

AT& T Communications of
Maryland, Inc,
Petitioner

vs.

Comptroller of the Treasury,
Respondent

* IN THE
* CIRCUIT COURT
* FOR BALTIMORE CITY
* Case No.: 24-C-05-000945

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* * * * *

MEMORANDUM OPINION

AT&T Communications of Maryland, Inc. (“AT&T”) filed this appeal from a Final Order of the Maryland Tax Court (“the Tax Court”) affirming a sales tax assessment by the Comptroller of Maryland (“Comptroller” or “State”) against AT&T for “900 number calls.” AT&T argues that the Tax Court’s decision must be reversed and the tax assessment abated because it is not a vendor under the statute, and thus not responsible for collecting the tax. Alternatively AT&T argues (1) that the statute is unconstitutionally vague and/or ambiguous or (2) if the Tax Court’s interpretation of the statute is correct, then this matter must be remanded to the Tax Court for it to clearly state its factual findings and legal conclusions. The Comptroller argues that the Tax Court should be affirmed because AT&T is in fact a vendor under Md. Code Ann., Tax General Article §§ 11-101(o), 11-701(b), and 11-701(c), and therefore liable for the tax under § 11-403.¹

On August 12, 2005, a hearing was held on AT&T’s petition and for the reasons discussed below, the Court will issue an order affirming the Tax Court.

¹ All statutory references herein are to the Md. Code Ann., Tax General Article unless otherwise indicated.

FACTS

There is no dispute of the facts. AT&T is a telephone company that is licensed to transmit long distance telephone calls and 900 number calls. A 900 number call is an area code assigned by the Federal Communications Commission (“FCC”) that reflects the type of call rather than the geographic location of the call. Also referred to as 900 telecommunications services, 900 number calls permit consumers to obtain a variety of information and/or services over the telephone for a fee. As an AT&T employee testified, a 900 number call is a service provided by AT&T where a consumer can use the “telephone to buy information.”

The information is developed by “information providers” or “content providers” who contract with a the long distance carrier and the local exchange carrier (“LEC”). The content provider decides what information or services to offer and what amount to charge. AT&T entered into contracts with content providers that state that “acting as Customer’s agent AT&T will perform the following services. . . .” The Tax Court found that AT&T’s connections and activities related to the calls included assigning a 900 number, reviewing advertisements, reviewing the preambles that the consumer received over the phone, reviewing the content of the message, transporting the message over part of its network, and, in most cases, billing for the content provider. AT&T also provided dispute resolution services. Grounds for Decision at 2. These services were “in response to federal statutes and regulations, in response to LEC’s and in response to AT&T’s own policies.” *Id.* Finally, the Tax Court pointed out that “AT&T received some of the total revenue produced by the operation,” *id.* and discussed the source of these funds:

The funds received for transport were based on the volume of messages, including the length of time and the number of messages. In addition, there was a fixed element of those funds for the number of lines that were set up. As for collection services, AT&T received a percentage of the money that was involved. It was not based on the amount of time on the network but rather on the number of dollars.

Id. at 3.

During the audit period, AT&T did not collect tax on the 900 number calls over its lines. After the audit the Comptroller assessed sales and use tax against AT&T in the amount of \$6,641,897.82, interest in the amount of \$3,998,241.89, and a penalty in the amount of \$664,159.99.² AT&T appealed, and after a hearing, the Comptroller found that “AT&T is a co-vendor of 900 telecommunications services along with the information providers and, therefore, equally liable for remitting sales tax.” The Comptroller rejected AT&T’s argument that it was only a billing agent for the information providers.³

AT&T filed a timely appeal to the Maryland Tax Court and after a two day trial and briefing by the parties, the Tax Court issued a Memorandum and Order affirming the assessment. The Tax Court rejected AT&T’s argument that it was a common carrier and not a vendor, and noted that “AT&T [was] involved in almost every step in the entire [900-number telecommunications] process.” The Tax Court also rejected AT&T’s argument that

²The assessment was calculated mainly based on the charges appearing on consumer bills for the 900-number calls. A portion of the assessment was attributed to AT&T’s custom calling services. Only the assessment related to 900-number calls is on appeal.

³By agreement, AT&T paid the Comptroller for the tax and interest on its custom calling services from May 1, 1992, through February 28, 2001. The Comptroller waived the penalty and adjusted the tax assessment accordingly to reflect the full assessment.

the statute is vague and ambiguous and decided that AT&T had sufficient nexus to Maryland for it to hold AT&T liable for the tax.

