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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001185-MR
AND
NO. 2010-CA-001266-MR

VIRGIN MOBILE USA, L.P. — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 08-CI-010857

COMMONWEALTH OF KENTUCKY ON BEHALF OF COMMERCIAL MOBILE RADIO SERVICE TELECOMMUNICATIONS BOARD — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

CAPERTON, JUDGE: The Appellant and Cross-Appellee, Virgin Mobile U.S.A., L.P., appeals from a judgment of the Jefferson Circuit Court that applied a tax to

its prepaid wireless business. On appeal, Virgin Mobile argues that the lower court wrongly applied the KRS[1] 65.7629 Commercial Mobile Radio Service service charge to Virgin Mobile for periods prior to the July 2006 statutory amendments which extended the tax to the prepaid wireless service. Appellee and Cross-Appellant, the Commonwealth of Kentucky on behalf of the Kentucky Commercial Mobile Radio Service Emergency Telecommunications Board (hereinafter "CMRS") appeals from the court's denial of prejudgment interest to the Board. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm in part, reverse in part, and remand this matter for additional proceedings not inconsistent with this opinion.

Virgin Mobile provided prepaid wireless telecommunications services in the Commonwealth of Kentucky from August 2002 through July 2006, the period of time at issue in this matter; Virgin Mobile was a reseller of wireless services over the Sprint Network. All Kentuckians who used Virgin Mobile's

[1] Kentucky Revised Statutes

services during the period of time at issue prepaid[2] for the service and, because the service is prepaid, Virgin Mobile's customers do not receive phone bills.

Virgin Mobile does not operate its own retail stores, but its handsets and "top-up" prepaid cards are sold nationwide at large and small retailers and on the Virgin Mobile website. During the period of time at issue, the vast majority of Virgin Mobile's customers purchased its services from independent third-party retailers. Virgin Mobile asserts that its website sales accounted for no more than 15% of its business.

In 1998, the Kentucky legislature enacted KRS 65.7621-65.7643, the CMRS Act, in response to a mandate from the Federal Communications Commission requiring all emergency 911 systems to service wireless callers. The purpose of the CMRS Act is to develop throughout Kentucky a statewide enhanced wireless 911 service.[3] Through the CMRS Act, the legislature directed that the 911 system would connect wireless 911 calls to appropriate public safety answering points (PSAP) by selective routing based upon the geographical location from

[2] "Prepaid" in the context of the wireless industry generally means the customer (i) pays for services before the customer uses those services, and (ii) has no commitment to the service provider to make any future payments. In order to activate the prepaid service, Virgin Mobile collects a zip code from its customer, and in exchange, gives the customer a wireless number. The customer then purchases airtime for use by way of a "top-up" card. The customer's phone number is, in essence, the customer's account number, through which airtime is added and deducted as the customer uses his or her phone. Once the customer has depleted his or her original "top-up" card, the customer must purchase additional cards to continue using the phone. In order to add dollars to the prepaid account, the customer must provide Virgin Mobile with his or her telephone number. In that manner, Virgin Mobile is able to track how many customers it has assigned a Kentucky telephone number with activity each month.

[3] There has never been a dispute that Virgin Mobile's prepaid customers have a CMRS connection, as defined by KRS 65.7621(6), or that Virgin Mobile is a CMRS provider, as defined by KRS 65.7621(9).

which the call originated. In addition, the CMRS Act mandates that the 911 system have the capability of allowing the 911 service called to identify the phone from which the call was made, and to geographically locate the position of the person making the call.

The CMRS Board, which was established in accordance with the 1998 Act, manages a CMRS fund to reimburse wireless carriers and local governments for their expenses in providing wireless 911 services in Kentucky. The CMRS fund is funded by the levy of a CMRS service charge pursuant to KRS 65.7629. Since 2001, the CMRS Act has required CMRS providers to "provide a quarterly report to the [CMRS] Board of the number of subscribers receiving bills in each zip code serviced by the provider during that quarter, if needed." KRS 65.7639.

The Kentucky General Assembly adopted the federal Mobile Telecommunications Sourcing Act (MTSA), effective July 2002. Among other things, the General Assembly amended CMRS service charge statute KRS 65.7629(3) to impose the CMRS service charge only on wireless users with a "place of primary use [as defined in the MTSA] within the Commonwealth":

> (3) To collect the CMRS service charge from each CMRS connection:
>
> (a) With a place of primary use, as defined in 4 U.S.C. sec. 124, [the MTSA] within the Commonwealth. . . . . .

> The CMRS service charge shall be seventy cents ($0.70) per month per CMRS connection, and shall be collected in accordance with KRS 65.7635. . . .

KRS 65.7629(3).

The CMRS service charge statute regarding collection remained unchanged and contained the following mandatory collection procedures imposed on billing providers:

> Each CMRS provider shall act as a collection agent for the CMRS fund … [and] shall, as part of the provider's normal monthly billing process, collect the CMRS service charges levied upon CMRS connections under KRS 65.7629(3) from each CMRS connection to whom the billing provider provides CMRS. Each billing provider shall list the CMRS service charge as a separate entry on each bill which includes a CMRS service charge.

KRS 65.7635(1).

Virgin Mobile began doing business in Kentucky in 2002. Virgin Mobile remitted the Kentucky CMRS service charge from August 2002 through May of 2005. Rather than collect the CMRS service charge from its customers, Virgin Mobile remitted service charges from its general revenues. From August 2002 to May of 2005, Virgin Mobile remitted $286,807. Virgin Mobile also voluntarily made quarterly reports to the CMRS Board pursuant to KRS 65.7639 with respect to "the number of subscribers receiving bills in each zip code served by the provider during that quarter."

In September of 2004, the CMRS Board issued a letter to all wireless providers in the Commonwealth indicating that the Act did apply to prepaid

services. Nevertheless, in early 2005, Virgin Mobile's tax department learned that a tax rating table published by CCH, a national tax and business law information service, had been updated to specifically address taxation of prepaid wireless carriers. The updated tax rating table, referenced as "Cellular Prepaid Telephone Service," indicated that for carriers providing prepaid services in Kentucky, the CMRS service charge rate was "zero." Afterwards, Virgin Mobile independently concluded that the CMRS service charge did not apply to prepaid wireless carriers in general and did not apply to the services provided by Virgin Mobile in particular. Accordingly, on June 1, 2005, Virgin Mobile stopped remitting the Kentucky CMRS service charge.

