STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
NEW CINGULAR WIRELESS PCS LLC	:	DECISION DTA NO. 825318
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period November 1, 2005 through September 30, 2010.	:	

Petitioner, New Cingular Wireless PCS LLC, filed an exception to the determination of the Administrative Law Judge issued on July 17, 2014. Petitioner appeared by Wilson Agosto LLP (Margaret C. Wilson, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert Maslyn, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in New York, New York on August 13, 2015, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter the Tax Appeals Tribunal renders the following decision.

***ISSUE*S**

I. Whether the Administrative Law Judge properly denied petitioner's motion to vacate the determination and to reopen the record.

II. Whether the Administrative Law Judge properly granted the Division of Taxation's motion for summary determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. We have also made two additional findings of fact, numbered 28 and 29 herein, to more fully detail the procedural history of this matter. The Administrative Law Judge's findings of fact and the additional findings of fact appear below.

1. New Cingular Wireless PCS LLC (ATTM) is a Delaware limited liability company having its principal place of business in Atlanta, Georgia. ATTM provides Internet access services enabling its customers to use wireless devices, such as smart phones and laptops, to access the Internet. The Internet access services that ATTM sells are separate and distinct from other telecommunications services it provides.

2. Between November 1, 2005 and September 7, 2010 (refund claim period), ATTM billed and collected from New York customers sales tax on charges for Internet access services, which both parties agree was erroneous. All such taxes collected were remitted by ATTM to the Division of Taxation (Division).

3. In 2009, 54 separate class action lawsuits were filed on behalf of ATTM's customers in 44 states alleging that ATTM had improperly charged them taxes on Internet access service. The Judicial panel on Multidistrict Litigation consolidated those lawsuits in the United States District Court for the Northern District of Illinois as ***In re AT&T Mobility Wireless Data Services Sales Tax Litigation*** (MDL No. 2147 [ND Ill]).

4. On June 2, 2011, the Honorable Amy J. St. Eve granted final judicial approval to the Global Settlement Agreement between ATTM and a national settlement class with state specific sub-classes, including a New York sub-class, consisting of current and former customers that

paid tax on charges specific to Internet access service for the refund claim period.

5. For taxing jurisdictions like New York, the Global Settlement Agreement required ATTM to file a refund claim seeking the refund of sales tax on Internet access services for the benefit of the impacted customers. Importantly, the Federal District Court noted that the settlement did not purport to dictate to any state the substance of its laws with regard to refunds or refund procedure. (***In re AT&T Mobility Wireless Data Services Sales Tax Litigation***, 789 F Supp2d 935, 983 [ND Ill 2011].)

6. By the express terms of the Global Settlement Agreement, each settlement class member consented to ATTM's filing of the claim for refund of Internet taxes erroneously collected, payment of the refund by the taxing authority to petitioner or directly to the court's escrow account, and the distribution of the net settlement fund to the customers by the escrow agent under the supervision of the court.

7. Per the agreement, ATTM assigned all of its rights, title and interest in any refund it received to the settlement class of customers.

8. The Global Settlement Account ensures that ATTM pays over any amounts refunded by the Division to its customers, first by establishing different escrow subaccounts (e.g. a New York specific subaccount) for the purpose of receiving funds specific to each taxing jurisdiction that issues a refund or future tax credit. For those jurisdictions that issue a cash refund to ATTM, the agreement requires ATTM to seek to have the taxing jurisdiction refund monies directly to the escrow subaccount specific to that taxing jurisdiction. If the taxing jurisdiction issues the refund directly to ATTM, ATTM must transfer all refund monies it receives to the escrow subaccount specific to that taxing jurisdiction within seven days of receipt.

9. Where the taxing jurisdiction issues a future tax credit, the agreement requires ATTM to pay the full amount of the credit into the escrow subaccount for the specific taxing jurisdiction within 14 days of receiving the notification of future tax credit.

10. ATTM's customers agreed that the funding of jurisdiction specific escrow subaccounts constitutes a repayment of erroneously collected taxes to the customers by ATTM.

11. Once a jurisdiction specific escrow subaccount is funded, the federal court is asked to approve the distribution of the funds in the account to the appropriate customer subclass. Upon receiving the distribution order from the settlement administrator, the escrow agent will transfer monies to an acceptable payment account from which payments to class members shall be made. Any checks returned by the United States Postal Service as undeliverable and with no forwarding address will be transferred into an escheat account under the jurisdiction of the federal court. When requested on behalf of a particular state, the District Court has entered an order providing that such funds will be repaid to the state pursuant to its escheat laws. Through these processes, the agreement sought to ensure that 100 percent of any amount that ATTM receives through refund or future tax credit is returned to ATTM's customers for the taxing jurisdiction.