STANDARD OF REVIEW

Because “[t]he applicable standard of judicial review of the final order of the Tax Court depends on whether the court is reviewing a question of law, question of fact, or a mixed question of law and fact,” *State Dept. of Assessments and Taxation v. Consol. Coal Sales Co.*, 382 Md. 439, 454 (2004) (internal quotations and citations omitted), the first task is to determine whether the Court is reviewing a question of law, fact or a mixed question of law and fact. As with the judicial review of most decisions by an administrative agency, “[f]indings of fact by the Tax Court receive greatest deference. . . .” *United Parcel Service, Inc. v. Comptroller of Treasury*, 69 Md. App. 458, 464 (1986). If they are supported by substantial evidence, they may not be reversed. “In contrast, no deference is accorded to a Tax Court’s legal conclusions. . . .” *Id.* (citations omitted). Thus “if the Tax Court’s decision is based on an interpretation of [a] . . . statute,” the Court is “not bound by the agency’s interpretation,” and “the substituted judgment standard applies.” *Rouse-Fairwood Ltd. P’ship v. Supervisor of Assessments of Prince George’s County*, 120 Md. App. 667, 685-86 (1998)(citations omitted).

Most often, an administrative decision is “neither a singularly factual or legal determination,” *Comptroller of Treasury v. World Book Childcraft Intern., Inc.*, 67 Md. App. 424, 440 (1986), but instead is a mixed question of fact and law and “an intermediate level of scrutiny applies.” *United Parcel Service, Inc.*, 69 Md. App. at 464. When the question is mixed the agency’s finding must be affirmed if “after deferring to the [agency’s] expertise and to the presumption that the decision is correct, a reasoning mind could reasonably have

reached the conclusion [that the agency reached].” *Id.*(internal citations and quotation marks omitted). Stated another way, when there is a mixed question of law and fact, the question before the reviewing court is “whether, in light of substantial evidence appearing on the record, a reasoning mind could reasonably have reached the conclusion reached by the Tax Court, consistent with a proper application of [pertinent legal principles].” *World Book Childcraft Intern., Inc.*, 67 Md. App. at 440 (citation omitted).

AT&T argues that the question before the Court is purely legal because the Tax Court misinterpreted the statute, and thus the substituted judgment standard applies and no deference should be accorded to the Tax Court’s Decision. Alternatively, AT&T argues that if the Tax Court did not misinterpret the statute, then the case must be remanded because the Tax Court failed to clearly articulate “the facts found, the law applied, and the relationship between the two.” *Forman v. Motor Vehicle Admin.*, 332 Md. 201, 221 (1993). The Comptroller argues that because there is no dispute of any material fact, the Court is only reviewing a question of law and is free to substitute its judgment for that of the Tax Court.

To determine the applicable standard of review, it is necessary to begin with AT&T’s alternative argument that the Tax Court’s Decision is not “precise and clear enough to facilitate meaningful review.” *Eastern Outdoor Adver. v. Mayor and City Council of Baltimore*, 146 Md. App. 283, 320 (2002). AT&T argues that the Tax Court did not clearly explain what facts it relied upon to show that AT&T is a “vendor,” as defined by § 11-101(o)(1), nor did it ever explicitly state that AT&T is a vendor. AT&T argues that normally this failure would require a remand but a remand is not necessary here because there is no evidence in the record from which the Tax Court could have found that AT&T is a vendor. Alternatively, AT&T argues that if this Court finds that there is evidence in the record that

could support a finding that it is a vendor, the case must be remanded to the Tax Court for it to make explicit findings required by *Forman*, 332 Md. at 220 (“In order to apply the appropriate standard of review, . . . , the reviewing court first must know how and why the agency reached its decision.”).

The Comptroller argues that *Forman* does not apply because there is no dispute of any material fact. Further the Comptroller argues that the Tax Court implicitly found that AT&T was a vendor when it rejected AT&T’s argument that it is not a common carrier, and while ordinarily the review would be a mixed question of law and fact, because there is no dispute of material fact, the Court is only reviewing the law and is free to substitute its judgment for that of the Tax Court.

This Court agrees with the Comptroller. While there was not a stipulation of facts, there is no dispute of any material fact; therefore the substituted judgment standard applies. *See Hercules v. Comptroller*, 351 Md. 101, 110 (1998) (the facts were undisputed and the Court substituted its judgment for that of the Tax Court). *See also Disclosure Information Group v. Comptroller of the Treasury*, 72 Md. App. 381, 386 (1987)(“Given the agreed statement of facts presented to the Tax Court, from which there were no conflicting inferences to be drawn, the only conclusions to be reviewed by the circuit court were the Tax Court's legal conclusions and mixed conclusions of law and fact.”)(citation omitted).

The Court must acknowledge that AT&T is correct that the Tax Court’s opinion is not a model of clarity. Thus the issue is similar to the one recently confronted by the Court of Special Appeals in *Bond v. Dept. of Pub. Safety and Corr. Services*, 161 Md. App. 112 (2005). There the Court held that a remand was not necessary, despite the fact that the ALJ had not specified which portion of the statute the employee had allegedly violated. First of

all, it was possible to determine the scope of the ALJ's decision.

