

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

WIRELESS CITY, LLC,

Petitioner,

vs.

NEBRASKA DEPARTMENT OF
REVENUE, AND TONY FULTON,
TAX COMMISSIONER,

Respondents.

CASE NO. CI 20-769

ORDER

LANCASTER COUNTY
2020 AUG 19 AM 7:23
CLERK OF THE
DISTRICT COURT

This matter came before the Court on June 12, 2020, on Petitioner, Wireless City, LLC's ("Petitioner") appeal from a final decision of Respondents, Nebraska Department of Revenue ("DOR") and Tony Fulton, Tax Commissioner ("Tax Commissioner") (collectively "Respondents"), dated February 10, 2020. Zachary W. Lutz-Priefert appeared for Petitioner. Assistant Attorney General Jay Bartel appeared for Respondents. The transcript¹ and the supplemental transcript² were filed on April 2, 2020 and April 13, 2020, respectively. The Court heard arguments and took the matter under advisement. The Court, being fully advised in the premises, finds and orders as follows.

¹ The original transcript "contains all the documentation that [DOR] received and reviewed with regard to the appeal of [Petitioner] for the denial of credits for prepaid wireless surcharge returns filed by [Petitioner]." Tr. ii.

² The supplemental transcript "contains the fax transmittal information that was faxed on February 26, 2020 to [DOR] that were inadvertently omitted from the original transcript relating to the claim filed by [Petitioner]." Supplemental Tr. ii.



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FACTUAL AND PROCEDURAL BACKGROUND

Petitioner owns and operates a store selling Boost Mobile telephones and prepaid cards containing minutes for Boost Mobile cellular telephones. Pet. ¶ 11. Boost Mobile is a subsidiary of Sprint Corporation (“Sprint”). Tr. 32; Supplemental Tr. 1. All of the products and services sold by Petitioner are products which are serviced by Sprint. Pet. ¶¶ 12, 14.

In a letter dated October 20, 2019, James G. Jandrain, Petitioner’s accountant, informed DOR that Petitioner “ha[s] been inadvertently filing the Nebraska Prepaid Wireless Surcharge Return and remitting the associated payment for the past year and a half.” Tr. 32; Supplemental Tr. 1. He explained that “[p]er an affidavit signed by [Michael G. Wall,] the vice president of Sprint Corporation (see attached), as of September 8, 2017, Sprint changed its pricing strategy for its prepaid plans and services” and “Boost Mobile assumed responsibility for the application and remittance of such taxes that apply to the sale and use of prepaid wireless services.” Tr. 32; Supplemental Tr. 1. He was informed that filing Form E911XN “would be the best way to request a refund” of the prepaid wireless surcharges previously paid. Tr. 32; Supplemental Tr. 1.

In the affidavit referenced in Mr. Wall stated as follows:

Effective September 8, 2017, Boost is changing its marketing, advertising, and pricing strategy for its prepaid plans and services. Under this new model, Boost will advertise to its Customers that the total charges for prepaid services will include taxes Boost is discontinuing the sale of prepaid wireless calling cards. Boost’s new product will be Tax Inclusive Prepaid Service Credits (“Boost Mobile Wireless Card”). **Boost will be responsible for the application and remittance of such taxes that apply to the sale and use of its Boost Mobile Wireless Cards at the time the cards are redeemed for Boost’s products and services** Customers will now purchase Boost Mobile Wireless Cards from Boost and vendor partners. Using their online account, Customers can use their credits to purchase prepaid service plans, add-ons, or other prepaid services. Boost will calculate the amount of taxes and fees applicable to the prepaid services or add-ons selected and purchased by the customer and will charge and display applicable taxes at the time of that transaction. **Boost will be responsible for the application and remittance of such taxes to the appropriate taxing jurisdiction.**

Tr. 34–35 (emphasis added); Supplemental Tr. 3–4 (emphasis added).

On or about October 23, 2019, Petitioner filed Amended Nebraska Prepaid Wireless Surcharge Returns, Form E911XN, requesting a refund of the surcharges for the tax periods from September 2017 through July 2019. Tr. 1, 3, 8–31, 40–62; Supplemental Tr. 9–31. Each form indicated that Petitioner “inadvertently continued to file the prepaid wireless surcharge return despite having received an affidavit from the wireless provider stating the provider would take over these tax payments[.]” Tr. 40–62; Supplemental Tr. 9–31.