12. The agreement also provides that, when a taxing jurisdiction, like New York, requires ATTM to refund the erroneously collected tax to its customers prior to the taxing jurisdiction granting and/or paying a refund to ATTM, ATTM must fund a pre-refund escrow fund for class members. The agreement states:

> "In order to effectuate the provisions of this Settlement Agreement, each Settlement Class Member agrees that, for purposes of satisfying the requirement of any Taxing jurisdiction, that AT&T Mobility refund taxes to the affected customers prior to granting or paying a refund claim, the payment by AT&T of an amount representing Internet Taxes paid by that Settlement Class member into the Pre-Refund Escrow Fund will be considered the payment by AT&T of such taxes to such Settlement

Class Member" (Global Class Action Settlement Agreement, section 8.7).

13. ATTM never made payments to a pre-refund escrow fund established under Section 8.7 of the Global Class Action Settlement Agreement.

14. The settlement agreement further provides that if the pre-refund escrow fund has been funded, once ATTM receives a refund from New York, the refund will be placed in the New York escrow subaccount and the funds previously deposited in the pre-refund escrow fund by ATTM will be returned to ATTM.

15. Following the Division's issuance of its denial of petitioner's refund application on August 6, 2012, ATTM and the settlement class entered into a "clarifying" agreement, dated September 9, 2013, officially titled the Agreement Regarding Payment to New York Escrow Account Under Global Class Action Settlement Agreement. This agreement provided that any payments made by ATTM to either the New York escrow account or the pre-refund escrow account are considered payments made to the settlement class and that said funds so deposited are to be used to make refunds and should be considered refunds to the settlement class at the moment they are deposited in the accounts. The agreement also provided that if the State of New York agrees that a refund will be granted, that the amount of the refund is fixed; that the only prerequisite for payment of the refund to ATTM is the payment of the refund amount to the settlement class; and that a payment of the refund amount by ATTM to either of the escrow accounts satisfies the Global Settlement Agreement and Tax Law § 1139 (a) and 20 NYCRR 534.2. At that point, ATTM will pay an amount equal to the refund amount into the New York escrow account. Such payment by ATTM will be subject to the Division agreeing to issue ATTM a refund of money or future credit in the refund amount within one day of the payment

made by ATTM. In the alternative, if the foregoing conditions cannot be met, then ATTM will deposit a sum of money into the pre-refund escrow fund pursuant to the terms in the Global Agreement. When New York issues a refund or credit in full or partial satisfaction of the Internet tax refund claim (approved amount), funds equaling the approved amount will be transferred from the pre-refund escrow fund to the New York escrow account. Any shortage will be made up by ATTM and any excess amount remaining in the pre-refund escrow fund will be distributed to ATTM.

16. Although petitioner has not made a payment into any escrow fund, the clarification agreement states that it is ready to do so if the Division will concede that such a deposit will satisfy the repayment requirement of Tax Law § 1139 (a).

17. Linda A. Fisher is the current Director of Transaction Tax Operations for an affiliate of ATTM. Her responsibilities include, and have included, accounting for and remittances of transaction taxes for all business units and affiliates of AT&T Mobility LLC, including New Cingular Wireless PCS. She was responsible for compiling aggregate and customer-specific data used for preparing the refund claim filed herein.

18. In her affidavit, Ms. Fisher stated that the refund amount was derived from individual billing records, first determining whether its New York customers were charged for Internet access by examining which service order codes and feature codes were used in various billing plans for stand-alone sales, then by parsing customer billing records to determine which customers had purchased services under those codes. PriceWaterhouseCoopers was engaged to review and test the data analysis. During the testing, other combinations of codes were identified, on which taxes had been charged, collected and remitted.

19. Once the customers who purchased Internet access had been identified, the full amount of sales tax billed was computed. ATTM determined the amount reflected on the refund claim for the refund period to be $103,137,913.66, after adjustments from the original claimed amount of $107,074,142.31.

