any final denial of a refund claim must be issued by the tax

administrator. We find AT&T Ohio's application of these cases to the February 6, 2001 denial letter misplaced.

{¶ 26} While we agree that the tax administrator is the sole person with authority to issue a final administrative ruling, we find the denial letter issued by the income tax auditor (as a result of the taxpayer's failure to submit the requested information) to be consistent with the administrator's authority to delegate duties to review, investigate, and audit returns in connection with requests for refunds. See former Articles 23:06(A) and 23:07(A). Indeed, of the estimated 500-600 refunds that are pending before the Agency at any given time, we find no basis to conclude that the tax administrator is the sole person with authority to deny a request for refund based on a taxpayer's failure to comply with the Agency's request for information. Instead, we agree with the Board's disposition of this argument, noting that there is no provision in law "requiring that the Administrator personally execute every document issued by the Division," and there is "nothing unreasonable in a procedure that puts the onus on the taxpayer to request a ruling of the Tax Administrator from which to appeal."

{¶ 27} Indeed, as noted by the Ohio Supreme Court, "[i]n the operation of any public administrative body, subdelegation of authority, impliedly or expressly, exists — and must exist to some degree." *Bell v. Bd. of Trustees* (1973), 34 Ohio St.2d 70, 74, 296 N.E.2d 276. We are unpersuaded that the February 6,

2001 denial letter had no effect simply because it was not a "final administrative ruling" from the tax administrator. Therefore, we find no legal basis to conclude that the denial letter is invalid solely because it was a form letter issued by a tax auditor. Again, AT&T Ohio could have requested a ruling from the tax administrator close in time to its receipt of the denial letter. To the extent that it waited over three years to do so, its inability to now recover on the claim arises directly from its own inaction — not any wrongdoing by the Agency.

{¶ 28} AT&T Ohio further argues that the trial court improperly disregarded the evidence of the Agency's contradictory actions in handling its TY 1999 claim. Specifically, AT&T Ohio relies on January 6, 2005 and January 27, 2005 approval letters of its TY 1999 claim as evidence that the Agency's intention to keep AT&T Ohio's claim open and pending. But this argument presupposes that the February 6, 2001 denial letter was somehow invalid. Having already found that the letter was valid, we find this argument to have no merit. And while these erroneous notifications clearly created some confusion, they 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.

{¶ 29} Finally, AT&T Ohio argues that the Agency's request for information related to its TY 1999 claim, after it issued the February 2001 denial letter, further evidences the Agency's intent to keep the claim open. The record reveals, however, that the Agency requested this information because AT&T

Ohio carried its TY 1999 claim as a credit in its subsequent filings. We therefore find no merit to this argument.

{¶ 30} In conclusion, while we recognize AT&T Ohio's frustration in not being able to recover what appears to have been a valid claim, we cannot overlook that it sat on its rights for over three years, ignoring the Agency's request for additional information and ultimate denial of its claim. AT&T Ohio did not provide the requested information until March 24, 2004, thereby constituting a new claim, which was outside the statute of limitations period. Under such circumstances, we find that the statute of limitations was properly applied and that its TY 1999 claim is time-barred.

{¶ 31} The first six assignments of error are overruled.

Trial Court's Jurisdiction to Consider Cross-Assignments of Error

{¶ 32} In its seventh assignment of error, AT&T Ohio argues that the trial court lacked jurisdiction to consider the tax administrator's cross-assignments of error because he failed to separately appeal from the Board's decision. We agree.

{¶ 33} Here, the tax administrator never filed a separate appeal from the Board's decision. And while we agree that (1) every final administrative decision may be reviewed under R.C. 2506.01, and (2) the procedures in reviewing the appeal are set forth in Chapters 2505 and 2506, with the provisions of R.C. 2506.01 through 2506.04 controlling, the trial court's

jurisdiction is not invoked unless the appealing party files a timely notice of appeal. In this case, the trial court's jurisdiction to hear the appeal arises specifically under R.C. 718.11, which recognizes "that the taxpayer or the tax administrator may appeal the board's decision as provided in section 5717.011 of the Revised Code." R.C. 5717.011 provides in relevant part:

{¶ 34} "If the taxpayer or the tax administrator elects to make an appeal to the board of tax appeals or court of common pleas, the appeal shall be taken by the filing of a notice of appeal with the board of tax appeals or court of common pleas, the municipal board of appeal, and the opposing party. The notice of appeal shall be filed within sixty days after the day the appellant receives notice of the decision issued under section 718.11 of the Revised Code."

{¶ 35} Thus, the statute specifically imposes a duty on the party seeking to appeal to file a timely notice of appeal.