On October 28, 2019, Sarah J. Krueger, Revenue Senior Agent of DOR, emailed Lee Glaser, DOR’s Tax Specialist, stating that Petitioner has filed amended prepaid wireless surcharge returns for the tax periods from September 2017 through July 2019, and that the affidavit mentioned in the letter was not attached. Tr. 3. In her email, Ms. Krueger asked, “What information other than the affidavit do we need to substantiate this refund?” *Id.* Mr. Lee responded, “[Petitioner] will need to provide documentation to substantiate Sprint has remitted the prepaid wireless surcharge to DOR and [Petitioner] has refunded the prepaid wireless customer before DOR can credit the prepaid wireless account.” *Id.*

On November 11, 2019, Mr. Jandrain faxed the Power of Attorney (Form 33) for Petitioner to Ms. Krueger pursuant to her request. Tr. 5–6. The record contains no other communications between Petitioner and DOR between November 11, 2019 and February 10, 2020, regarding Petitioner’s refund requests.

On February 3, 2020, Mr. Lee informed Ms. Krueger that Petitioner’s refund requests should be denied because “DOR has made determination that [Petitioner] is the seller/retailer of prepaid wireless telecommunication service for the periods in question and was required to collect the prepaid wireless surcharge as stated in Neb. Rev. Stat. §§ 86-901 through 86-905.” Tr. 2 (underline in original).

On February 10, 2020, Jessie Case, Revenue Operations Supervisor of DOR, issued a letter denying Petitioner's refund requests "due to not receiving the supporting documentation requested." *Id.* at 1. Ms. Case advised that Petitioner had 30 days to appeal the DOR's determination with the Lancaster County District Court. *Id.* No administrative hearing was requested or held in regard to this matter. *Id.* at ii. On March 10, 2020, Petitioner appealed.

STANDARD OF REVIEW

"Any final action of the Tax Commissioner may be appealed, and the appeal shall be in accordance with Administrative Procedure Act." Neb. Rev. Stat. § 77-27,127 (2018). A petition for review filed pursuant to Administrative Procedure Act are conducted by the district court without a jury *de novo* on the record of the agency. *Id.* at § 84-917(5)(a). In a review of *de novo* on the record, the district court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *Schwartz v. Neb. Liquor Control Comm'n*, 271 Neb. 346, 351 (2006). The district court may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings. Neb. Rev. Stat. § 84-917(6)(b).

ANALYSIS

Petitioner argues that it is entitled to a refund of the prepaid wireless surcharges it paid to DOR because it is not a "seller" of prepaid wireless services. Respondents, however, argue that Petitioner lacks standing to request a refund of the prepaid wireless surcharges it collected from customers and remitted to DOR, as it is a "seller" of prepaid wireless services, and the legal incidence of the surcharge is on the customer. They argue that, even if Petitioner did not lack standing, the Court should nonetheless affirm because Petitioner is a "seller" and is required by statute to collect and remit the surcharges from its customers on each retail transaction.

The central issue in this appeal is whether Petitioner is a “seller” required by statute to collect and remit the prepaid wireless surcharges from its customers.³ Petitioner argues that it is not a “seller,” but an independent contractor of Boost/Sprint. Petitioner’s Br. 6–10. According to Petitioner, “Boost/Sprint was the one who actually received funds from a customer, and then used those funds to pay the tax.” *Id.* at 8. Petitioner argues that it “was not remitting funds to [DOR] that it was holding from customers pursuant to the tax, [but] instead, was remitting its own funds [as] [a]ll of the funds that [it] received were immediately paid to Boost/Sprint.” *Id.*

Pursuant to the Nebraska Prepaid Wireless Surcharge Act (the “Act”), a “[p]repaid wireless surcharge [is a] charge that is required to be collected by a seller from a consumer[.]” Neb. Rev. Stat. § 86-902(2). Under the Act, “each seller shall collect the prepaid wireless surcharge from the consumer with respect to each retail transaction occurring in this state.” *Id.* at § 86-903(4). “Consumer means a person who purchases prepaid wireless telecommunications service in a retail transaction[.]” *Id.* at § 86-902(1). “Prepaid wireless telecommunications service means a wireless telecommunications service that allows a caller to dial 911 to access the 911 system, which service must be paid in advance and is sold in predetermined units or dollars of which the number declines with use in a known amount of expiration of time[.]” *Id.* at § 86-903(3). “Retail transaction means the purchase of prepaid wireless telecommunications service from a seller for any purpose other than resale[.]” *Id.* at § 86-903(5). “Seller means a person who sells prepaid wireless telecommunications service to another person[.]” *Id.* at § 86-902(6). “Provider means a person that provides prepaid wireless telecommunications service pursuant to a license issued by the Federal Communications Commission[.]” *Id.* at § 86-903(4).

³ Respondents’ lack of standing argument is premised on their assertion that Petitioner is a “seller” of prepaid wireless services and is required by statute to collect and remit the surcharges from its customers. Thus, the Court must first address whether Petitioner is a “seller” as defined by the statute.