[W]e will review the record for substantial evidence . . . because we can discern that the ALJ either concluded, (1) as a pure matter of fact, that one can reasonably infer, based on appellant's positive drug test, that appellant actually smoked or possessed marijuana at work, or (2) as a mixed question of fact and law, one can reasonably conclude that the presence of detectable traces of marijuana use in appellant's body constitutes use or possession of drugs at work. . . .

Id. at 125. Further, the material facts were undisputed and there was no serious dispute as to the ALJ's application of the law.

Aside from the inference we have held to be unreasonable, the parties do not dispute the facts underlying this case. Nor is there any serious dispute as to the ALJ's statements of the applicable law. The parties' dispute, rather, is over the proper application of the law to the specific, undisputed facts.

Id. at 126. Therefore, the question was whether the ALJ's conclusion was reasonable in light of the evidence and the law. *Id.*

AT&T is correct that the Tax Court's Decision is not as clear as it should be because it never states explicitly that AT&T is a vendor. However, the Tax Court's Decision clearly concluded that AT&T is a vendor. After reviewing the evidence, the Tax Court stated:

The Comptroller asks this Court to affirm based on the fact that AT&T is a vendor (Section 11-107) or, alternatively, as an agent (Section 11-101(m)(2)).

The Petitioner's position is that it is not a vendor or an agent, but merely a regulated provider of telecommunication services to the content providers. In effect, a common carrier like UPS. This position is not supported by the evidence.

Grounds for Decision at 3. The Tax Court then discussed the facts in support of its conclusion that AT&T that is a vendor:

AT&T is involved in almost every step in the entire process. It did not actually write the content but reviewed the

content of the message. AT&T also reviewed the advertisements to the public regarding the 900 service as well as the content of the required preambles. It also provided the transport of the message. The transport function is the only one most like that of a common carrier. AT&T often provided billing and collection activities. It also had a marketing staff to contact potential providers with the intention of adding to the volume of the 900 services. It should be noted that within AT&T these services generated “Fat Sticky Minutes.” The “Fat” part referring to the higher rate that AT&T charged for 900 minutes.

Id. at 4. The steps “in the entire process” had also been discussed by the Tax Court earlier in its Grounds for Decision. *Id.* at 2. After rejecting its argument that it is not a vendor, the Tax Court then rejected AT&T’s arguments that: (1) it is a common carrier; (2) it has no nexus with Maryland; and (3) the statute is vague.

AT&T places great importance on the fact that the Comptroller described AT&T as a “co-vendor,” the Tax Court used the term “involvement,” and in *Bell Atlantic-Maryland, Inc. v. Comptroller*, Md. St. Tax Rep. (CCH) ¶ 201-611 (Md. Tax Ct. January 18, 2000), the Tax Court referred to Bell-Atlantic as a “partner” because “partner,” “co-vendor,” and “involvement” are not terms used in the statute. This Court rejects AT&T’s argument that the use of those terms reflects a confused effort to ignore the language of the statute and create an improper test for determining who is a vendor. They reflect nothing more (or less) than lack of precision.

The Tax Court clearly found that AT&T is a vendor of 900 telecommunications services as defined in § 11-101(o)(1)(ii) or (2)(i) or (ii). Therefore, because it is possible to

discern what the Tax Court decided and the facts are not in dispute, a remand is not necessary.⁴

AT&T IS A VENDOR

AT&T argues that it is not a vendor as that term is used in §§ 11-101(o)(1) and 11-701(c)(1) because it does not sell or deliver a taxable service in Maryland. It argues that it is not an agent or representative of an out-of-state vendor as that term is used in §§ 11-701(b)(2)(ii) and 11-101(o)(2) because it does not sell or deliver a taxable service for the content providers; it is not an agent of the content providers; as a matter of Supreme Court law, it is a common carrier, and therefore cannot be an agent for the content providers; and as a matter of law there are no facts to support a finding that it is a vendor. The Comptroller argues that AT&T is a vendor because it sells and delivers the 900 number calls and acts as an agent or representative of the content providers.

The “Taxable Service” is Not Limited to the Information Provided by the Content Providers But is the Entire Telecommunication Service.

