

Supreme Court Again Rules in Favor of AT&T

The Supreme Court of Georgia in [*New Cingular Wireless PCS v. Department of Revenue*](#), for a second time has ruled in favor of four cellular and wireless data providers who are seeking millions in tax refunds from the Georgia Department of Revenue (DOR) on behalf of their customers.

The high court has again reversed part of a Georgia Court of Appeals decision that upheld a DeKalb County court's dismissal of a lawsuit brought by New Cingular Wireless PCS and three other AT&T Mobility subsidiaries (AT&T). AT&T alleged that from 2005 to 2010, the subsidiaries sold wireless Internet access services, which were exempt from state sales tax under O.C.G.A. § 48-8-2.

The statute says that for purposes of state sales and use tax, "telecommunications service" shall not include "Internet access service." In November 2010, AT&T requested a refund from DOR for sales tax AT&T claimed had been erroneously charged to its Georgia customers on the purchase of wireless Internet access service. More than four years later, in March 2015, DOR denied the request to refund almost \$6 million for Georgia customers. In April 2015, AT&T sued DOR and the state revenue commissioner in her official capacity. In response, DOR filed a motion to dismiss the suit. It argued the complaint should be dismissed because: 1) AT&T did not reimburse the alleged illegally collected sales tax to customers before seeking a refund from the Department; 2) AT&T lacked standing to file sales-tax-refund claims on behalf of customers for periods prior to May 5, 2009 – the effective date of the General Assembly's amendment to the refund statutes allowing dealers such as AT&T to seek refunds on behalf of their customers; and 3) AT&T's claims amounted to a class action barred by the refund statutes. The trial court granted the Department's motion on all three grounds, and AT&T then appealed to the Court of Appeals.

In 2017, the Court of Appeals upheld the trial court's dismissal on the first ground, finding that AT&T had not proven it had reimbursed the customers for the taxes before requesting the refund. AT&T appealed to the Supreme Court, and in April 2018, the high court reversed the Court of Appeals decision, holding that "with regard to the period beginning on May 5, 2009 and ending on Sept. 7, 2010, the Court of Appeals erred by affirming the dismissal of AT&T's case on the basis that AT&T was required to prepay any claimed refund amount to its customers prior to receiving a determination from the Department as to whether any refund will be approved." The state Supreme Court also remanded the case to the Court of Appeals with direction to consider the second and third grounds for the trial court's dismissal. On remand, the Court of Appeals ruled that the third ground lacked merit, but it upheld the trial court's ruling that AT&T lacked standing to seek refunds for periods prior to the effective date of the 2009 amendments to the refund statutes that allowed dealers to seek refunds on behalf of their customers.

Again, AT&T appealed to the Supreme Court, which agreed to review the case to determine whether the Court of Appeals erred in holding that AT&T lacked standing to file refund claims for periods prior to May 5, 2009. The high court has concluded that "the Court of Appeals did err. We therefore reverse in part and we again remand this case to the Court of Appeals."

O.C.G.A. § 48-2-35 (a), as amended in 2009, states: "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from such taxpayer under the laws of this state...." Under the same Code section, "the term "taxpayer" "shall mean a dealer...that collected and remitted erroneous or illegal sales and use taxes to the commissioner." The

Court noted that the Court of Appeals correctly recognized that “legislation which involves mere procedural or evidentiary changes may operative retrospectively; however legislation which affects substantive rights may only operate prospectively,” and that “a substantive law creates rights, duties, and obligations while a procedural law prescribes the methods of enforcing those rights, duties, and obligations”. “However, in applying these principles to the facts here, the Court of Appeals reasoned that, because standing is the question of ‘whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues,’ standing therefore is ‘an entitlement, or a substantive right,’ and that the 2009 amendments to the refund statutes thus created a substantive right and may not be applied retrospectively. This ultimate conclusion was erroneous.” The Court explained that “It is true that in order to maintain an action, a party ‘must establish standing to sue on the ground asserted, which requires showing an injury in fact that was caused by the breach of a duty owed by the defendants to the plaintiffs and that will be redressed by a favorable decision from the court’”. “But it does not follow that standing to sue is necessarily a substantive right. For example, standing may be granted at common law or by statute for the special purpose of representing others in the assertion of their claims. This is generally termed ‘representational standing.’”

In this case, “contrary to the Court of Appeals’ assertion,” the “dealer” (here AT&T) acquires no substantive “right” to a refund under O.C.G.A. § 48-2-35.1. As this Court previously explained in its first decision in this case, “the statutory and regulatory scheme itself demonstrates that the dealer as representative acquires no right to a tax refund.” Therefore, “the dealer makes no claim for itself but only on behalf of the real party in interest, just as a guardian ad litem or next friend acquires no ‘right’ in the underlying claim of the minor or incapacitated person.” In conclusion, “the representational standing granted to AT&T by the amended statute is not a substantive change in the law”. The revised statute is procedural, not substantive. “Because the statute is procedural and does not alter or create any rights or obligations, the amendment properly may be applied retrospectively.”

“Thus, AT&T has statutorily granted representational standing to recover wrongfully paid sums on behalf of and for the benefit of its customers. To the extent, therefore, that the Court of Appeals held that AT&T lacked standing to file a claim on behalf of its customers for any taxes for periods before May 5, 2009, the Court of Appeals judgment is erroneous and must be reversed.”