Subsequently, on or about October 6, 2005, Virgin Mobile submitted a claim to the Board, requesting a refund of what it alleged were mistakenly remitted CMRS service charges in the amount of $286,807. Virgin Mobile's refund claim was summarily denied via a December 1, 2005, letter from the Board.[4]

Shortly thereafter, in early 2006, Governor Ernie Fletcher proposed that the General Assembly amend the CMRS service charge statutes to close what he described as a "tax loophole on prepaid cell phones." The Legislative Research Commission examined the proposed legislation and issued a Fiscal Note Statement on March 15, 2006. The Fiscal Note concluded that the amendments to the CMRS service charge statutes were for the purpose of closing a loophole by requiring

[4] Virgin Mobile states that it appears that the Board never met to consider or formally determine Virgin Mobile's refund claim prior to sending its denial.

prepaid wireless phone services to pay the CMRS surcharge. According to the Fiscal Note, the prepaid "loophole" allowed prepaid, wireless phone services not to remit the CMRS surcharge. The Fiscal Note also estimated that if the statute was amended, an additional $1.2 million in revenue would be raised.

Consistent with Governor Fletcher's proposal, the 2006 Kentucky General Assembly enacted House Bill 656. The legislation expressly extended the CMRS service charge to services that had not been included either in the original statute enacted in 1998, or as amended to conform to the MTSA in 2002. Specifically, the General Assembly enlarged the CMRS service charge statutes to expressly subject even prepaid CMRS connections without a place of primary use, as defined in 4 U.S.C. §124, to the CMRS service charge.

Among other changes, KRS 65.7629(3)(b) was added to extend the CMRS service charge to "prepaid CMRS connections," and more than one hundred words were added to KRS 65.7635, the collection portion of the statutory scheme, to create a formula for calculating the newly expanded CMRS service charge for CMRS customers who purchase CMRS service on a prepaid basis. KRS 65.7635 was also amended to reach CMRS connections without monthly billing services, which had not been taxed under the original version of KRS 65.7635(1). Thus, there is no dispute in this case that from July 12, 2006, forward, prepaid wireless services are subject to the CMRS service charge. The Board sent a letter to Virgin Mobile on May 2, 2006, informing Virgin Mobile of the 2006 amendments.

On October 17, 2006, after the CMRS service charge statutes were amended to apply to Virgin Mobile's services, Virgin Mobile again wrote to the Board proposing to recover its $286,807 in what it asserted were erroneously remitted funds through a credit against the newly applicable CMRS service charge. After receiving no response from the Board, on January 23, 2007, Virgin Mobile sent a second letter enclosing tax returns applying a portion of the $286,807 credit in satisfaction of its liability under the new prepaid CMRS service charge. Virgin Mobile subsequently received a February 15, 2007, letter from the Board's attorney refusing to grant the requests for a refund or credit and promising to initiate legal action against Virgin Mobile.

Accordingly, on October 14, 2008, the Board filed the instant action against Virgin Mobile in the Jefferson Circuit Court.[5] In November of 2008, Virgin Mobile exhausted the $286,807 credit it applied for CMRS service charges which it asserts were erroneously remitted prior to July of 2006. Virgin Mobile remitted $4,203.88 to the Board in December of 2008 for the balance of the November 2008 CMRS service charge and has continued to remit CMRS service charges for all subsequent monthly periods.

[5] The CMRS Board also filed a sister action against TracFone Wireless, Inc. TracFone removed its action to the U.S. District Court for the Western District of Kentucky, Louisville Division, before the Honorable Judge John G. Heyburn, II. Judge Heyburn issued an August 18, 2010, opinion. That court held that TracFone was responsible for the CMRS service charge under the 1998 statute. Of note, however, the federal opinion was issued subsequent to the circuit court's opinion in this matter, and draws heavily upon the reasoning contained therein. (See discussion herein, *infra*). TracFone has filed an *amicus curiae* brief in this matter.

Following litigation of this matter, on March 24, 2010, the Jefferson Circuit Court entered an order awarding the Board $547,945.67 in unpaid CMRS service charges, representing the amount that Virgin Mobile voluntarily paid but then rescinded by imposing its credit strategy as well as additional amounts that Virgin Mobile refused to remit between June of 2005 and January of 2007 prior to the amendments in 2006. The court awarded postjudgment interest, but denied the Board's request for prejudgment interest.

The court below viewed this case solely as a question of law, holding that the CMRS service charge was imposed on users and not on providers, but that the prepaid-versus-postpaid distinction was "irrelevant." The court found that the 1998 statutes levied the CMRS service charge on all CMRS connections, whether postpaid or prepaid. It characterized Virgin Mobile as a party seeking exemption from a tax and, therefore, noted that it would strictly construe the statute and concluded that an exemption was the "exception" to the rule that doubt and ambiguities are normally to be resolved in favor of the taxpayer.

According to the court, Virgin Mobile should have collected the service charge even though Virgin Mobile was not a "billing provider" under the statute and there was no statutory collection method applicable to Virgin Mobile. In so finding, the court noted that because the statute was silent as to the method of collection, there was "no rational way" to correlate the levy and collection statutes. Nevertheless, the court expressed an interest in furthering the statutory mandate of uniformity, noting that treating two types of providers discriminately would fail to

further that interest. The court refused to address any legal arguments with respect to Virgin Mobile's request for a refund[6] because it held that the CMRS service charge applied to Virgin Mobile before the 2006 amendments.

The Board moved to alter, amend, or vacate the March 24th opinion and order, and requested that the court award prejudgment interest and attorney's fees. On June 8, 2010, the court awarded the Board $137,869.03 in attorney's fees, but again denied the Board's request for prejudgment interest. The court held, without analysis, that the Board was entitled to attorney's fees under the statute. Although reasonableness of the fee amount was not contested, the court concluded that the fees were reasonable. The court concluded that the Board was not entitled to prejudgment interest because there was no statutory provision authorizing prejudgment interest. Alternatively, the court denied awarding prejudgment interest as a matter of equity. Virgin Mobile now appeals both the March 24 and June 8, 2010, opinions and orders, and the Board appeals the portions of the orders denying its request for prejudgment interest.