A pivotal question, which AT&T has labeled the “determinative issue,” (AT&T’s Memo at 16) is what is the “taxable service”? Section 11-101(m)(5) provides that “[t]axable service means . . . ‘900,’ . . . and other ‘900-type communication services’.” In its pleadings in this Court, AT&T argued that “the service that the Tax Court deemed to be taxable was *information*,” and that in “the State’s view, . . . , the taxable [service] is the sale of

⁴Indeed, neither party seriously contends that remand is necessary; the Comptroller argues that remand is unnecessary and AT&T’s 44 page Memorandum spends barely three pages at the end of it arguing for remand and does not mention remand in its 15 page reply.

information.” (Emphasis added.)⁵ However during oral argument, AT&T conceded that the Tax Court in fact found that the taxable service is not limited to the information but is the whole “kit and caboodle”:

The definition that seems most appropriate to us of what a 900 call is[,] is when a consumer places a 900 call on his telephone or her telephone, receives some information in response to that call and pays for this transaction through his phone bill. It seems that definition was provided, makes sense to me and *seems to be the service that the legislature intended to tax.*

Oral Opinion Transcript at 501-02 (emphasis added). This was reiterated in the Tax Court’s written grounds for decision:

The following uncontested definition seems most appropriate to the Court concerning what a 900 call is: “When consumers place calls on their telephones, receive some information in response to those calls and pay for these transactions though their phone bills, it is a 900 call.” The Court believes that using this definition, it is clear that the Legislature intended to tax the above described *telephone service*. *This is the taxable event* that shows up on the individual’s phone bill.

Tax Court’s Memorandum of Grounds for Decision at 1. (Emphasis added.) AT&T does not argue that this definition is not supported by substantial evidence.

As the Comptroller points out “[t]he service (like many services) has multiple components, but all these pieces are bundled into a single service for which a single charge is collected.” Even one of AT&T employees acknowledged that a 900 call is a service where information is being purchased “through your telephone”. “Through the telephone” is a

⁵AT&T relied on two out-of-state unpublished opinions in support of its position that what is being purchased by the consumer is information. *In the Matter of the Petition of Phone Programs, Inc.*, 200 WL 385560 (N.Y. Tax. App. Trib. 2000); *Equifax Check Services, Inc. v. Johnson* 2000 WL 827963 (Tenn. Ct. App. 2000). Neither of those case provide any guidance to the resolution of this case primarily because this case involves the interpretation of a Maryland statute and neither of the cited opinions involved interpreting statutes with language similar to the one before this Court.

major component of the service that is being purchased. There is no question that the same information is available through other sources, i.e., newspaper, telephone, or a personal visit, but what the consumer buys, and what is being sold is the ability to obtain information “through the telephone.”

After conceding that the Tax Court found that the telecommunication, not simply the information, is the taxable service, AT&T argued that it sells the telecommunication service to the content providers not to the consumer, and thus it is not the vendor, and not liable for the tax. However, once it is clear that what is being taxed is the “telecommunication services,” i.e., the whole “kit and caboodle” of AT&T’s argument breaks down.

AT&T Sells and Delivers the 900 Telecommunication Services That are Referred to as 900 Number Calls.

AT&T is adamant that it neither sells nor delivers the 900 service to the ultimate consumer and therefore is not a retail vendor or a representative for an out-of-state vendor because it neither sells or delivers the taxable service in this State. The Comptroller argues that AT&T is a vendor because it sells and delivers its communications infrastructure, a taxable service, in Maryland.

To interpret a statute, a court must begin with the words of the statute and interpret them in light of the context in which the statute appears. *GEICO v. Ins. Comm’r*, 332 Md. 124, 131-32 (1993) (citations omitted). Words in statutes are given “their natural and usual meaning in the context of the Legislature’s purpose and objective in enacting the statute.” *Holbrook v. State*, 364 Md. 354, 364 (2001). Statutory language must not be read “in isolation or out of context [but must be read] in light of the legislature’s general purpose and in the context of the statute as a whole.” *Forbes v. Harleysville Mut. Ins. Co.*, 322 Md. 689,

696-97 (1991) (citations omitted). “Context may include related statutes, pertinent legislative history and ‘other material that fairly bears on the . . . fundamental issue of legislative purpose or goal. . . .’ ” *GEICO*, 332 Md. at 132 (citation omitted).

Thus the Court begins with the language of § 11-701 which provides in relevant part:

(b)(2) "Engage in the business of an out-of-state vendor" includes:

(ii) having an agent, canvasser, representative, salesman, or solicitor operating in the State for the purpose of *delivering, selling*, or taking orders for . . . a taxable service; or

(c)(1) "Engage in the business of a retail vendor" means to *sell or deliver* . . . a taxable service in the State.

(Emphasis added.) Sale means “a transaction for a consideration whereby . . . a person performs a service for another person.” § 11-101(i)(1). The statute does not define “deliver.” *The American Heritage Dictionary*, 378 (2nd College Ed. 1982) defines “deliver” as “[t]o take to the intended recipient,” and “delivery” as “[t]he act of delivering or conveying,” and “[t]he act of transferring to another.”⁶ *Id.*

AT&T argues it does not sell because it does not “perform a service for [the customer]” but only sells “transport services” to the content providers. This argument is premised on AT&T’s argument that the taxable service is simply the information, but as discussed above, the Tax Court rejected that argument and found that the taxable service includes the delivery of the information via telephone.