{¶ 36} Relying on the Ohio Supreme Court's decision in *Cincinnati Bell v. Glendale* (1975), 42 Ohio St.2d 368, 370, 328 N.E.2d 808, the tax administrator argues that, since a Chapter 2506 appeal "proceeds as in the trial of a civil action," AT&T Ohio's filing of a notice of appeal alone allowed the trial court to consider his cross-assignments of error seeking a partial reversal of the Board's decision, despite the tax administrator never having filed an appeal. But we find the tax administrator's reliance on *Cincinnati Bell* for this proposition misplaced. While we agree that *Cincinnati Bell* recognizes that a Chapter 2506 appeal

differs substantially from other appeals in that an administrative appeal may involve a de novo hearing at the common pleas court, it has no bearing on a trial court's jurisdiction to consider an appeal. Nor does it hold that a party to an administrative proceeding below can appeal the judgment of the administrative tribunal without filing a notice of appeal. We find no authority to support such a position.

{¶ 37} We likewise find no merit to the tax administrator's claim that Loc.R. 28(B) authorizes the trial court to consider cross-assignments of error for purposes of modifying the Board's decision despite the appellee not filing a notice of appeal. But, this provision merely sets forth the time line for filing cross-assignments of error.

{¶ 38} Further, the application of this rule must be applied consistently with R.C. 2505.22, which expressly governs cross-assignments of error. And it is well settled that while "[a]n appellee who has not filed a notice of appeal * * * can file cross-assignments of error under R.C. 2505.22, * * * such assignments of error are only for the limited purpose of preventing the reversal of the judgment under review." *Chapman v. Ohio State Dental Bd.* (1986), 33 Ohio App.3d 324, 515 N.E.2d 992, paragraph two of the syllabus. Indeed, while a cross-assignment of error "may be used by the appellee as a shield to protect the judgment of the lower court," it "may not be used by the appellee as a sword to destroy or modify that judgment." *Parton v. Weilnau* (1959), 169 Ohio St.

145, 171, 158 N.E.2d 719. Thus, to construe Loc.R. 28(B) as authorizing an appellee to challenge an administrative adjudication, despite not having filed a timely notice of appeal, would directly conflict with R.C. 2505.22 and therefore be unlawful. See *State ex rel. Mothers Against Drunk Drivers v. Gosser* (1985), 20 Ohio St.3d 30, 485 N.E.2d 706, paragraph three of the syllabus ("A local rule of court cannot prevail when it is inconsistent with the express requirements of a statute.").

{¶ 39} Having found that the trial court lacked jurisdiction to consider the tax administrator's cross-assignments of error, we reverse its decision to the extent that it modified the Board's decision in favor of the tax administrator. The seventh assignment of error is sustained. We further find that our disposition of this assignment of error renders the two remaining assignments of error moot.

Judgment affirmed in part, reversed in part, and case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR

APPENDIX

"[1.] The Common Pleas Court erred in finding that the City of Cleveland Board of Income Tax Review ('Board') correctly denied AT&T Communications of Ohio's ('AT&T') tax year 1999 refund claim because the statute of limitations for filing the refund claim had expired.

"[2.] The Common Pleas Court erred in affirming the Board's finding that the February 6, 2001 letter to AT&T from a Central Collection Agency ('CCA') auditor constituted a final denial of AT&T's tax year 1999 refund claim.

"[3.] The Common Pleas Court erred in failing to address AT&T's argument and hold that the CCA auditor did not have authority to issue a final order denying AT&T's tax year 1999 refund claim.

"[4.] The Common Pleas Court erred in failing to address AT&T's argument and hold that the Board's finding that the February 6, 2001 form letter from the CCA auditor was a final denial of AT&T's tax year 1999 refund claim results in a denial of AT&T's procedural due process rights.

"[5.] The Common Pleas Court erred in failing to address AT&T's argument and hold that the February 6, 2001 letter, to the extent it was intended as a final decision denying AT&T's tax year 1999 refund claim, was void for failing to provide the requisite due process notice to AT&T.

"[6.] The Common Pleas Court erred in failing to address AT&T's argument and hold that the February 6, 2001 letter, to the extent it was intended as a final decision denying AT&T's tax year 1999 refund claim, was invalid for failing to comply with the notice requirements of R.C. 718.11.

"[7.] The Common Pleas Court erred in considering the holding of the Board on the interest income and withholding tax liability offset issues because the court lacked jurisdiction over those issues for the reason that the tax administrator did not file an appeal from the Board's decision.

"[8.] The Common Pleas Court erred in reversing the holding by the Board that the tax administrator's attempt to tax interest income deducted by AT&T on its 1999 - 2002 returns violated R.C. 718.01(F)(3) and in holding that the interest income did not meet the definition of intangible income in R.C. 718.01(A)(4).

"[9.] The Common Pleas Court erred in reversing the holding by the Board that the tax administrator improperly offset AT&T's refunds for the 2000 - 2002 tax years for an alleged withholding tax liability of AT&T's parent company and in concluding that a paymaster relationship existed between AT&T and its parent company."