

No. 82741-9

CHAMBERS, J. (dissenting) — Our role in statutory interpretation is to find the intent of the legislature. Tax statutes are strictly construed, and “[i]f any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer.” *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992) (citing *City of Puyallup v. Pac. Nw. Bell Tel. Co.*, 98 Wn.2d 443, 448, 656 P.2d 1035 (1982)). Based upon the plain language of the relevant statutes, I find no evidence the legislature intended to tax prepaid wireless plans. I concede that these statutes may, through an ambiguous and doubtful reading, be construed to reach prepaid wireless. Because I believe that we should resolve ambiguities against the taxing power, I respectfully dissent.

The majority is correct that the general tax-imposing portion of the chapter uses sweeping language: “[A] state enhanced 911 excise tax is imposed on *all* radio access lines whose place of primary use is located within the state in an amount of twenty cents per month for each radio access line.” RCW 82.14B.030(4) (emphasis added). “‘Radio access line’ means the telephone number assigned to or used by a subscriber for two-way local wireless voice service available to the public for hire.” RCW 82.14B.020(5). That could be construed to reach prepaid wireless phone

Tracfone Wireless, Inc. v. Dep't of Revenue, No. 82741-9

numbers. However, when interpreting the intent of the legislature, we look at *all* the legislature has said on the subject. *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993) (citing *Donovick v. Seattle-First Nat'l Bank*, 111 Wn.2d 413, 415, 757 P.2d 1378 (1988)). The legislature has made the phone subscriber, not the provider, primarily liable for the tax. RCW 82.14B.042(1). This weighs against finding that the legislature intended TracFone Wireless, Inc., to be the taxed entity. More importantly, the legislature has told us how the tax shall be collected:

The state enhanced 911 tax and the county enhanced 911 tax on switched access lines shall be collected from the subscriber by the local exchange company providing the switched access line. The state enhanced 911 tax and the county 911 tax on radio access lines shall be collected from the subscriber by the radio communications service company providing the radio access line to the subscriber. *The amount of the tax shall be stated separately on the billing statement which is sent to the subscriber.*

RCW 82.14B.040 (emphasis added). This language is mandatory. The bill sent to the customer “shall” state the amount of the tax. But TracFone does not send out billing statements. Customers pay up front for a certain amount of access, not monthly for a subscription. Given that, it is hard to imagine that the legislature intended this tax to apply to prepaid wireless.

Other elements of the statutory schema bolster this conclusion. In addition to the reference to a monthly billing statement, the statute imposes a \$0.20 per month flat tax that “shall be uniform for each radio access line.” RCW 82.14B.030(4). It

is difficult to see how the tax at the flat rate of \$0.20 per month can be applied in a “uniform” manner on both access lines provided under the traditional monthly model and access lines utilized under the prepaid model. Again, under the prepaid model, the subscriber pays based upon the minutes used, not the number of months the line is accessed. A prepaid subscriber may purchase three or four cards within one month or one card used over 12 months; if the subscriber was charged \$0.20 per card, the former would pay \$0.80 per month in E-911 taxes and the latter less than \$0.02 per month.

Perhaps most importantly, applying this tax to TracFone violates the principle that a person should not have to guess what is prohibited or required. The law should be written such that every person can reasonably ascertain what is forbidden and what is compulsory. *See State v. Miller*, 156 Wn.2d 23, 29, 123 P.3d 827 (2005) (citing Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897)). The legislature has largely codified this principle in the context of tax: taxpayers in Washington have “[t]he right to receive, upon request, clear and current tax instructions, rules, procedures, forms, and other tax information.” RCW 82.32A.020(5). TracFone tells us that originally, it was instructed to collect the tax from the customer at the time of sale. And indeed, in 2002, the Washington State Department of Revenue (department) issued a “special notice,” which states in part, “Service providers must collect the full amount of the tax and may not prorate the tax when a customer starts or ends service during the month. Sellers of prepaid service and disposable cellular phones must collect the tax at the time of sale.”

Clerk's Papers at 309 (Washington State Dep't of Revenue, Special Notice: New State Enhanced 911 Tax on Cellular Telephone Service 2 (Nov. 14, 2002)). But as discussed above, it is difficult to see how the tax can be both a uniform flat \$0.20 per month and be charged at the point of sale on the prepaid model.¹

The Department suggests that TracFone should simply pay the tax as an expense of doing business, citing RCW 82.14B.042(2). But the statute expressly requires that the tax "shall" and "must" be collected from the subscriber. *See* RCW 82.14B.042(1) ("The state enhanced 911 excise taxes imposed by this chapter must be paid by the subscriber to . . . the radio communications service company providing the radio access line, and . . . each radio communications service company shall collect from the subscriber the full amount of the taxes payable."). The legislature would not have declared that the tax "must" and "shall" be paid by the subscriber if it merely intended to impose the tax on the radio communication company.

Importantly, the legislature knew about prepaid wireless. It could have explicitly included prepaid wireless in the tax statute. It did not. The Department's legislative liaison testified at a deposition that the representatives of the cellular phone companies that assisted the legislature in drafting the bill were aware of prepaid wireless and hoped and intended that it would not be taxed under this bill. Further, other states have enacted specific legislation to tax prepaid wireless phone

¹The Department correctly points out that the point of sale is not the time of sale of the prepaid card or minutes by a retailer but the moment of activation of those minutes by the access line provider. Still, the Department fails to explain how this distinction solves the difficulty of applying the flat monthly tax uniformly.

models for E-911 service. North Carolina, for example, has given the providers of prepaid wireless the choice of either collecting the tax from the subscribers or paying the tax itself based on monthly revenue. N.C. Gen. Stat. § 62A-43(b).² Virginia gives providers an additional choice; it may also collect the tax at the point of sale. Va. Code Ann. § 56-484.17(B). Connecticut explicitly taxes prepaid wireless. Conn. Gen. Stat. § 16-256g(a). Legislatures clearly know how to assess taxes on prepaid wireless. *See also* Neb. Rev. Stat. § 86-457(1)(a); Ohio Rev. Code Ann. § 4931.61 (A); Okla. Stat. tit. 63, § 2843.1(D); 35 Pa. Cons. Stat. § 7021.4(b)(4); R.I. Gen. Laws § 39-1-62; Tenn. Code Ann. § 7-86-108(a)(1)(B)(iv).

This statute does not clearly extend to prepaid wireless. Any ambiguities should be resolved in favor of the taxpayer. *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396-97, 103 P.3d 1226 (2005) (quoting *Ski Acres*, 118 Wn.2d at 857). Read as a whole, the taxing statutes before us are ambiguous. We should not resolve the ambiguity in favor of taxation.

I respectfully dissent.

²The latter approach is somewhat similar to the department's recommendation that TracFone pay the tax as a cost of doing business based on the number of lines active any particular month.

Tracfone Wireless, Inc. v. Dep't of Revenue, No. 82741-9

AUTHOR:

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WE CONCUR:

Justice James M. Johnson

Justice Richard B. Sanders Justice Debra L. Stephens