Prior to addressing the arguments of the parties on appeal, we note that each involves a disputed question of law. As our courts have repeatedly held,

[6] On August 18, 2010, in the CMRS Board's litigation with TracFone, Judge Heyburn entered summary judgment in favor of the CMRS Board on the issue of the CMRS Act's application to prepaid services. *See CMRS Board v. TracFone Wireless, Inc.*, 735 F. Supp. 2d 713 (W.D. Ky. 2010). Judge Heyburn looked to the opinion of the Jefferson Circuit Court for guidance, and concluded that "Judge Conliffe undertakes this difficult analysis in a convincing, well-reasoned, and most thorough manner." *Id*. at 7. The court also undertook its own analysis of the statutes, and of the criticisms raised by TracFone against the circuit court opinion. Ultimately, the federal court came to the same conclusion as the circuit court, holding that, "[t]he [1998] statute[s], at its most basic level and in no uncertain terms, requires [prepaid CMRS providers] to collect the service fees from [their] Kentucky customers." *Id.* at 6.

this Court is not bound by the trial court's decisions on questions of law. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky.App. 2001). Accordingly, we review these questions *de novo*. *Id.* Moreover, we note that the most commonly stated rule in statutory interpretation is that the 'plain meaning' of the statute controls. *Wheeler & Clevenger Oil Co. Inc. v. Washburn*, 127 S.W.3d 609, 614 (Ky. 2004). Thus, we begin analysis with an examination of the statute's language. To that end, an act is to be read as a whole, and interpretation should rest on the entirety of the act and not just a portion of it. *See Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 465 (Ky. 2004). We review the arguments of the parties with these standards in mind.

On appeal, Virgin Mobile makes three arguments: (1) that the circuit court erred in holding that the CMRS service charge applied to Virgin Mobile prior to the July 2006 amendments; (2) that Virgin Mobile is entitled to a refund of amounts mistakenly paid or a credit for such amounts against post-July 2006 charges; and (3) that the circuit court erred in requiring Virgin Mobile to pay the Board's attorney's fees. In response, the Board argues that: (1) the circuit court correctly held that the 1998 statutes applied to prepaid wireless customers and prepaid wireless providers; (2) Virgin Mobile is not entitled to a refund or a credit for the CMRS service charges it voluntarily remitted; and (3) the circuit court correctly awarded the Board its attorney's fees pursuant to KRS 65.7635(5). Further, as its basis for cross-appeal, the Board argues that it is entitled to

prejudgment interest on the judgment amount. We now address the arguments of the parties in turn.

As its first basis for appeal, Virgin Mobile argues that the circuit court erred in holding that the CMRS service charge applied to Virgin Mobile prior to the July 2006 amendments for three primary reasons: (1) because Virgin Mobile customers have no "primary place of use" within the Commonwealth of Kentucky as that term is defined in 4 U.S.C. § 124; (2) that even if Virgin Mobile's services had a "primary place of use," the CMRS service charge did not apply to Virgin Mobile prior to July of 2006 because the statute applied only to billed wireless services; and (3) that because there is no rational way to apply the CMRS service charge to Virgin Mobile prior to 2006, all ambiguities in the statute's application must be resolved in favor of Virgin Mobile.

First, Virgin Mobile argues that the CMRS service charge statutes did not apply to its prepaid wireless services until those statutes were amended in 2006, and that prior to that time, the charge applied only to services where the "primary place of use" - as defined in 4 U.S.C. § 124, the federal Mobile Telecommunications Act - was within the Commonwealth of Kentucky. Virgin Mobile argues that prepaid services have no "primary place of use" under federal or Kentucky law and that, accordingly, the charge should not have applied to its services prior to July of 2006.

Virgin Mobile notes that the MTSA, at section 116(c), states that section 124 (place of primary use) does not apply to prepaid wireless, specifically

indicating that "This section (116) through 126 of this title – (1) do not apply to the determination of the taxing situs of prepaid telephone calling services …." 4 U.S.C. § 116(c).[7] Thus, Virgin Mobile argues that as a prepaid service under both federal and Kentucky law, none of its customers have a CMRS connection with a place of primary use, a fact which it asserts was previously recognized by the Board itself.[8]

In response to Virgin Mobile's argument that the circuit court erred in holding that the CMRS service charge applied to Virgin Mobile prior to the July 2006 amendments, the Board argues that the circuit court correctly held that the 1998 statutes applied to prepaid wireless customers and prepaid wireless providers. First, the Board asserts that incorporating the terms of the MTSA into the CMRS Act in 2001 did not exempt prepaid services from the CMRS Act. The Board asserts that the MTSA is simply a tax-sourcing statute. In making this argument, the Board recognizes that, pursuant to the 1998 statutes, the Board was directed to collect the CMRS service charge from "each CMRS connection within the Commonwealth." However, in 2002, the CMRS Act was amended to incorporate

[7] As noted by the court below, KRS 65.7640(1) provides that the provisions of 4 U.S.C. §§ 116-126 are adopted and incorporated by reference.

[8] Specifically, Virgin Mobile directs the attention of this Court to the fact that the Board, for several years, wanted the General Assembly to amend the statute to cover prepaid wireless services, specifically asking that the Assembly "amend KRS 65.7629(3) by removing the words 'as defined in U.S.C. Section 124'" to "eliminate the prepaid gap within the current legislation." *See* Lucas Depo. Ex. 10 at 6. Indeed, Virgin Mobile notes that the Board twice considered seeking the opinion of the Attorney General as to the applicability of the CMRS service charge to prepaid wireless services, and twice was advised not to do so. *See* Lucas Depo. at 30, 31, Ex. 15 at 2 and Ex. 23 at 3. The Board argues that this fact is irrelevant, and that it supported amending the statutes because several of the largest prepaid providers were not remitting the CMRS service charge.

provisions from the MTSA and, thus, directed to collect the CMRS service charge "from each CMRS connection with a place of primary use, as defined in 4 U.S.C. §124 [the MTSA] within the Commonwealth."