20. On November 9, 2010, ATTM submitted a claim for refund by certified mail seeking a refund of sales tax or credit in the sum of $107,074,142.31 plus interest. The claim included a detailed statement in support, a DVD with data purportedly identifying each customer charged New York sales tax on charges specific to Internet access service, the total amount each customer was charged and a separate listing of the total monthly amounts of sales tax billed on Internet access for each month of the refund period. This claim was assigned claim number 2010-11-0472 by the Division.

In the statement of support, ATTM noted that the settlement class acknowledged that its members already received payment of refund amounts sought in the refund claim by virtue of ATTM's assignment of its refund rights to the settlement class and its obligations under the Global Settlement Agreement to transfer all refunds received to the settlement class. Further, the settlement class waived any requirement that ATTM pay them cash refunds prior to obtaining a refund from the taxing jurisdiction. ATTM made no other statement with its claim for refund that it had repaid or refunded any of the subject sales tax to its New York customers.

21. On or about March 28, 2011, ATTM notified the Division of adjustments in the amount of the refund sought, claiming an additional amount of $2,188,524.33 and a reduction in the refund claim of $378.65 for New York customers who opted out of the Global Settlement Agreement. The net claim became $109,262,287.99 and was assigned a second claim number,

2011-05-0712.

22. By letter, dated June 15, 2012, petitioner reduced its claim to account for removal of tax associated with "certain charges" determined to be taxable and changes in billing codes, warranting a reduction in the refund claimed of $3,223,689.40. In addition, in the same letter, petitioner suggested a 1.5% reduction in the claim due to bad debts. The percentage was suggested based upon historical records of ATTM that indicate the rate of bad debts typically encountered in each jurisdiction by month.

23. Subsequent to the claims for refund and petitioner's modifications, the Division audited the claim and examined the documentation submitted therewith. The Division concluded that, in order to approve the refund, two reconciliations needed to be made. The first is whether the amounts due to each customer are correct, i.e., that documentation indicate the actual overpayment by each customer. The second is whether the refund sought is properly attributed to the correct locality, allowing the Division to recapture the tax from the proper locality.

24. The financial data submitted by petitioner in support of its refund claim was reviewed in detail and determined to be insufficient to conduct the above reconciliations or complete an audit adequate to determine if the refund amount was accurate. This review took place between November 2010 and August 2012.

25. On August 6, 2012, the Division denied the refund claims for the refund period November 1, 2005 through September 30, 2010, i.e., 2010-11-0472 and 2011-05-0712. The refund amount listed on the denial was $109,262,287.99, the highest of all the claims made by petitioner.

26. The Division's denial letter cited three reasons for the denial:

(A) Section 1139 (a) of the Sales and Use Tax Law makes it clear that in order for a vendor to be eligible for a refund of taxes collected erroneously from their customers, the vendor must show that such sales tax was repaid to the customer. The Division also stated that, based on the information and documentation submitted, ATTM was not eligible to make a claim for refund of taxes paid on behalf of its customers for failing to reimburse the customers.

(B) The documentation submitted did not allow the Division to determine how the refund amounts were calculated.

(C) The refund claim appeared to include claims made on behalf of customers that have opted not to participate in the Global Settlement Agreement.

27. Following the denial of petitioner's refund application in August of 2012, petitioner and the Division continued to pursue a resolution of their differences to no avail.

28. Petitioner timely filed a petition in the Division of Tax Appeals contesting the August 6, 2012 refund denial. The Division subsequently brought a motion for summary determination, dated July 8, 2013, seeking denial of the petition on the grounds that petitioner was not entitled to the claimed refund because it neither refunded the tax paid to it by its customers nor established a substantive right to a refund. Petitioner opposed the Division's motion, and also brought a cross motion for partial summary determination in its favor premised on its contention that the refund claim is substantively valid.

29. By a determination dated July 17, 2014, the Administrative Law Judge granted the Division's motion. Petitioner then brought a motion, dated August 15, 2014, to vacate the determination and to reopen the record for the purpose of submitting additional evidence. The proposed additional evidence is an affidavit which asserts that, as of August 14, 2014, petitioner had entered into an escrow agreement and funded an escrow account in the amount of $106,038,598.59 in accordance with the terms of the Global Settlement Agreement. By an order dated December 4, 2014, the Administrative Law Judge denied petitioner's motion.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that petitioner did not repay the sales tax that it erroneously collected from its customers. He determined that such repayment was required before the claimed refund could be granted. Accordingly, the Administrative Law Judge concluded that the Division's denial of petitioner's refund claim was proper.

