

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
TWELFTH DIVISION

NEW CINGULAR WIRELESS PCS LLC AND
AT&T MOBILITY WIRELESS OPERATIONS
HOLDINGS INC. SUCCESSOR TO PINE
BLUFF CELLULAR, INC.

PLAINTIFFS

V.

NO. 60CV-14-1722

RICHARD A. WEISS, in his Official Capacity
DIRECTOR, ARKANSAS DEPARTMENT
OF FINANCE AND ADMINISTRATION

DEFENDANT

**BRIEF IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED
COMPLAINT TO RECOVER OVERPAYMENT OF
ARKANSAS GROSS RECEIPTS TAXES**

Defendant Richard Weiss, Director of the Arkansas Department of Finance and Administration, submits this Brief in Support of his Motion to Dismiss Plaintiffs' First Amended Complaint to provide the factual and legal authority for the Motion. Plaintiffs' First Amended Complaint to Recover Overpayment of Arkansas Gross Receipts Taxes ("Amended Complaint") should be dismissed in its entirety. Plaintiffs have failed to plead sufficient compliance with the legal prerequisites of the Tax Procedure Act to sustain a lawsuit under Ark. Code Ann. § 26-18-507.

History of Case

Plaintiffs filed their complaint on May 2, 2014. Plaintiffs bring this claim under the provisions of the Arkansas Tax Procedure Act ("TPA") addressing a request for refund made by the Plaintiffs pursuant to Ark. Code Ann. § 26-18-507. Defendant was served with a copy of the Complaint on May 6, 2014. Defendant timely filed a Motion to Dismiss and Brief in Support on May 29, 2014. Plaintiffs filed the First Amended Complaint on June 27, 2014. The First

Amended Complaint did not adopt and incorporate the original Complaint. The Court entered an agreed order on July 8, 2014, extending the Defendant's time until July 31, 2014, to file a responsive pleading to the First Amended Complaint. The filing of the First Amended Complaint supersedes any issues or arguments addressed in the original Complaint and any pleadings filed in relation thereto. This conclusion is supported by the Arkansas Supreme Court which has held:

Next, in determining whether the allegations of Williams's complaint are within the scope of the *Lake View* mandate, we must first determine whether Williams can rely on his original complaint as well as his amended complaint. This court has stated with approval the "widely recognized doctrine that an amended complaint, unless it adopts and incorporates the original complaint, supersedes the original complaint." *Edward J. DeBartolo Corp. v. Cartwright*, 323 Ark. 573, 577, 916 S.W.2d 114, 116 (1996). Having failed to incorporate the original complaint into the amended complaint by reference, Williams cannot now rely on it. We are, therefore, limited in our analysis to the terms in the amended complaint.

James v. Williams, 372 Ark. 82, 88, 270 S.W.3d 855 (2008).

Based upon this principle, Defendants will address only those averments and allegations contained in the First Amended Complaint. In effect, the case will begin anew with the filing of the First Amended Complaint. In response to the First Amended Complaint, the Defendant now timely files a Motion to Dismiss and Brief in Support.

Adequacy of Pleadings

Rule 8 of the ARCP requires that a pleading for relief contain "a statement in ordinary and concise language of facts showing that the court has jurisdiction of the claim and is the proper venue and that the pleader is entitled to relief...."

A court cannot properly entertain an action that does not establish subject-matter jurisdiction. *Hambay v. Williams*, 373 Ark. 532, 285 S.W.3d 239 (2008). Accordingly, the

defense of lack of subject-matter jurisdiction may be asserted by motion. ARCP 12(b)(1). Similarly, ARCP 12(b)(6) allows the defense of failure to state facts upon which relief can be granted to be asserted by a motion to dismiss.