The Board now argues to this Court that the MTSA is simply a federal act which attempts to address the problems of determining the appropriate taxing jurisdiction for wireless calls. The Board urges that the MTSA essentially provides for the jurisdiction encompassing the cell phone customer's "place of primary use" to be the jurisdiction which can tax the cell phone transaction. While recognizing that the MTSA by its terms "does not apply to the determination of the taxing situs of prepaid telephone calling services …",[9] the Board nevertheless argues that the MTSA does not prohibit states from assessing fees or taxes on prepaid wireless services, nor does it prohibit a taxing jurisdiction from basing the appropriate taxing situs for prepaid services on the prepaid customer's "place of primary use" as that term is defined in the MTSA.

The Board also argues that incorporating the terms of the MTSA into the CMRS Act in 2001 did not exempt prepaid services from the CMRS Act because it believes that Virgin Mobile's customers do have a "primary place of use" in Kentucky. The Board argues that pursuant to 4 U.S.C. § 124(8),[10] a

[9] *See* 4 U.S.C. § 116(c)(1).

[10] Providing that:

> (8) Place of primary use. -- The term "place of primary use" means the street address representative of where the customer's use of the mobile telecommunications service primarily occurs, which must be --
> (A) the residential street address or the primary business street address of the customer; and
> (B) within the licensed service area of the home service provider.

person's "place of primary use" is simply his or her residential or business address and that this applies to both prepaid and postpaid customers. The Board argues that the mere fact that a prepaid customer pays for his or her cell phone service in advance instead of receiving a bill does not mean that the user has no primary address. The Board asserts that Virgin Mobile in fact collects zip codes from its customers in order to activate prepaid service, and had been remitting the service charge to the Board for three years based on the number of active prepaid customers within a Kentucky zip code each month. Likewise, the Board argues that Virgin Mobile could determine its customer's "place of primary use" by asking for the customer's residential or business address prior to activating the customer's prepaid wireless service.

Further, the Board asserts that the 2006 amendments continue to incorporate the MTSA, specifically with respect to prepaid services. The Board asserts that, contrary to the assertions made by Virgin Mobile, KRS 65.7629(3) still uses the term "place of primary use" with respect to prepaid services. Pursuant to the 2006 amendments, KRS 65.7629(3) now states that the CMRS Board is required to collect the service charge from prepaid connections either "With a place of primary use, as defined in 4 U.S.C. §124, within the Commonwealth," or "[w]ith a geographical location associated with the first six (6) digits … of the mobile telephone number inside the geographic boundaries of the Commonwealth." The Board argues that if the legislature had believed the term "place of primary use" to be completely inapplicable to prepaid connections,

it would have eliminated the term with the 2006 amendments rather than retain it and specifically apply it to prepaid connections.

In response to the Board's assertions in this regard, Virgin Mobile argues that even if its services did have a "primary place of use" within the Commonwealth of Kentucky, as defined in 4 U.S.C. § 124, the service charge did not apply to Virgin Mobile prior to July 2006, because it applied only to billed wireless services. Virgin Mobile asserts that when the Kentucky General Assembly decided to fund enhanced 911 services for wireless phones, it chose to collect the funds with a service charge added to wireless services which billed monthly and did not reference prepaid non-billed wireless service nor provide for a statutory collection method for prepaid wireless services.

Specifically, KRS 65.7635(1) states that:

> Each CMRS provider shall act as a collection agent for the CMRS fund … [and] shall, as part of the provider's billing process, collect the CMRS service charges levied upon CMRS connections under KRS 65.7629(3) from each CMRS connection to whom the billing provider provides CMRS. Each billing provider shall list the CMRS service charge as a separate entry on each bill which includes a CMRS service charge.

KRS 65.7635(1). Virgin Mobile argues that since it is not a "billing provider," and because it has no "normal monthly" billing process, there was no statutory collection method for its prepaid services and, therefore, no rational way to apply the statute to wireless services. Virgin Mobile asserts that all of the "billing" language included in the statutory provisions at issue prior to the July 2006

amendments clearly indicates exactly what services were in the contemplation of the General Assembly when the provisions were drafted: namely those services which were regularly billed monthly.[11] Virgin Mobile thus argues that applying the statutes to prepaid services requires disregarding whole portions of the provisions in order to achieve the desired result and that the circuit court's decision based on the "uniform application" of the statute was in error.

The Board disagrees and argues that the plain and unambiguous language of the 1998 statutes levy the CMRS service charge on all wireless connections without regard to payment or collection methodology. The Board argues that the clear legislative intent and purpose behind the CMRS Act (i.e., to support an E 911 [emergency call center] infrastructure and to enable all wireless providers and customers to participate in that infrastructure) support interpreting the 1998 statutes to levy the CMRS service charge universally and equally upon all cell phone connections without regard to payment methodology. Stated simply, the Board argues that every person who has an active cell phone number assigned to him or her each month in return for compensation is subject to the CMRS service charge, whether those customers are prepaid or postpaid.

The Board asserts that the plain and unambiguous terms of the 1998 statute required *all* CMRS providers to collect and remit the CMRS service charge to the Board and states that the language concerning "billing" merely modifies the

[11] Virgin Mobile further directs this Court's attention to the fact that the Board itself admitted that when the CMRS service charge legislation was crafted, "monthly bills were the only method that was notable at the time." *See* Lucas Depo. at 19. Thus, Virgin Mobile asserts that it is obvious that the 2002 act was intended to apply only to postpaid billed wireless.

mandate that all CMRS providers be a collection agent for collecting the service charge from their customers. The Board urges that a focus on the term *bill* suggests that a provider's choice of payment methodology can obviate the duty to pay, which it asserts should not be the case. The Board asserts that such an interpretation would subvert the plain intent that the CMRS service charge be levied on all CMRS connections and be collected by all CMRS providers.

