

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 26, 2006 Session

**BELLSOUTH TELECOMMUNICATIONS, INC. v. RUTH E. JOHNSON,
COMMISSIONER OF REVENUE OF STATE OF TENNESSEE**

**Appeal from the Chancery Court for Davidson County
No. 02-2211-II Carol McCoy, Chancellor**

No. M2005-00865-COA-R3-CV - Filed on October 27, 2006

BellSouth Telecommunications seeks a refund of sales and use taxes assessed on some of its voice mail services. Following an audit, the Department of Revenue assessed a tax on all but the most basic of BellSouth's voice mail services, finding they were subject to the sales and use taxes as "telecommunication" services under Tenn. Code Ann. § 67-6-102(a)(32). When the Department of Revenue denied a refund request, BellSouth filed this action. The trial court ruled in favor of the Department finding the services were taxable as "telecommunication" services. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Michael D. Sontag and Tara L. Swafford, Nashville, Tennessee, for the appellant, BellSouth Telecommunications, Inc.

Paul G. Summers, Attorney General and Reporter; Richard H. Sforzini, Jr., and Jonathan N. Wike, Assistant Attorney Generals, for the appellee, Ruth E. Johnson, Commissioner of Revenue of the State of Tennessee.

OPINION

This dispute pertains to three types of voice mail services provided by BellSouth Telecommunications, Inc. The services are MemoryCall Answering Service Plus (MAS+), Basic Messaging, and Deluxe Messaging. The issue is whether the services are taxable under Tenn. Code Ann. § 67-6-102(a)(32)(2003) as telecommunications services.

The dispute arose after the Tennessee Department of Revenue audited BellSouth Telecommunications, Inc., for the period of January 1, 1992, through December 31, 1997, and the Department audited BellSouth's predecessor in interest, South Central Bell, for the period of January 1, 1990, through December 31, 1991. As a result of the audit, the Department assessed BellSouth and South Central Bell \$8,532,661.04, inclusive of taxes and interest. Following the assessment, BellSouth requested a conference for the purpose of determining whether some of the voice mail services assessed by the Department were telecommunications services as that term is defined by Tenn. Code Ann. § 67-6-102(a)(32). Following the conference, the Department determined that BellSouth's most basic service, known as Basic MemoryCall Service, was not taxable and adjusted the assessment accordingly.¹ The Department, however, maintained its position that BellSouth was providing telecommunication services to its customers through its MAS+, Basic Messaging, and Deluxe Messaging services, and therefore these services were taxable as telecommunication services.

BellSouth paid the adjusted assessment and thereafter applied for a refund for taxes paid on MAS+, Basic Messaging, and Deluxe Messaging totaling \$1,339,483.00. The Department did not respond to the refund request, and after six months lapsed, the refund request was deemed denied. BellSouth then filed this action seeking the refund.

Both parties filed motions for summary judgment on the sole issue of whether BellSouth's MAS+, Basic Messaging, and Deluxe Messaging are taxable telecommunications services.² After hearing oral argument, the trial court denied BellSouth's Motion for Summary Judgment and granted summary judgment to the Department of Revenue finding that the services at issue are taxable communications because they "charge the customer for communicating with another person by means of all types of telecommunications transmissions." BellSouth appeals.

ANALYSIS

The parties are in agreement that no material facts are in dispute and that the issue hinges on a question of law concerning the proper interpretation of a Tennessee statute, that being Tenn. Code Ann. § 67-6-102(a)(32)(2003). When we engage in statutory interpretation, we must "ascertain and give effect to the intention and purpose of the legislature." *Carson Creek Vacation Resorts, Inc. v. Dep't of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993); *McGee v. Best*, 106 S.W.3d 48, 64 (Tenn. Ct. App. 2002). Our duty is to seek a reasonable construction "in light of the purposes, objectives, and spirit of the statute based on good sound reasoning." *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 286 (Tenn. 2001) (citing *State v. Turner*, 913 S.W.2d 158, 160 (Tenn. 1995)).

¹ The basic voice mail service that was deemed non taxable by the Department, MemoryCall, was distinguished by the fact it provided little more than basic answering machine service.

² BellSouth presents its argument in part by establishing the characteristics of each of its services separately. The Department takes the position that collectively, these services are all voice mail services, and that the classification of telecommunications applies to all of them collectively. We have chosen to distinguish the services because the Department agreed that BellSouth's most basic voice mail service, the Basic MemoryCall, was not taxable as telecommunications.

We are to "give effect to every word, phrase, clause and sentence of the act in order to carry out the legislative intent." *Tidwell v. Collins*, 522 S.W.2d 674, 676-77 (Tenn. 1975); *In re Estate of Dobbins*, 987 S.W.2d 30, 34 (Tenn. Ct. App. 1998). We must also presume the General Assembly selected their words deliberately, *Tenn. Manufactured Housing Ass'n. v. Metro. Gov't.*, 798 S.W.2d 254, 257 (Tenn. Ct. App. 1990), and the use of their words conveys some intent and carries meaning and purpose. *Tenn. Growers, Inc. v. King*, 682 S.W.2d 203, 205 (Tenn. 1984); *Clark v. Crow*, 37 S.W.3d 919, 922 (Tenn. Ct. App. 2000).