A properly pleaded complaint will demonstrate subject-matter jurisdiction by showing that a proper cause of action exists for the court to decide. The facts constituting the cause of action cannot be pleaded by way of argument, inference, or belief. Statements of generalities and conclusions of law are not sufficient to state a cause of action. *See McKinney v. City of El Dorado*, 308 Ark. 284, 286, 824 S.W.2d 826, 827 (1992); *Big A Whse. Distribs., Inc. v. Rye Auto Supply, Inc.*, 19 Ark. App. 286, 290, 719 S.W.2d 716, 718 (1986). “[F]acts, not mere conclusions, must be alleged.” *Arkansas Dep’t of Envtl. Quality v. Brighton Corp.*, 352 Ark. 396, 403, 102 S.W.3d 458, 462 (2003). The failure to state facts showing that the Court has jurisdiction over the claim requires dismissal of the action under ARCP 12(b)(1) (lack of jurisdiction over the subject matter). *Hesser v. Johns*, 288 Ark. 264, 265, 704 S.W.2d 165, 165 (1986).

The Arkansas Supreme Court has stated that since ARCP 12(b)(6) tests the sufficiency of the pleadings, it is necessary to read ARCP 12(b)(6) in conjunction with ARCP 8, which deals with the contents of the pleading. *Harvey v. Eastman Kodak Company*, 271 Ark. 783, 786, 610 S.W.2d 582, 584 (1981). Furthermore, mere recitation of conclusory statements does not equal a demonstration of facts upon which relief can be granted. *Hollingsworth v. First Nat’l Bank & Trust Co.*, 311 Ark. 637, 640-41, 846 S.W.2d 176, 179 (1993); *see also McKinney*, 308 Ark. at 284, 824 S.W.2d at 827; *and Big A Whse. Distribs., Inc.*, 19 Ark. App. at 290, 719 S.W.2d. at 718. As described by the Arkansas Supreme Court, “A complaint must state facts, not mere conclusions, in order to entitle the pleader to relief.” *Arkansas Tech Univ. v. Link*, 341 Ark. 495,

504, 17 S.W.3d 809, 815 (2000) (citing *Brown v. Tucker*, 330 Ark. 435 (1997)). See also *Brighton Corp.*, 352 Ark. at 403, 102 S.W.3d. at 462.

Tax Procedure Act Generally

Claims for refunds of overpayment of taxes are governed by the Arkansas Tax Procedure Act. Ark. Code Ann. § 26-18-101 through -1006. The Tax Procedure Act provides an administrative process that comports with due process requirements of the Arkansas and Federal Constitutions. *Ross v. Martin*, 800 F.2d 808 (8th Cir. 1986). The procedures for a refund under the Tax Procedure Act are straightforward but have not been met by Plaintiffs in this case.

A taxpayer, that is an entity holding a sales and use tax permit that has remitted tax to the Department, may request a refund of taxes allegedly overpaid. See Ark. Code Ann. § 26-18-507. Requests for refunds must comply with the statute of limitations in Ark. Code Ann. § 26-18-306(i), which provides that refund requests occur within two (2) years of the tax being paid or three (3) years of the tax being due, whichever is greater. *Id.* Additionally, a taxpayer must meet one of three conditions to request a refund – the taxpayer must have borne the tax in question by paying it instead of collecting it from a customer; the taxpayer must have refunded the tax to the customers from whom the tax was collected prior to the request for a refund; or the taxpayer must have obtained the consent of those who paid the tax to receive the refund or credit. Ark. Code Ann. § 26-18-507(d). Plaintiffs have not pleaded compliance with any of these three requirements.

I. Failure to Plead Subject Matter Jurisdiction under ARCP 12(b)(1) for Claims Outside the Statute of Limitations

Plaintiffs have failed to plead a claim over which this court has subject matter jurisdiction for refunds of taxes allegedly improperly paid outside the statute of limitations for requests for refunds.