⁶The other meanings are clearly not applicable to the statute.

Further AT&T argues that it does not sell the service because it does not have direct contact with the customer, but sells directly to the content providers; it has no ownership interest in the information and no right or ability to set its price; and on the bill sent to customers the 900 calls are labeled “Non-AT&T” and “Non-Telecommunications.” This argument is not persuasive. As the ALJ found, and all parties agree, AT&T reviews advertisements, reviews the preamble, reviews the content of the message, provides transport over part of its network, provides billing and collection for at least some of the content providers, provides dispute resolution services, and receives funds based on the volume of messages. Thus “AT&T is involved in almost every step in the entire process.” Grounds for Decision at 4.

Additionally, the conclusion that AT&T is a vendor is consistent with other cases finding that a vendor is defined as an entity that receives the income from or owns the item being sold. *See Baltimore Country Club, Inc. v. Comptroller*, 272 Md. 65, 72 (1974) (“Taxability under the Maryland statute . . . in no way depends upon whether the vendor receives income from the sale, retains the amounts collected or receives any benefit therefrom; all that is required is that the amounts be paid in the consummation and complete performance of a ‘retail sale.’”) *Id.* at 72 (citations omitted); *Ridgewood Log Homes, Inc. v. Comptroller*, 77 Md. App. 382, 390 (1988) (independent contractor for out-of-state manufacturer held jointly liable for tax); *Chesapeake Indus. Leasing Co. v. Comptroller*, 331 Md. 428, 436 (1993) (leasing company that assigned right to receive payments retained sales tax collection responsibility); *Hooks v. Comptroller*, 265 Md. 380, 387 (1972) (tax is based on total price of the transaction).

AT&T argues that each one of its involvements should be viewed in isolation from each other and, because none of them individually would support a finding that it is a seller (or deliverer), all of them taken together cannot support a finding that it is a seller. The ALJ rejected this argument. AT&T performs multiple acts that help create the product. There is no basis for saying that as a matter of fact or law each of those acts must be viewed in isolation from each other. *See e.g. Comptroller v. Equitable Trust Co.*, 296 Md. 459, 481-85 (1983) (content of magnetic tapes containing computer programs were not separate from the method of delivery).

AT&T argues that it acts only as a conduit when it delivers the information in the 900 calls and is therefore in the same position as UPS or Federal Express, and that the statute does not, and could not, include a business that simply delivers items purchased by a customer from another entity. AT&T's analogy does not withstand examination. When a customer buys a product from L.L.Bean, the product is separate from the delivery. The customer could arrange to have it delivered any number of ways, and could choose to pick up the product directly from L.L.Bean. That is not true with a 900 call. Even if AT&T's involvement was limited to "transport," (which it is not), the "transport" cannot be separated from the product that the customer is purchasing. Unlike UPS, the consumer would never buy the "product" separate from its delivery. Or stated another way, without the delivery, there is no product. The content is inseparable from the means of delivery and it is only together that they make the "taxable service," i.e., the 900 telecommunication services that are referred to as 900 number calls.

One of the Comptroller's witnesses explained in detail why AT&T's delivery of the 900 calls is not in the same category as Fed Ex delivering a consumer's purchase from Lands End

Q. Now, do you know whether or not AT&T is a common carrier?

A. It is not a common carrier that I am familiar with in the terms common carrier.

Q. So you don't know whether it is or is not then?

A. Personally no, I do not.

Q. Let me give you a hypothetical and ask you what the Comptroller's policy and position would be with regard to it.

If a caller in Maryland calls Lands End in Maine and buys a sweater and Lands End ships it to that caller in Maryland by Fed Ex, is Fed Ex required under Maryland law to collect and remit the sales tax if Lands End omits it from the bill?

A. If Lands End's only responsibility is to deliver that product to the purchaser, no, they have no responsibility.

Q. Now, suppose –

THE COURT: You mean Fed Ex.

A. I'm sorry. Fed Ex. I'm sorry.

Q. Now, suppose it is a COD so that Fed Ex is responsible for collecting the amount of the bill.

Does that change your answer with regard to their responsibility?

A. If their only obligation, it is as a

collection agent, they are only a bill collector, the answer is no, they do not have responsibility to collect the debts.

Q. But if you said – the predicate to your answer was if they are only the bill collector, but they were also delivering the product, were they not?