The Administrative Law Judge rejected petitioner's contrary statutory interpretation. He noted that the language of the refund statute unambiguously requires repayment by a vendor to its customers before a refund may be granted. The Administrative Law Judge also rejected petitioner's contention that the provisions of the Global Settlement Agreement and the clarifying agreement were sufficient to satisfy petitioner's repayment obligation because, at the very least, petitioner did not fund the escrow accounts by which its customers would actually receive repayment under the terms of those agreements. The Administrative Law Judge distinguished a Tax Court of New Jersey case, decided in ATTM's favor, that involved a similar refund claim and the same Global Settlement Agreement. According to the Administrative Law Judge, the critical difference between the New Jersey case and the instant matter is the difference in the language of the New York and New Jersey refund statutes.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge denied petitioner's motion because the evidence that petitioner sought to introduce was not in existence at the time the record herein was created and hence not newly discovered as required under the Tribunal's Rules of Practice and Procedure (Rules).

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner contends that the Administrative Law Judge erred in denying its motion to reopen in order to submit evidence of its funding of the escrow account. Petitioner argues that the Division of Tax Appeals and this Tribunal have the authority to reopen the record of a prior decision where there is a change of circumstances.

With respect to the determination, petitioner contends that the Administrative Law Judge's interpretation of the refund statute is inconsistent with the statutory language and defeats the statutory purpose. Petitioner proposes a construction of the refund statute that would not require an applicant to repay erroneously collected sales tax to its customers until after the Division has made a decision regarding the substance of the claim.

Alternatively, petitioner contends that its repayment obligations are satisfied by the terms of the Global Settlement Agreement because such agreement contractually requires it to pay any refund received from the Division to its customers through the escrow account. Petitioner notes that, under the agreement, it makes a formal assignment of any refund monies received to its customers and that its payment of funds into the escrow account is a relinquishment of any right to those funds. Petitioner thus contends that, through these safeguards, it has satisfied the purpose of the repayment provision in Tax Law § 1139 (a); that is, to ensure that the customer receives the refunded amounts.

Petitioner also contends that the Division's failure to promulgate regulations addressing the form of repayment precludes the Division from enforcing a form of repayment that is more limited than common law principles provide. Petitioner contends that the enforcement of such a limited form of repayment violates the State Administrative Procedure Act (SAPA) because the

Division did not prescribe a regulation defining repayment in such a manner.

Additionally, petitioner asserts that the Administrative Law Judge erred in concluding that the Division audited petitioner's refund claim prior to the issuance of the August 6, 2012 refund denial letter. Petitioner argues that a material issue of fact exists regarding whether such an audit was conducted.

The Division contends that the Administrative Law Judge properly denied petitioner's post-determination motion because the evidence offered with the motion was not newly discovered as required to justify the reopening of the record.

As to the determination, the Division contends that the plain language of the relevant statute and regulations requires that a vendor repay its customers before a refund may be granted. The Division asserts that petitioner's interpretation of Tax Law § 1139 (a), characterized by the Division as a promise to repay customers, is erroneous.

OPINION

For the reasons that follow, we affirm both the order and the determination of the Administrative Law Judge.

We first address petitioner's exception to the Administrative Law Judge's order denying the motion to reopen the record.

Our Rules (***see*** 20 NYCRR 3000.00 et seq.) provide that the Administrative Law Judge may, upon motion by a party, issue an order vacating the determination and reopening the record upon the grounds of "newly discovered evidence which, if introduced into the record, would probably have produced a different result and which could not have been discovered with the exercise of reasonable diligence in time to be offered into the record of the proceeding" (20

NYCRR 3000.16 [a] [1]).

20 NYCRR 3000.16 is patterned after Civil Practice Law and Rules (CPLR) 5015, a provision that allows a party to move for relief from a judgment or order on certain grounds, including newly discovered evidence (***see Matter of Frenette***, Tax Appeals Tribunal, February 1, 2001). Newly discovered evidence for purposes of CPLR 5015 means "evidence which was in existence but undiscoverable with due diligence at the time of judgment" (***Matter of Commercial Structures v City of Syracuse*** (97 AD2d 965 [1983]). This Tribunal has long applied this standard or the similar standard applicable to motions to renew in determining whether to reopen the record following the conclusion of a hearing (***see e.g***., ***Matter of Jenkins Covington, N.Y., Inc***., Tax Appeals Tribunal, November 21, 1991, ***affirmed sub nom Jenkins Covington, N.Y. v Tax Appeals Trib.***, 195 AD2d 625 [1993], ***lv denied*** 82 NY2d 664 [1994]; ***Matter of Youngstown Yacht Club***, Tax Appeals Tribunal, October 16, 1997; ***Matter of Reeves***, Tax Appeals Tribunal September 2, 2004; ***Matter of Jay's Distributors, Inc***., Tax Appeals Tribunal, Tax Appeals Tribunal April 15, 2015).