As its final argument in support of its assertion that the circuit court erred in holding that the CMRS service charge applied to Virgin Mobile prior to the July 2006 amendments, Virgin Mobile argues that there was no rational way to apply the pre-2006 provisions to prepaid wireless services. In support of that assertion, Virgin Mobile first argues that the statutory language at issue was ambivalent, and that any ambiguity in the statute prior to July of 2006 must be construed in favor of the taxpayer and not the Board. Virgin Mobile argues that the circuit court opinion rests upon the erroneous conclusion that this is an exemption case requiring construction in favor of the taxing authority. Virgin Mobile asserts that, to the contrary, this is a case as to whether the pre-2006 CMRS service charge applied to its services in the first instance, not whether some provision of law exempts Virgin Mobile from an otherwise applicable tax. Thus, Virgin Mobile argues that the circuit court erred in construing the statutory ambiguities in favor of the Board, and should have instead construed the ambiguities in favor of the taxpayer.

Moreover, Virgin Mobile argues that the provisions at issue could not have been rationally applied to prepaid services prior to 2006 because there was no method provided for the Board to calculate the service charge owed by prepaid wireless providers. Virgin Mobile notes that, according to the 2002 version of KRS 65.7629(3), the fee was "seventy cents ($0.70) per month per CMRS connection, and shall be collected in accordance with KRS 65.7635." Virgin Mobile argues that while this posed no challenge for postpaid providers issuing monthly bills, there was no way for prepaid providers, who provide services that were purchased in advanced and could be used over one hour or several months, to calculate the CMRS service charges owed.[12] Virgin Mobile thus argues that the statute is at best ambiguous and must, therefore, be interpreted in its favor. Moreover, Virgin Mobile argues that it is fundamentally unfair for the Board to attempt to apply the CMRS fee to Virgin Mobile in an instance where the Board itself cannot calculate the fee.

The Board disagrees with Virgin Mobile's assertions in this regard and argues that the CMRS Act contained no ambiguity regarding the subject to be

[12] In support of its assertion, Virgin Mobile directs our attention to testimony provided below by deposition:

> Q: [H]ow about [CMRS Board Member] Mr. Patterson's questions[:] "Someone who buys two cards during one calendar month, good for 30 minutes over the next 30 days, which is common, are they billed 70 cents or $1.00 [sic] or a $1.40" Do you see that?
> A: Uh-huh.
> Q: I'm going to say that's a good question. What's the answer?
> A: Oh, it's a good question, and that answer has been debated for years. I don't know the answer.
> Q: Okay. Fair enough, if you don't. Does the Board have a position on that?
> A: Not really.

Lucas Depo. at 13.

taxed and that the courts have correctly held that prepaid providers were seeking an implied exemption. Moreover, the Board argues that in the case when an exemption does exist, such provisions will be construed against the taxpayer. The Board disputes Virgin Mobile's assertion that the statute is ambiguous, asserting that there has never been any question as to who is required to pay the service charge and that the subject of the charge has always been "every CMRS connection." Likewise, the Board asserts that there has never been any ambiguity as to the fact that CMRS providers are the entities responsible for collecting these charges from their customers.

The Board argues that Virgin Mobile cannot claim exemption from the charge simply because of its chosen business model and asserts that the only "ambiguity" concerns the method by which prepaid providers would collect the service charge. Nevertheless, the Board asserts that this ambiguity is one which was created by the chosen business model itself, and not by the statute. Accordingly, the Board argues that the circuit court was correct in determining that Virgin Mobile was seeking an implied exemption based on its own chosen business model from an otherwise universal tax and that Virgin Mobile failed to meet its burden to show a clear exemption.

As final support for its argument that the pre-2006 statute could not be rationally applied to Virgin Mobile, Virgin Mobile directs the attention of this Court to the 2006 amendments which changed the CMRS service charge statutes themselves. Virgin Mobile asserts that it is a well-established axiom of statutory

construction that when the General Assembly amends a statute it means to change it, and that all public commentary on the 2006 legislation thus far has construed it as imposing a *new* tax on prepaid wireless services. Virgin Mobile argues that both the General Assembly and then-Governor Fletcher believed that by enacting the amendments, they were "closing a loophole" and that, accordingly, the 2006 amendments can only be applied prospectively. Virgin Mobile argues that if the legislature had intended the amendments to apply retroactively it would have done so, but chose not to do so. Accordingly, Virgin Mobile urges this Court to reverse the circuit court's determination that the statutes requiring the CMRS service charge applied to it prior to the 2006 amendments.

In response to this argument, the Board asserts that the 2006 amendments to the CMRS Act clarified how the service charge could be collected by prepaid providers but did not amend who owed the service charge itself. The Board argues that amendments do not always indicate intent to change the law, and can instead be utilized to clarify the original intent when same has come into question. Secondly, the Board argues that, although the 2006 amendments clearly changed the law with regard to the collection methodology for prepaid wireless services, it did not alter the taxable event itself. The Board argues that the 2006 amendments ultimately changed *how* the service charge could be collected from prepaid customers, not whether it was to be collected. The Board asserts that the amendments regarding how the service charge could be collected resulted directly from certain prepaid providers' refusal to remit the service charges. Thus, the

Board argues that, while the added collection methodologies for prepaid providers were certainly new in 2006, the "subject to be taxed" (i.e., every CMRS connection) was not amended and, therefore, the legislature had no need to make the amendments retroactive or to clarify their intent prospectively. Virgin Mobile disagrees, and argues that it is error to elevate the principle of uniformity above the language of the statute.