The Act provides that “[t]he prepaid wireless surcharge is the liability of the customer and not of the seller or of any provider, except that the seller shall be liable to remit all prepaid wireless surcharges that the seller collects from consumers as provided in section 86-904, including all such charges that the seller is deemed to collect when the amount of the charge has not been separately stated on an invoice, receipt, or other similar document provided to the consumer by the seller.” *Id.* at § 86-903(5). “Sellers shall remit collected prepaid surcharges to the Department of Revenue in the manner provided in the Nebraska Revenue Act of 1967 with respect to sales tax.” *Id.* at § 86-904(1).

The Court finds that the record is insufficient to support DOR’s action in this matter. The record indicates that DOR denied Petitioner’s refund requests “due to not receiving the supporting documentation requested.” Tr. 1. The record, however, is unclear as to which supporting documentation was requested and what the deadline was for submitting the requested documentation. Moreover, the record indicates that DOR’s denial was based on its determination that Petitioner was “the seller/retailer of prepaid wireless telecommunication service for the periods in question and was required to collect the prepaid wireless surcharge as stated in [the Act].” *Id.* at 2. The record, however, does not support this determination.

Mr. Wall’s affidavit states that, as of September 8, 2017, Boost “discontinu[ed] the sale of prepaid wireless calling cards,” and instead, introduced a new product called “Tax Inclusive Prepaid Service Credits (“Boost Mobile Wireless Cards”).” Due to this change in product, customers would now purchase Boost Mobile Wireless Card from Boost and vendor partners and use their credits to purchase prepaid service plans and other prepaid services from Boost. Tr. 34–35; Supplemental Tr. 3–4. In other words, Petitioner, as a vendor partner, no longer sells any prepaid wireless services to customers, but instead sells “credits” that can be used to purchase

prepaid service plans or services from Boost directly. Tr. 34–35; Supplemental Tr. 3–4.

Although the affidavit alone is not sufficient to establish that Boost actually paid the surcharges, it is sufficient to show that there has been a change in Boost’s marketing, advertising, and pricing strategy for its prepaid plans and services, whereby Boost elected to apply and remit taxes and fees applicable to its prepaid wireless products and services. Tr. 34–35.

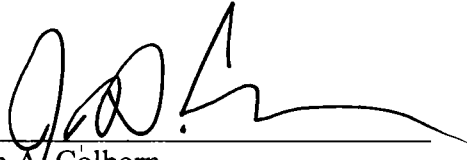
Respondents argue that this Court should not consider Mr. Wall’s affidavit because it was not submitted until after the refund requests were denied on February 10, 2020. Respondents’ Brief at 2, 10. They seem to rely on the date stamp of February 27, 2020, on Mr. Jandrain’s letter included in the supplemental transcript. *Id.* (citing Supplemental Tr. 1, 3–4). The date stamped on Mr. Jandrain’s letter, however, does not establish the date on which the affidavit was received. Supplemental Tr. 1. Respondents’ argument is further undermined by the fact that both Mr. Jandrain’s letter and the affidavit are included in the original transcript, which the Tax Commissioner certified as “contain[ing] all the documentation that [DOR] received and reviewed” in this matter. Tr. ii, 32, 34–35. Moreover, in an email dated October 28, 2019, Ms. Krueger stated: “We have received amended [Prepaid Wireless Surcharge] returns for [Petitioner] . . . [but] [t]he affidavit mentioned in their **letter** is not attached.” Tr. 3, 8 (emphasis added). This statement indicates that DOR received Mr. Jandrain’s letter as early as October 28, 2019, despite the date stamped on the letter in the supplemental transcript. Supplemental Tr. 1. Thus, based on review of the entire record, the Court rejects Respondents’ argument that the affidavit was not received until February 27, 2020. The record indicates that, although the affidavit was not initially attached to Mr. Jandrain’s letter, it was subsequently received and reviewed by DOR, and included in the original transcript as part of the record below. Tr. 3, 8, 34–35.

Accordingly, the Court concludes that this matter should be remanded to DOR for further proceedings. On remand, DOR shall reconsider, in light of the affidavit and any other relevant evidence, whether Petitioner is a “seller” of prepaid wireless services as defined by the statute, and whether Petitioner is entitled to a refund of the prepaid wireless surcharges paid from September 2017 through July 2019.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the final decision of Respondents dated February 10, 2020, is hereby reversed and remanded for further proceedings in accordance with this order.

DATED this 18 day of August, 2020.

BY THE COURT:



John A. Colborn
District Court Judge

cc: Zachary W. Lutz-Priefert, Attorney for Petitioner
zlutzpriefert@grosswelch.com
Jay Bartel, Assistant Attorney General
Jay.bartel@nebraska.gov