Plaintiffs have requested a refund of taxes paid from November 1, 2005 to September 31, 2010. **See Plaintiffs' Amended Complaint ¶ 8.** The Arkansas Tax Procedure Act states that a refund may be requested within three years of the tax being due, or two years of the tax being paid. Ark. Code Ann. § 26-18-306(i). As pleaded by the Plaintiffs, the request for a refund was submitted on November 9, 2010 and the Department acknowledged that the request would lock in the time periods available for a refund. **See Pls' Amend. Compl ¶ 14-21.** Requests for refunds of tax that are filed outside the time periods in the Tax Procedure Act are properly dismissed. *Mac. v. Weiss*, 360 Ark. 384, 201 S.W.3d 897 (2005). On the face of the Amended Complaint, with all pleaded facts taken as true, there is no question regarding whether portions of the claimed refund are outside the statutory time limitations. The facts pleaded by the Plaintiffs demonstrate that three years of requested refunds are outside the scope of the TPA statute of limitations. To the extent that the Plaintiffs' Amended Complaint includes a request for a refund of taxes paid more than three years before the Department received the request, that is taxes that were due prior to November 9, 2007, there is no subject matter jurisdiction. This court should dismiss Plaintiffs' Amended Complaint as it relates to claims for taxes prior to November 9, 2007 for failure to state a claim over which this court has subject matter jurisdiction with prejudice.

II. Failure to Plead Facts on Which Relief Can be Granted under ARCP 12(b)(6) by Failing to Bear the Tax or Refund the Tax to Its Customers

Plaintiffs have failed to plead facts that demonstrate compliance with the Tax Procedure Act's requirement of having borne the tax. The Plaintiffs admit that they charged and collected sales tax from customers. **Plaintiffs' Amend. Complaint ¶ 8.** Specifically, Plaintiffs pleaded that they "mistakenly collected Arkansas state and local sales taxes from customers on internet access charges...." **Id.** The facts pleaded in the Plaintiffs' Amended Complaint demonstrate that they cannot claim to have borne the tax as provided in Ark. Code Ann. § 26-18-507(d)(1). Furthermore, Plaintiffs pleaded that they have NOT repaid the customers the amount in full prior to filing the request for a refund. **Plaintiffs' Amend. Complaint ¶ 27.** Specifically, the Plaintiffs pleaded that the customers who bore the tax would be refunded only if the State paid money to the escrow account first and then after both escrow fees and attorney fees were deducted. **Id.** Since the amount of the tax has not yet been repaid to the customers, this fails to meet the requirements of Ark. Code Ann. § 26-18-507 and therefore fails to plead facts on which relief can be granted. It is also the Department's position that Plaintiffs cannot establish that they have obtained the consent of their customers under Arkansas law as contemplated by Ark. Code Ann. § 26-18-507(d)(3) through the Settlement Agreement in the federal lawsuit to which the Department was not a party. This issue will be discussed in greater detail in Section IV, *infra*.

III. Failure to Plead Facts on Which Relief Can Be Granted under ARCP 12(b)(6) by Failing to Demonstrate Consent of All End Customers

There is not a sufficient showing under the Arkansas Tax Procedure Act that the customers who paid the tax to the Plaintiffs have consented to payment of their refund to the Plaintiffs. Plaintiffs have failed to demonstrate express consent under Arkansas law from the customers to abrogate their rights, and attempt to remedy these failures purely by reference to a

settlement agreement in a case which has no bearing or authority over the State of Arkansas and the Department.

Plaintiffs have neither pleaded nor provided proof of adequate consent under Arkansas law for AT&T to proceed with refund requests in the customers' names or to limit the refund of the customers through the withholding of escrow fees and attorneys' fees as compared to their right to a complete refund under Arkansas law. Plaintiffs have pleaded that the Settlement Agreement acts as consent of the customers to this litigation. The Settlement Agreement, however, does not meet the requirements of Ark. Code Ann. § 26-18-507 authorizing a refund or credit of allegedly overpaid taxes when the customer who was charged the tax consents to the vendor receiving the refund or credit. The Settlement Agreement, to which the Department was not a party, is not binding on the Department and is not consistent with the application of Arkansas law, as discussed below. There is no independent showing of compliance with the Tax Procedure Act by the Plaintiffs.