In addressing the arguments of the parties on this issue, we turn first to the plain language of the disputed statute itself. A plain reading of the statute leaves no question as to the fact that it applies only to "CMRS providers," a term which the statute defines as "a person or entity who provides CMRS to an end user, including resellers." KRS 65.7621(9)(1999). Pursuant to this definition, there is no question that Virgin Mobile is a CMRS provider because it clearly provides mobile phone services to its customers, whether those services are purchased directly from Virgin Mobile or through a third-party retailer and then subsequently activated by Virgin Mobile. Further, it is clear that the service charge applies to "each CMRS connection . . . within the Commonwealth." KRS 65.7629(3). A "CMRS connection" is defined as "a mobile handset telephone number assigned to a CMRS customer." KRS 65.7621(6). A "CMRS customer" is a person to whom a CMRS is provided in return for compensation. Certainly, each Virgin Mobile customer receives a "mobile handset telephone number" as well as cell phone service from Virgin Mobile. Thus, in accordance with the clear language of the statute, these individuals qualify as CMRS customers. Without

question, KRS 65.7629(3) provides that the service charge is to be collected from each customer within the Commonwealth regardless of his or her method of purchasing the service. Moreover, the statute clearly states that "each CMRS provider shall act as a collection agent for the CMRS fund …." KRS 65.7635(1). Thus, we believe that the statute was clear in its requirement that all CMRS providers act as collection agents for their customers.

Having so found, we do not disagree with Virgin Mobile's assertion that the statute, as written, provided a method of collection which certainly did not comport with Virgin Mobile's chosen business model. As noted, the statute provided that:

> Each CMRS provider …. shall, as part of the provider's normal monthly billing process, collect the CMRS service charges levied upon CMRS connections under KRS 65.7629(3) from each CMRS connection to whom the billing provider provides CMRS. Each billing provider shall list the CMRS service charge as a separate entry on each bill which includes a CMRS service charge.

KRS 65.7635(1).[13] While the circuit court was correct in stating that the statute, as written, left much to be desired in terms of elucidating the manner in which the charge was to be collected, we simply cannot accept Virgin Mobile's assertion that the legislature intended to exclude prepaid providers from the requirement of

[13] Certainly, it is tempting to premise payment based on the wording of the statute to those cellular phone carriers that bill monthly. However, if the legislature had meant for this to truly be a condition precedent to the imposition of the service charge, then any particular cellular carrier could avoid the statutory service charge by merely billing in a manner other than monthly. Consider bimonthly billing, quarterly billing, and semiannual billing as only a few examples of many. Insofar as the application of KRS 65.7635(1), we see little difference between those cellular carriers that bill their customers in advance versus those that bill in arrears or those that calculate the charges based on use versus those that sell minutes in prepaid form.

collecting the fee. Indeed, we are in agreement with both the circuit court and the federal court that the interpretation urged by the prepaid wireless providers would contravene the uniformity requirement of KRS 65.7627. While we acknowledge that the statute's suggested method of collection is contrary to the business model of the prepaid provider, we simply cannot find that this exempts prepaid providers from what certainly appears to be a general duty to collect the service fee.

In so finding, we acknowledge Virgin Mobile's argument that it is not seeking an "exemption" from a general tax, and that such an analysis presumes that the statute applied to Virgin Mobile in the first place. To that end, Virgin Mobile argues that the statute is at best ambiguous, and that it is our duty to resolve any doubts or ambiguities in its favor. *See George v. Scent*, 346 S.W.2d 784, 789 (Ky. 1961). While this is certainly a general rule of construction, it does not apply in situations where a tax is applicable to the party in question and the party is seeking an exemption. As our Kentucky Supreme Court has stated:

> A grant of exemption from taxation is never presumed; on the contrary, in all cases of doubt as to the legislative intention, or as to the inclusion of particular property within the terms of the statute, the presumption is in favor of the taxing power, and the burden is on the claimant to establish clearly his right to an exemption....

Martin v. High Splint Coal Co., 268 Ky. 11, 103 S.W.2d 711, 714 (Ky.App. 1937).

Sub judice, having reviewed in detail the very thorough and well-reasoned argument of the parties, we are in agreement with both the circuit court and the federal court that the clear language of the statute requires "each CMRS

provider" to collect the service fees from each customer to whom service is provided. This includes Virgin Mobile. To interpret the statute to apply only to postpaid providers would, in fact, create an exemption for prepaid providers. We cannot accept Virgin Mobile's argument that the statute did not apply to it in the first place because of the suggested method of collection outlined therein. Being unable to accept such an argument, this Court is of the opinion that an exemption, if one were intended to exist, must have been clearly and explicitly provided for. This not being the case, we are compelled to agree with the other courts which have reviewed the provision at issue and determined it applicable to all providers, regardless of their chosen business model.

In so finding, we briefly address Virgin Mobile's assertion that, because the legislature amended the statutes in 2006 to specifically reference prepaid providers, the Act did not apply to prepaid providers prior to that time. While this argument is certainly a legitimate one, upon careful review of the amended statute we must disagree. Virgin Mobile argues that this court should presume, by virtue of the amendment, that the legislature intended to change the law. *See Whitley County Board of Education v. Meadors*, 444 S.W.2d 890, 891 (Ky. 1969). While this is generally true, a review of the statutes reveals that the amendment only changed the method by which collection was to occur and not the general obligation of providers to pay the fees. Indeed, the first sentence of the 2006 version of KRS 65.7635 is identical to the first clause in the 1998 version, stating, "Each CMRS provider shall act as a collection agent for the CMRS fund."

Further, the legislature left the definition of "CMRS provider" largely unchanged, adding only the specification that the term applies to both facilities-based resellers and non-facilities-based resellers. KRS 65.7621. Accordingly, this Court is of the opinion that the 2006 amendments changed only the permissible methods of collection and not the duty to collect.

As its second basis for appeal, Virgin Mobile argues that it is entitled to a refund of amounts mistakenly paid, or, alternatively, to a credit for such amounts against its post-July 2006 charges. Virgin Mobile notes that because the court determined that it was subject to the CMRS service charge prior to July of 2006, the lower court did not address its request for a refund or credit for charges paid prior to July of 2006. However, Virgin Mobile asserts that, pursuant to KRS 134.580, it is entitled to a refund or credit of those charges. Having affirmed the circuit court in finding that the pre-2006 statute did apply to Virgin Mobile and that, accordingly, Virgin Mobile was required to collect the charges in question, we find the question of whether a refund or credit is due to be moot. Accordingly, we decline to address this issue further herein.