A. Yes.

Q. Does that change your answer?

A. No. Both are nontaxable services.

Q. So delivery and bill collecting are nontaxable in that circumstance; is that right?

A. That's correct.

Q. And is that because Fed Ex is a common carrier?

A. Yes. That is because Fed Ex is the delivery agent, is a delivery person. He is a common carrier, yes, but not a contract carrier.

REDIRECT EXAMINATION

BY MR. BARRY:

Q. Mr. Glacken, your testimony concerning common carriers, do you believe or was it the practice of the division to carry over policies for tangible goods of common carriers such as trucking companies to taxable telecommunication services?

A. No. And the reason being is that we cannot unbundle, you cannot unbundle that transportation service from the product or service being sold.

Lands End, the purchaser has many options. He could drive up to pick up that

sweater. He could have it shipped by Lands End, or he could have a myriad of carriers to have that sent in. It could be sent through the mail.

With a telecommunications service, gas or electric, there is no other way to get that. You can't go pick this up. It can be delivered only by through lines or telecommunications lines or whatever. There is no way to really separate that product from the transportation.

Q. From the 900 service?

A. The 900 service. There is no other way to get that service. You can't go pick it up. You can't have it sent to you through the mail. When you get that service and buy a 900 number, that is the only way you are going to get it is through the telecommunication service.

As the Comptroller states "AT&T may not completely control the transaction, [neither does the content provider] but it controls enough of the transaction to fit within the definition of vendor contained in the statute: someone who sells or delivers a taxable service."

AT&T also relies on provisions in the Communications Act of 1934, 47 U.S.C. § 228 (c), (d) and the Telephone Disclosure and Dispute Resolution Act, 15 U.S.C. §§ 5711 et seq. and §§ 5721 et seq. to support its argument that it is not the seller of the 900 service, and is at most a common carrier. This Court agrees with the Comptroller that AT&T's status under these laws has no bearing on AT&T's responsibility for collecting the sale tax under the Maryland statute. The federal laws were enacted October 28, 1992, six months after the Maryland statute was amended. Thus the federal regulatory scheme was not something that the General Assembly considered when it was deciding who would be responsible for collecting the tax for the 900 service. Further, the Communications Act does not purport to limit a state's ability to tax. Thus, whether AT&T is a seller or a "transporter" under the

federal law has no bearing on its status under the Maryland statute.

Finally, relying on *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and *National Bellas Hess v. Dept. of Revenue of Illinois*, 386 U.S. 753 (1967), AT&T argues that as a matter of federal constitutional law, it is a common carrier who cannot be liable for collecting the tax. AT&T's reliance is misplaced. In *Quill* the Court clarified that "a vendor whose only contacts with the taxing State are by mail or common carrier" may not be taxed by the state because it "lacks the 'substantial nexus' required by the Commerce Clause." *Quill*, 504 U.S. at 311 (discussing *Bellas Hess*). Thus, a state may not impose a tax on a seller who has no connection to a state other than delivering goods by a common carrier. These cases shed no light on whether Maryland may impose this tax on AT&T since AT&T is within the State and the delivery cannot be separated from the product.⁷

AT&T is a Representative of an Out-of-State Vendor.

The Comptroller argues that AT&T is both a retail vendor as defined in § 11-701 subsection (1) and a representative of an out-of-state vendor under subsection (2). At oral argument, this Court suggested that AT&T could not be a retail vendor and an "in-state representative of an out-of-state vendor" at the same time. The Comptroller cited *Ridgewood Log Homes v. Comptroller*, 77 Md. App. 382 (1988) in support of the position that they could be. The Comptroller is correct. In *Ridgewood Log Homes*, the Court held that Ridgewood was a vendor and an agent of the vendor. *Id.* at 390.

⁷Thus AT&T's reliance on the testimony discussed above at pages 15-17 as proof that the Comptroller's witness admitted that AT&T is a common carrier, is not only factually inaccurate, it is irrelevant because AT&T's alleged common carrier status has no bearing on its responsibility for collecting the sales tax.

Subsection (2) of § 11-701 provides that:

(b)(2) "Engage in the business of an out-of-state vendor" includes:

* * *

(ii) having an agent, canvasser, representative, salesman, or solicitor operating in the State for the purpose of delivering, selling, or taking orders for . . . a taxable service;

Section 11-101(o)(2), the definitions section, provides that:

‘Vendor’ includes, for an out-of-state vendor, a salesman, representative, peddler, or canvasser whom the Comptroller, for the efficient administration of this title, elects to treat as an agent jointly responsible with the dealer, distributor, employer, or supervisor. . . .