If a vendor has neither refunded the tax to the consumers nor assigned the right to request a refund to consumers, the consent portion of the TPA requires that a consumer consent to the vendor receiving the refund of tax. Ark. Code Ann. § 26-18-507. Aside from the Plaintiffs' sole reliance on the Settlement Agreement, discussed below, there is no showing of consent for the Plaintiffs to receive the refund. In fact, the procedure requested by the Plaintiffs does not refund the tax to the vendor at all. **See Plaintiffs' Amend. Complaint ¶ 28.** Additionally, the taxpayers have the right to receive the entirety of the tax refund if an overpayment is proven, *see* Ark. Code Ann. § 26-18-507, though in no place do the Plaintiffs plead such a fact. The Plaintiffs chose to take this route of filing the refund claim instead of assigning the rights to the refund to each of members of the class. The Settlement Agreement contemplates a methodology for the

consumers to make such requests for refunds in different jurisdictions. *See* **Plaintiffs’ Amend. Compl.** Exhibit H, Global Class Action Settlement Agreement ¶ 8.5. Plaintiffs now wish to not only deprive the customers of a refund they claim is due but to profit from their decision not to enable the customers to request the refund.

IV. The Class Action Settlement Agreement Does Not Meet the Requirements of the Arkansas Tax Procedure Act and Does Not Bind the Department by its Conclusions

Plaintiffs make repeated citations and references to a Settlement Agreement in a class action lawsuit in Federal Court in pleading their alleged compliance with the Arkansas Tax Procedure Act. This is a class action settlement to which the Department was not a party. **Plaintiffs’ Amend. Complaint ¶ 28** (citing Settlement Agreement ¶ 8.10). The Global Class Action Settlement does not provide the Plaintiffs with a sufficient procedural basis to claim compliance with the Arkansas Tax Procedure Act. There are two specific defects that prevent this settlement between private parties from dictating the course of a tax refund – the failure to include the Department as a party to the litigation and therefore to the settlement; and the Federal District Court’s recognition that the settlement itself does not override or otherwise displace the laws of a state or local taxing jurisdiction in the refund process.

A. The Class Action Settlement Does Not Bind the Department

The global class action settlement was a binding settlement between the private parties to the consolidated class action lawsuit. *In re AT & T Mobility Wireless Data Services Sales Tax Litig.*, 789 F. Supp. 2d 935, 983 (N.D. Ill. 2011) (“The Settlement amounts to no more than an agreement, enforceable in contract, . . .”). These parties were the class of plaintiffs allegedly overcharged sales taxes in various jurisdictions and the companies who collected the allegedly overcharged tax. *Id.* No state, and certainly not the Department as the entity charged with

enforcement and administration of Arkansas's tax laws, was a party to this litigation or settlement. A court's settlement is binding only on parties to the settlement. *Id.* It is axiomatic that a civil lawsuit cannot bind individuals who are not parties.

Plaintiffs cannot avoid the requirements of the Arkansas Tax Procedure Act by settling a civil lawsuit to which the Department was not a party. The Amended Complaint seeks to require the Department to abandon statutory procedures established by the General Assembly and administered by the Department without representation in a lawsuit. The district court's approval of the Settlement agreement does not bind the Department and does not require the Department and the State of Arkansas to open its coffers to a judgment that is not binding on the State.

B. The Class Action Settlement Does Not Obviate The Tax Procedure Act's Requirements

Even under the terms of the Settlement Agreement, Plaintiffs must still comply with the Arkansas Tax Procedure Act. The district court, potentially in recognizing the limitations on its approval of a class action settlement where the remedy was payment from a nonparty to the lawsuit, required the individual procedures of each state to be met. Specifically, the District Court, when it issued a final approval of the settlement stated:

A recurring concern involves the perception that the Court, in approving the Agreement, is affirmatively holding that the relevant taxing jurisdictions must grant the parties' refund requests. The Court makes no such finding. The Settlement is an agreement that, once approved by this Opinion, will only bind the private parties that are privy to it. The Settlement does not purport to dictate to any state or local authority the makeup of its applicable law.

In re AT & T Mobility Wireless Data Services Sales Tax Litig., 789 F. Supp.2d 935, 983 (N.D. Ill. 2011).