As its final basis for appeal, Virgin Mobile argues that the court erred in requiring it to pay the Board's attorney's fees. It argues that although there is fee-shifting language in the wireless 911 statute, by its own terms it does not apply where, as here, Virgin Mobile collected no taxes from its customers. Virgin Mobile asserts that KRS 65.7635(5), the provision relied upon by the court in ordering the payment of attorney's fees only concerns timing issues for wireless

providers that bill the 911 charge to customers, collect the money, and then turn it over to the state. That provision provides in relevant part that:

> All CMRS service charges imposed under KRS 65.761 to 65.7643 collected by each CMRS provider … are due and payable to the board monthly and shall be remitted on or before sixty (60) days after the end of the calendar month. Collection actions may be initiated by the state, on behalf of the board … and the reasonable costs and attorneys' fees which are incurred in connection with any such collection may be awarded by the court to the prevailing party in the action.

Virgin Mobile argues that this law is to deter conversion of customer monies and nothing more. Thus, it argues that if no service charges are collected from customers, as was the case *sub judice*, there are no "collected" service charges to recover and, thus, no basis for an award of fees.

Alternatively, Virgin Mobile argues that the court abused its discretion by assessing attorney's fees against a carrier that raised a good faith dispute over whether the service charge was due from its customers. Virgin Mobile notes that it has been in full compliance with current law and has made a good faith objection to the state's demands under the former law. Virgin Mobile argues that it had good basis to make this objection,[14] and that it should not now be penalized for doing so. Moreover, Virgin Mobile asserts that, had it taken its customers' money and given it to the government simply to maintain peace with a state agency or to comply with an agency policy which went beyond requirements

[14] In support of this assertion, Virgin Mobile states that two national tax compliance services had opined that the Kentucky wireless fee did not apply to prepaid cellular phones, and that when Virgin Mobile tried to discuss the law with the Board, it was rebuffed.

clearly imposed by statute, it would have been at significant risk of suit from customers alleging that they were wrongfully charged.[15] Finally, Virgin Mobile notes that the language of the collection statute is permissive and not mandatory and that the trial court ignored this fact in making its order.

In response to Virgin Mobile's third and final basis for appeal, the Board argues that the court correctly awarded the Board its attorney's fees pursuant to KRS 65.7635(5). In support of that assertion, the Board argues that: (1) the plain meaning of KRS 65.7635(5) permits an award of attorney's fees in this case; and (2) the circuit court did not abuse its discretion in awarding attorney's fees to the Board, even if Virgin Mobile acted in good faith.

First, the Board asserts that the plain meaning of KRS 65.7635(5) permits an award of attorney's fees in this case. The Board argues that the statute clearly allows for the recovery of attorney's fees and it disputes Virgin Mobile's characterization of the statute as "penal." The Board argues that the statute simply provides for the award of fees to the "prevailing party." It argues that to accept Virgin Mobile's interpretation would be to allow a provider who completely fails or refuses to collect the CMRS service charge to be immune from an award of attorney's fees following a successful action by the Board. The Board argues that,

[15] In support of this assertion, Virgin Mobile directs our attention to the fact that under the common law doctrine of constructive fraud, telecommunications providers that mistakenly collect charges at the urging of a government agency can be forced to refund any pass-through charges not clearly supported by the statute itself. Virgin Mobile cites the recent refund litigation against Cincinnati Bell Telephone Company brought by a class of its Kentucky customers who allege that it collected Kentucky sales tax on internet access services that are not within the statutory definition of "sale" in KRS 139.120.

to the contrary, an award of attorney's fees to the prevailing party is permitted whenever the Board institutes a collection action.

Secondly, the Board asserts that the circuit court did not abuse its discretion in awarding attorney's fees to the Board even if Virgin Mobile acted in good faith. The Board again disputes Virgin Mobile's characterization of the provision providing for an award of attorney's fees as "penal," and argues that the language of KRS 65.7635(5) is permissive and not mandatory. The Board ultimately argues that a failure to award the Board attorney's fees, whether or not Virgin Mobile acted in good faith, would defeat the purpose of the CMRS Act and induce providers to refuse compliance. The Board asserts that *sub judice*, the substantial attorney's fees it was forced to incur will result in a "net" of less than the actual damages to the Board caused by Virgin Mobile's refusal to comply with the act and the imposition of its unilateral credit strategy. Thus, it asserts that the court's award of attorney's fees was in keeping with the legislative intent and not an abuse of discretion.

Having reviewed the arguments of the parties and the applicable law, we feel that a reversal of the award of attorney's fees is warranted. In making this determination, we note first that we are in agreement with both the Board and the circuit court that KRS 65.7635(5) does in fact authorize an award of attorney's fees *sub judice*. We disagree with Virgin Mobile's attempt to characterize the statute as one intended solely to deter conversion of customer monies. Indeed, if this Court were to accept Virgin Mobile's characterization of the statute in this regard, all

prepaid providers could, whether in good or bad faith, decline to collect and remit the service charge and later evade responsibility for the costs which the Board would necessarily incur by instituting a suit to recover the money which it was owed. Nevertheless, in this particular instance, this Court is of the opinion that Virgin Mobile did, in fact, dispute payment of the service charge in good faith and, accordingly, we believe the court exceeded its discretion in ordering Virgin Mobile to pay the attorney's fees of the Board.

In making this determination, this Court notes that two national tax compliance services had issued opinions indicating that the Kentucky CMRS fee did not apply to prepaid cellular phones. Moreover, the record indicates that when Virgin Mobile made an attempt to discuss payment of the fee with the Board, it was rebuffed. Additionally, various other prepaid providers had taken similar actions and this led to much confusion as to the application of the statute and whether it was intended for prepaid as well as postpaid carriers. Our courts have repeatedly held that a good faith basis for dispute can obviate the need for assessment of attorney's fees. *See Commonwealth v. Cincinnati*, *N.O & T.P. Ry. Co.*, 155 S.W.2d 460 (Ky. App. 1941),[16] and *Commonwealth v. Thomas*, 298 S.W.2d 302, 303 (Ky. 1957).[17]

[16] Holding that, despite the mandatory nature of the statute, denial of penalties and interest was appropriate on the basis that the original collection statute was in fact ambiguous and the railway had resisted payment in good faith.

[17] Holding that this was a good faith dispute and that penalties and interest would not be awarded against the taxpayer in default.