AT&T argues that it is not a “representative”⁸ for several reasons. First, relying on its earlier argument, AT&T argues that it cannot be a representative of the content providers because it does not deliver or sell for them.⁹ Second, AT&T argues that it is not a “representative” because representative means sales representative and it is not a sales representative of the content providers. Third, AT&T argues that even if it is a “representative” it does not operate “under” the content providers nor does it “obtain the . . . taxable service” from the content providers. Fourth, AT&T argues that the fact that it is a billing agent for the content providers is not sufficient to make it a representative. Finally, AT&T argues that the Comptroller’s position that it is an in-state representative of an out-of-state vendor is inconsistent with the position that the Comptroller took previously.

⁸The Comptroller does not contend that AT&T is a salesman, peddler, or canvasser.

⁹The Comptroller does not contend that AT&T takes orders for the content providers.

AT&T's first argument fails because, for the reasons discussed above, AT&T does sell and deliver the 900 number calls. This Court rejects AT&T's argument that "representative" is limited to what is traditionally thought of as a sales representative. Section 11-101(o)(2), lists "salesman, representative, peddler, or canvasser," as the categories of in-state actors who may be held liable for the tax.¹⁰ "It is a cardinal rule of statutory interpretation that the words of the statute are to be read so as not to create surplusage." *Motor Vehicle Admin. v. Lytle*, 374 Md. 37, 61-62 (2003). AT&T's argument that "representative" means sales representative creates surplusage. Thus, while this Court agrees that representative relates to sales, this Court also concludes that it is not limited to what is a traditional sales representative. AT&T's connections with the content providers and the sale and delivery of the 900 number calls are more than sufficient for it to be a representative whom the Comptroller may "elect[] to treat as an [in-state] agent."

AT&T argues that even if it is a "representative" it does not operate "under" the content providers nor does it "obtain the . . . taxable service" from the content providers. AT&T's argument that it does not operate "under" the content providers is similar to the argument that the Court of Special Appeals rejected in *Ridgewood Log Homes*. There the Court made clear that even an independent contractor may be an agent under the statute. 77 Md. App. at 390 (citing *Scripto, Inc. v. Carson*, 362 U.S. 207, 211-12 (1960); *Topps Garment Mfg. Co. v. State*, 212 Md. 23, 28 (1956); *Ex Parte Newbern*, 286 Ala. 348, 239 So.2d 792, 796 (1979)). Thus, AT&T's argument that it does not meet the three fold test of

¹⁰Sections 11-701(2)(ii) has a slightly different list and lists "agent, canvasser, representative, salesman, or solicitor," but there is no suggestion from either party that there are two different categories of in state actors.

an agent set out in *Forrest v. P & L Real Estate Inv. Co.* , 134 Md. App. 371, 396 (2000) misses the point. The question is whether AT&T may be treated as an agent under the terms of the statute. As the Comptroller points out, AT&T operates “under” the content providers when it follows their instructions, i.e., how much to bill, reviewing the preamble, or how or when to block calls. Further, AT&T obtains the taxable service from the content providers when it obtains the content from them since the content is part and parcel of the “taxable service”. In recognition of this relationship, AT&T’s contract with the content providers states that “acting as Customer’s agent AT&T will perform the following services”

Fourth, AT&T argues that the fact that it is a billing agent for many of the content providers is not sufficient, nor should the fact that it is a billing agent be considered in determining if it is a representative. In support of this argument, AT&T places great weight on the fact that one of the Comptroller’s witnesses testified that the Comptroller has never held that billing and collection *alone* create an agency relationship and that billing was not key in the decision to treat AT&T as an agent of the content providers. However, it is important to keep in mind that the question is not whether the Comptroller could treat an entity that is *only* a billing agent as a representative. The Comptroller is clearly authorized to use his discretion in deciding who to treat as an agent under the statute and there is nothing to suggest that in exercising that discretion the Comptroller cannot consider that AT&T is a billing agent for the content providers.

Finally, AT&T’s argument that the Comptroller has previously taken a different position is rejected. AT&T relies on a private letter that the Comptroller wrote in 1989

advising MCI that it was not considered to be a representative of 900 content providers. The letter states:

Since MCI's provision of telephone and, with the LEC, billing service would not make either one a representative of the 900 sponsor, a 900 Sponsor would not be subject to a requirement to collect the sales and use tax, absent other contacts with the State.

The problem with this argument is that this letter was written in 1989, before 900 number calls were taxable. The law changed in 1992. There is no dispute that the MCI letter has had no effect on audit policy since the 1992 amendment and that the Comptroller has taken a consistent policy since the 1992 enactment that the telephone company delivering the call must collect the required sales tax. *See Bell Atlantic-Maryland, Inc. v. Comptroller*, Md. St. Tax Rep. (CCH) ¶ 201-611 (Md. Tax Ct. January 18, 2000) (finding Bell Atlantic liable for the tax on 900 number calls).¹¹ Not surprisingly, AT&T does not argue that the Comptroller is bound by the MCI letter. *Cf. CBS v. Comptroller*, 319 Md. 687, 694-95 (1990) (administrative interpretation of a regulation may in certain instances only be changed by a new regulation).