The local applicable law is the Tax Procedure Act. Until and unless the Plaintiffs comply with the procedural requirements of the Tax Procedure Act, the substantive questions of whether the tax was improperly paid are not ripe and no refund is due. As noted above, there are no facts pleaded or legal authority cited by the Plaintiffs that sufficiently demonstrate compliance with the Tax Procedure Act. The claim that the Settlement Agreement somehow acts as proof of consent of the end consumers who bore the tax is a conclusory legal statement and cannot act to establish facts on which relief can be granted.

Plaintiffs have failed to demonstrate compliance with the Arkansas Tax Procedure Act by merely citing to the Settlement Agreement. As a matter of policy, attempts to require the state to comply with a procedure that is not approved by Arkansas law through a settlement to a legal proceeding to which the Department is necessarily excluded as a party, are contrary to good governance. The power of the State to tax is paramount and Arkansas courts have repeatedly upheld the primacy of the State in determining the taxability and procedures of taxability. See, e.g., *Weiss v. Chem-Fab Corp.*, 336 Ark. 21, 984 S.W.2d 395 (1999). The Department's interests were not represented by either party to the settlement and therefore this court should specifically hold that there is no end run around the requirements approved by the General Assembly in requesting a refund. The District Court recognized that the Settlement Agreement did not bind the State of Arkansas and this court should decline to allow the Plaintiffs to circumvent the properly enacted requirements of the Tax Procedure Act by merely citing to the Settlement Agreement.

V. Failure to Plead facts On Which Relief May be Granted under the Internet Tax Freedom Act

The court should additionally dismiss the claim under the Internet Tax Freedom Act, 47 U.S.C. § 151, note (1998) (as amended). **See Pls. Amend. Compl.** ¶¶ 10; 35-38. While Plaintiffs accurately reflect that the ITFA created a moratorium on the imposition of direct taxation of internet access in 47 U.S.C. § 151 note, §1101(a), Plaintiffs fail to plead any factual basis for the underlying requirements to claim exemption under the ITFA.

For a provider to avail itself of the exemption under the ITFA, certain requirements must be met because of exemptions carved out of the ITFA moratorium. Among these requirements is that filtering technologies would exist and be put in place on the internet access for parents to provide control over the internet browsing of children. 47 U.S.C. § 151 note, § 1101(e). In their First Amended Complaint, Plaintiffs have failed to plead that the internet access providers offered any such filtering or monitoring as required to avoid the exemption from the ITFA moratorium. In the absence of pleaded facts, the sufficiency of the complaint with respect to the ITFA is lacking. Based on the fact pleading requirements of Arkansas Courts, the failure to plead the inclusion of facts to demonstrate relief requires that this court dismiss the relief requested under the ITFA pursuant to ARCP 12(b)(6) – failure to state facts on which relief may be granted.

Conclusion

While Plaintiffs have filed a lawsuit under the Arkansas Tax Procedure Act, Plaintiffs have not pleaded facts that establish compliance with the Arkansas Tax Procedure Act to request a refund of allegedly overpaid taxes. This Court should dismiss Plaintiffs' Amended Complaint under ARCP 12(b)(1) with respect to the portion of the claim that is beyond the statute of limitations provided in Ark. Code Ann. § 26-18-306(i). Furthermore, this court should dismiss the remainder of the Amended Complaint under ARCP 12(b)(6) for failure to plead facts on

which relief can be granted because the Plaintiffs' Amended Complaint does not establish compliance with the Arkansas Tax Procedure Act and relies on a Settlement Agreement that bears no weight on the Department's application and interpretation of Arkansas law. For the foregoing reasons, the Court should dismiss the Amended Complaint and provide all other relief to which the Defendant is entitled.

Respectfully Submitted,

RICHARD WEISS, DIRECTOR
ARKANSAS DEPARTMENT OF
FINANCE AND ADMINISTRATION



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CERTIFICATE OF SERVICE

I, Joel DiPippa, do hereby certify that I have served a true and correct copy of the above and foregoing Defendant's Brief in Support of Defendant's Motion to Dismiss Plaintiffs' Complaint to Recover Overpayment of Arkansas Gross Receipts Taxes upon Plaintiffs herein by depositing same in the United States Mail, postage prepaid, or by hand delivery this 29th day of July, 2014, addressed to their attorneys of record:

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