Accordingly, believing the statute in this matter to have been somewhat unclear, and in consideration of the opinions of the national tax services and the actions of other similarly situated prepaid providers, this Court finds that Virgin Mobile disputed payment of the fees in this matter in good faith. Believing that good faith to obviate penalization via an award of attorney's fees, we find that the lower court's decision to award same exceeded its discretion, and we reverse.

As its first and only basis for cross-appeal in this matter, the Board argues that it is entitled to prejudgment interest because: (1) the CMRS service charge is not a tax; (2) if the CMRS service charge is a tax, KRS 131.183 allows prejudgment interest; and (3) the CMRS Board is entitled to prejudgment interest on a liquidated sum. Thus, the Board requests reversal of the circuit court on this issue.

First, the Board argues that the CMRS service charge is not a tax. It asserts that, to the contrary, its action against Virgin Mobile is simply a collection action for unpaid, liquidated amounts, owed by statute for service charges. Thus, it asserts that the circuit court erred in determining that the Board was not entitled to a refund because KRS 65.7635, "does not set forth any specific rate of interest to be applicable to delinquent payments, and therefore, none shall be awarded." [18] The Board asserts that the service charge is not a tax and, accordingly, that cases holding that interest is not allowable on unpaid taxes absent statutory authority are inapplicable.

[18] Appellate Record, pp. 251-253.

Alternatively, the Board argues that if the CMRS service charge is a tax, KRS 131.183 allows prejudgment interest. Below, the circuit court held that the CMRS service charge was a tax, but that it was not a tax administered by the Department of Revenue and, therefore, KRS 131.183 was inapplicable. To the contrary, the Board argues that the CMRS service charge, to the extent it is a "tax," is a tax payable to the Commonwealth. The Board asserts that KRS 131.183(1)(a) does not limit interest awards on taxes payable to the Commonwealth and "which are administered by the Department of Revenue." The Board argues that KRS 131.183 applies to a broader class of "taxes" than just assessments made by the Department of Revenue. Thus, it asserts that if the CMRS service charge is a tax, KRS 131.183 provides express authorization for the imposition of interest in this case.

Finally, the Board argues that the amounts owed by Virgin Mobile are not for unpaid taxes, but are merely unpaid, liquidated service fees owed pursuant to statute. Thus, the Board argues that where an award of damages is for a liquidated amount, then prejudgment interest is allowed. The Board states that Virgin Mobile has never disputed how much it owes to the Board, and there is no question that the amount is liquidated. The Board asserts that in light of the fact that Virgin Mobile voluntarily made payments for three years and then took a unilateral credit over the Board's objection, then equity demands that the Board receive a refund and the circuit court, finding to the contrary, erred in refusing to order the payment of same.

In response to the arguments made by the Board on this issue, Virgin Mobile argues that the circuit court properly held that the Board was not entitled to prejudgment interest. In support of its argument, Virgin Mobile again asserts that despite the Board's attempts to characterize the charge as a fee, it is in fact a tax, and that interest on taxes is not authorized unless specifically provided for by statute. Virgin Mobile asserts that the court below correctly held that KRS 131.183 does not allow prejudgment interest. Finally, Virgin Mobile argues that Kentucky law makes clear that prejudgment interest shall not be awarded where there was a good faith dispute as to whether the amount was actually due and owing.

In reviewing this issue, we note first, that a trial court's decision to deny prejudgment interest is reviewed for abuse of discretion. *See 3D Enterprises Contracting Corp. V. Louisville and Jefferson County Metropolitan Sewer District*, 174 S.W.3d 440, 450-51 (Ky. 2005). As our courts have long held,

> Taxes are not "debts," within the legal meaning of the term. They are not based upon contracts, either express or implied. They come upon the taxpayer *in invitum*. Their payment is a duty which the citizen owes to the state, in return for the protection it affords him and his property. Interest is not allowable upon them by the general law. The power to impose it must come from a statute. Although they are payable at a certain time, they do not carry interest, unless the statute says so.

Louisville & N.R. Co. v. Commonwealth, 12 S.W. 1064, 1065 (Ky.App. 1890). *See also City of Somerset v. Bell*, 156 S.W.3d 321 (Ky.App. 2005).

A review of KRS 131.183 provides that, "[a]ll taxes payable to the Commonwealth not paid at the time prescribed by statute shall accrue interest at the tax interest rate." KRS 131.183(1). For purposes of KRS Chapter 131, *tax* is defined as including "any assessment or license fee administered by the department [of revenue]." KRS 131.010(7) and KRS 131.010(2). Accordingly, it is clear that KRS 131.183 only authorizes interest on taxes administered by the Department of Revenue and does not extend to taxes administered by the Board.

This Court is of the opinion that in limiting the definition of *tax* to those taxes administered by the Department of Revenue for purposes of KRS Chapter 131, the governing statute excludes other taxes, including those administered by the Board. As our courts have repeatedly held, "[i]t is a primary rule of statutory construction that the enumeration of particular things excludes the idea of something else not mentioned." *Smith v. Wedding*, 303 S.W.2d 322, 323 (Ky. 1957)(citing *Bloemer v. Turner*, 137 S.W.2d 387, 390 (Ky.App. 1939)).

Alternatively, this Court is of the opinion that Virgin Mobile disputed the CMRS service charge in good faith. In determining not to remit the service charge, Virgin Mobile relied upon an independent national tax and business law information service as well as its own accountants and tax advisors. This Court is of the opinion that such reliance was in good faith and, accordingly, we cannot find that the court below exceeded its discretion in determining that an award of

prejudgment interest was not proper in this instance. *See Owensboro Mercy Health System v. Payne*, 24 S.W.3d 675, 679 (Ky.App. 2000).[19]

Wherefore, for the foregoing reasons, we hereby affirm in part and reverse in part the March 24, 2010, opinion and order of the Jefferson Circuit Court, and remand this matter for additional proceedings not inconsistent with this opinion.

ALL CONCUR.

[19] In which this Court affirmed the trial court's decision not to award prejudgment interest on a liquidated amount where the defendant disputed liability in good faith.

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