

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Cingular Wireless II, LLC,
Petitioner,

MTT Docket No. 448386

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

FINAL OPINION AND JUDGMENT

This matter was heard before Administrative Law Judge (“ALJ”) Thomas A. Halick. A Proposed Order Granting Petitioner’s Motion for Summary Disposition was issued on July 29, 2013. The Proposed Order provided, in pertinent part, “the parties shall have 20 days from date of entry of this Proposed Opinion and Judgment to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281). The exceptions and written arguments shall be limited to the evidence admitted at the hearing. This Proposed Opinion and Judgment, together with any exceptions and written arguments, shall be considered by the Tribunal in arriving at a final decision in this matter pursuant to Section 26 of the Tax Tribunal Act (MCL 205.726).”

Petitioner filed exceptions to the Proposed Opinion and Judgment on August 16, 2013. Respondent filed a response to Petitioner's exceptions on August 30, 2013.

PETITIONER'S EXCEPTIONS

1. "On page 2 of the Proposed Judgment, footnote one states, 'In 2007, Petitioner changed its name to AT&T Mobility LLC.' This is incorrect. Petitioner changed its name to AT&T Mobility II, LLC."
2. "On page 5 of the Proposed Judgment, there is a listing of states in which Petitioner conducted customer service activities. This list is missing the State of Mississippi."
3. "On page 10 of the Proposed Judgment, the first sentence . . . slightly misstates Mr. Francis's testimony. The sentence should be changed as follows: 'Mr. Francis testified that he found that there were no differences within each of the three services' cost patterns: Voice, messaging, and data services.' This also aligns with the factual findings at page 12"
4. "[A]ny discussion of whether the Department's argument that its assessment, issued using MCL 205.52 as the sales factor apportionment basis, can be argued to be an assessment based on MCL 205.53(b) using the billing address as the cost of performance measure, and whether that argument is precluded under

Montgomery Ward & Co, Inc v Dep't of Treasury, 191 Mich App 674; 478
NW2d 745 (1991) is moot because its resolution has no effect on the outcome.”

5. “Further, this discussion constitutes dicta because it is not necessary to the resolution of the case. The discussion of this issue and the *Montgomery Ward* case on pages 35 through 38 should be stricken from the Order and Judgment.”

RESPONDENT’S RESPONSE TO PETITIONER’S EXCEPTIONS

1. “. . . Respondent agrees that the Proposed Order correctly interprets and applies *Montgomery Ward* . . . to the facts of this case. In the Proposed Order, Judge Halick distinguishes the facts of this case from the facts in *Montgomery Ward* and correctly concludes that *Montgomery Ward* does not preclude Respondent’s legal argument in this case.”
2. “Petitioner fails to articulate, let alone, explain how Judge Halick’s *Montgomery Ward* analysis was based on an error of law or a mistake of fact, or any other legitimate basis for the Tribunal not to accept the Proposed Order as its final decision. The only basis Petitioner offers for removing Judge Halick’s *Montgomery Ward* discussion is that the issue has no effect on the outcome of this case. Petitioner’s reasoning cannot meet this Tribunal’s ‘good cause’ standard.”

3. “Judge Halick’s decision to address Petitioner’s *Montgomery Ward* argument - a count in Petitioner’s Petition and a legal issue in Petitioner’s Motion for Summary Disposition - was not an error of law or mistake of fact.”
4. “Judge Halick considered and ruled on an issue put before him by Petitioner. This was not an error of law or mistake of fact. Thus, Petitioner’s request to strike Judge Halick’s *Montgomery Ward* discussion should fail.”

CONCLUSION

The Tribunal has reviewed the exceptions, the response, and the case file, and finds that the ALJ correctly included a discussion of *Montgomery Ward* in the Proposed Opinion and Judgment. The issue of whether Respondent was limited to its theory of recovery during the audit, pursuant to the *Montgomery Ward* case, was raised by Petitioner, listed as a legal issue in the Prehearing Summary, and addressed more fully in Petitioner’s Motion for Summary Disposition. Petitioner’s reason for requesting that the discussion be removed from the Proposed Order is that it is “dicta” and is “moot because its resolution has no effect on the outcome.” There was no error on the part of the ALJ in addressing an issue raised by Petitioner’s Motion in the Proposed Order; rather it was appropriate for the ALJ to address an issue raised during the course of this appeal and in the Motion being ruled upon in the Proposed Order. As stated by Respondent, Petitioner has failed

to establish good cause or a mistake of fact or error of law on the part of the ALJ in considering this argument.

Tribunal further finds, however, that Petitioner has correctly pointed out typographical errors or misstatements on certain pages of the Proposed Order. The Tribunal finds that Petitioner's corrections indicated in its exceptions to pages 2, 5, and 10 of the Proposed Order should be made, with the remainder of the Proposed Order being adopted.

Given the above, the Tribunal modifies the July 29, 2013 Proposed Order, as indicated above to correct pages 2, 5, and 10, and adopts the modified Proposed Order as the Tribunal's Final Opinion and Judgment in this case, pursuant to MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law in the Proposed Order as modified herein, in this Final Opinion and Judgment. Therefore,

IT IS ORDERED that the Administrative Law Judge's Proposed Order is adopted as CORRECTED above by the Tribunal as the Final Opinion and Judgment.

IT IS FURTHER ORDERED Petitioner's Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that Assessment No. TM95966 shall be CANCELLED.

IT IS FURTHER ORDERED that Petitioner's claim for a refund in the amount of \$5,715,205 shall be GRANTED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties, as finally shown in the Proposed Order within 20 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund as required by this Final Opinion and Judgment within 28 days of entry of this Final Opinion and Judgment.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

By: Kimbal R. Smith III

Entered: September 09, 2013