¹¹Bell Atlantic's role was similar to the role that AT&T plays in these calls. In finding that Bell Atlantic was the vendor, the Tax Court said:

Bell Atlantic provides for the transmission from the caller through its network to the equipment of the content provider. Bell Atlantic also keeps track of the usage, calculates the bills, sends the bills to the caller and collects the funds for services rendered. Bell Atlantic has contracts or agreements with the content providers in each instance to provide the service Bell Atlantic has some control over the advertising of the content providers, has some control over assuring that the content providers in from the public of certain charges, not only in the advertising but in the content itself. They have no control over the content of the information itself. . . .

That Bell Atlantic has no control over the fees that are charged by the content providers but Bell Atlantic does collect a fee for the transmission of the message as well as billing and collecting and they have a separate fee that's related to the number of lines that goes to each content provider.

The Undisputed Facts are, as a Matter of Law, Sufficient to Find That AT&T is a Vendor.

Finally, AT&T argues that each of the factors relied upon by the Tax Court are insufficient together or alone to make it a vendor. First AT&T argues that neither transport or billing services are sufficient and that entering into the contracts with the content providers and assigning them telephone numbers must be not considered because they are intrinsic to transport and billing. AT&T also argues that the content providers entered into contracts with several other entities and that AT&T enters into contracts with all of its customers and is required to provide a telephone number to its customers. Further, AT&T argues that its review of advertisements, preambles, and content of the information, and its provision of dispute resolution services, should not be considered because they are required by federal law. AT&T argues that it conducts the reviews to ensure compliance with federal law and further that the guidelines are no different than a newspaper reviewing an ad before it goes in the paper or UPS saying what it will or will not carry for customers. As to the dispute resolution services, AT&T argues that they are also done to satisfy legal requirements and should not be considered in any event because AT&T cannot cancel the debts.¹²

Furthermore, AT&T lists factors that it says show conclusively that it was not involved in the sale of the 900 service: it did not write the content, advertising or other material used by the content providers; it has no ownership interest in the content; it did not set the price of the information to be sold to the customer; it did not provide the information

¹²AT&T points out in passing that except for the transport, none of these actions were done in Maryland. However as AT&T concedes, it has sufficient contacts with Maryland and does not argue that there is a lack of nexus.

to the customer; it did not share in the content providers' profits or losses¹³; it did not advertise the information; and it did not permit its name to be used by the content providers.

At&T's reliance on these facts to show that as a matter of law it is not a vendor is misplaced for all the reasons stated above.

The Statute is Not Vague or Ambiguous.

AT&T argues alternatively that the statute is unconstitutionally vague and/or ambiguous. In support of this argument, AT&T argues that the statement in the Comptroller's Sales & Use Tax Audit Manual that "it may be difficult to determine which entity is the vendor of the service" is an acknowledgment that the statute does not clearly specify who collects the tax. The Court rejects this argument for two reasons. First, the Manual reflects the fact that communications carriers disagreed with the Comptroller as to who was responsible for collecting the tax when the Manual was prepared, and in fact the Manual was prepared during the litigation of *Bell Atlantic-Maryland, Inc. v. Comptroller*, discussed at page 22. Second, and more importantly, the fact that it may be difficult to determine collection responsibility does not mean the statute is vague or ambiguous. It simply means that the Comptroller has to work harder to make the determination.

¹³This is not quite accurate. The Tax Court found that "AT&T received some of the total revenue produced by the operation. . . .":

The funds received for transport were based on the volume of messages, including the length of time and the number of messages. In addition, there was a fixed element of those funds for the number of lines that were set up. As for collection services, AT&T received a percentage of the money that was not involved. It was not based on the amount of time on the network but rather on the number of dollars.

Grounds of Decision at 2-3.

Finally, AT&T's argument that the statute is vague or ambiguous ignores the fact that in 1994, two years after the law changed, AT&T generated an internal memorandum that acknowledges its obligation to collect the tax:

[T]he [Maryland] sales tax should be applied to AT&T's 900 services. AT&T has not been in compliance with this law since July 1, 1992, therefore, I am also forwarding a copy of this memo to Conflict Resolution with a request that they give consideration to a reserve for contingent liability.

As the Tax Court stated "One can look at the wording of the statute itself to find clarity: '900 services...and other 900 type telecommunication services are to be taxable services.'*** It is clear that the [tax is on] . . . the entire service provided to the consumer in Maryland. The statute is not vague. . . ." Tax Court's Memorandum of Grounds for Decision at 4-5.

CONCLUSION

For all the reasons stated above, the Court will enter an order affirming the Tax Court.

Judge Evelyn Omega Cannon

Dated: September 30, 2005

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