“Statutes imposing a tax should be construed strictly against the government,” *Prodigy Servs. Corp. v. Johnson*, 125 S.W.3d 413, 416 (Tenn. Ct. App. 2003)(citing *SunTrust Bank v. Johnson*, 46 S.W.3d 216 (Tenn. Ct. App. 2000)), and we may not enlarge the operation of the tax statute “so as to embrace matters [or persons] not specifically named or pointed out.” *Prodigy Servs. Corp.*, 125 S.W.3d at 416 (citing *Nat’l Gas Distributions, Inc., v. State*, 804 S.W.2d 66, 67 (Tenn. 1991)).

Our analysis starts with the definitions of “telecommunications” provided by the Tennessee General Assembly.

(A) "Telecommunication" means communication by electric or electronic transmission of impulses;

(B) "Telecommunications" includes transmission by or through any media, such as wires, cables, microwaves, radio waves, light waves, or any combination of those or similar media;

(C) Except as provided in subdivision (a)(32)(D), "telecommunications" includes, but is not limited to, all types of telecommunication transmissions, such as telephone service, telegraph service, telephone service sold by hotels or motels to their customers or to others, telephone service sold by colleges and universities to their students or to others, telephone service sold by hospitals to their patients or to others, WATS service, paging service, and cable television service sold to customers or to others by hotels or motels;

Tenn. Code Ann. § 67-6-102(a)(32)(A),(B),(C)(2003).³

The Department of Revenue has taken the position that the services at issue in this case are taxable services because “telecommunications is provided as a part of these mailbox types.” BellSouth contends that telecommunications services are not the true object of the MAS+, Basic Messaging, and Deluxe Messaging services and therefore are not taxable as telecommunications services.

In making this argument, BellSouth relies on the “true object” analysis set forth in *Prodigy*, where internet services were provided through the telecommunications system. The issue in *Prodigy* was whether revenues from the internet services were taxable as

³ The matters at issue are to be determined by the legislation in effect in 2003.

“telecommunications services.” The court ruled that the internet revenues were not taxable as telecommunications services, concluding that “telecommunications services were not the “true object” of the sale, even if some of the services fit that definition.”⁴ *Prodigy*, 125 S.W.3d at 419.

The “true object” of a telecommunication service was again discussed in *Equifax Check Services, Inc. v. Johnson*, No. M1999-00782-COA-R3-CV, 2000 WL 827963 (Tenn. Ct. App. June 27, 2000). The issue was whether the service was taxable as a telecommunications service. The court looked to the services provided. In that matter Equifax provided a service whereby a merchant could utilize the telephone system to dial into computers located at Equifax to determine whether there were sufficient funds in a customer’s account to cover a check written to that merchant for goods or services. The object of the service was to enable merchants to minimize the number of bad checks they accepted. As the court explained, “the true object of the transactions was not telecommunication services, but the account information. Although Equifax and its customers relied upon telecommunications to transmit and receive the information, telecommunications were not required for the information to exist.” *Equifax*, 2000 WL 827963, at *4.

The three services at issue here can be summarized as follows. BellSouth’s MemoryCall service is an electronic voice mailbox made available to its customers via computers at BellSouth’s facilities. The service is accessible via BellSouth phone service. The MAS+ service includes the same service as MemoryCall, but it offers features enabling subscribers to contact an attendant by dialing “0,” to receive pages notifying them of new messages, and to have additional control over messaging, which includes the ability to specify a message as urgent. The Basic Messaging Service affords the subscriber all the features of MAS+, along with features allowing subscribers to exchange information through messaging with other subscribers of MemoryCall, as well as control over future delivery of messages, an extended absence greeting, and guest and home “mailboxes.” The Deluxe Messaging Service has all the features of the Basic Messaging Service, but it also provides subscribers with group distribution lists.

It is apparent from the above analysis that the true object of the voice mail services at issue is to facilitate, albeit delayed, the transmission and receipt of a telephone communication. As explained above, a caller uses a phone to call the person with whom he or she wishes to speak. If there is no answer, the caller may leave a recording of the intended communication for the recipient to receive at a convenient time. The BellSouth computers store the one-sided communication until such time as the intended recipient chooses to receive the communication. As stated by the trial court, “the fact that the oral message is held in abeyance in a computer memory does not change the service provided, that is, the customer can communicate with a specific person or persons through telephonic means.”

The statutory scheme for telecommunications “provides that when the totality of the circumstances indicates that telecommunications services, such as paging services, are themselves being furnished for consideration, those services are taxable.” *Equifax*, 2000 WL 827963, at *2. Having examined the totality of the circumstances associated with BellSouth’s MAS+, Basic Messaging, and Deluxe Messaging services, we find that the true object of these

⁴ The resolution of the issues in *Prodigy* hinged in part on the applicability of federal regulations. *Prodigy*, 125 S.W.3d 413. That is not the case here. This case is controlled by Tennessee statutes.

services is telecommunications. Accordingly, the services are subject to taxation as telecommunications services under Tenn. Code Ann. § 67-6-102(a)(32).

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against BellSouth Telecommunications, Inc.

FRANK G. CLEMENT, JR., JUDGE