Applying this standard to the present matter, we find that the Administrative Law Judge correctly denied petitioner's motion to reopen. "The language of the regulation which permits the motion clearly anticipates that the evidence must exist at the time the record is created, but was merely not offered at that time, despite due diligence" (***Matter of Youngstown Yacht Club***). We note that this interpretation is in accord with ***Matter of Commercial Structures v City of Syracuse***. Here, the evidence that petitioner sought to admit into the record by its motion undisputably did not exist at the time the determination was issued; it was created thereafter. Accordingly, such evidence was not newly discovered as required under the Rules and therefore

may not be introduced into the record in this matter.

Petitioner asserts that this Tribunal has inherent authority to reopen the record where there is a change in circumstances. We disagree. The authority of an administrative law judge or this Tribunal to reopen the record in order to reconsider a determination or a decision is limited by our authorizing statutes and the regulations promulgated thereunder (***see Matter of Scharff***, Tax Appeals Tribunal, October 4, 1990, ***revd on other grounds sub nom Matter of New York State Depart. of Taxation & Fin. v Tax Appeals Trib.***, 151 Misc 2d 326 [1991]; ***Jenkins Covington, N.Y. v Tax Appeals Trib.***). Our Rules codify certain limited circumstances where the record may be reopened (***see*** 20 NYCRR 3000.13 [d] [3], 3000.15 [b] [3], 3000.16). These provisions correspond to sections of the CPLR that permit the reconsideration of judicially determined matters under similar circumstances (***see*** CPLR 2221, 5015). Our Rules are thus consistent with the principle articulated in ***Evans v Monaghan*** (306 NY 312 [1954]), which applied the rules restricting the reopening of judicially determined matters to administrative determinations. The ***Evans*** court reasoned that the "[s]ecurity of person and property requires that determinations in the field of administrative law should be given as much finality as is reasonably possible" (306 NY at 323).

The motion under 20 NYCRR 3000.16 (a) (1) is thus one of the few circumstances under which an evidentiary record may be reopened, and as discussed, this provision offers no relief to petitioner herein. Contrary to petitioner's contention, this is not a matter of discretion, but rather one of authority. There is no basis upon which to reopen the record unless certain circumstances are present, and they are not present here.

Petitioner's motion to reopen would appear to be an effort to correct a perceived flaw in its

submission of evidence on the summary determination motion.[1] However, a motion for "renewal [or to reopen] 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation'" (***Carota v Wu***, 284 AD2d 614, 617 [2001] quoting ***Matter of Beiny***, 132 AD2d 190, 210 [1987], ***lv dismissed*** 71 NY2d 994 [1988]). Furthermore, to allow petitioner to submit additional evidence at this point would be contrary to our mission to provide a fair and efficient hearing system which, as we have long held, must be both defined and final (***see Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991).

We turn now to the determination, by which the Administrative Law Judge granted the Division's motion for summary determination. Our Rules provide that such a motion "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented" (20 NYCRR 3000.9 [b] [1]).

The Rules further provide that a motion for summary determination is subject to the same provisions as a motion for summary judgment brought under the CPLR (20 NYCRR 3000.9 [c]). We have articulated the well-established standard for the granting of such a motion as follows:

> "Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is 'arguable' (***Glick & Dolleck v. Tri-Pac Export Corp.***, 22 NY2d 439, 293 NYS2d 93). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***see Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879). Upon such a motion, it is not for the court 'to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist' (***Daliendo v. Johnson***, 147 AD2d 312, 543 NYS2d 987, 990)" (***Matter of United Water New York, Inc.***, Tax Appeals Tribunal, April 1, 2004).

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[1] The determination notes that petitioner "has yet to fund any escrow account with any monies."

Upon review of the record, as well as the relevant statutes and regulations, in light of the foregoing standard, we affirm the Administrative Law Judge's determination.

There is no question that petitioner erroneously billed, collected and remitted NewYork sales tax on its sales of Internet access services during the audit period. Tax Law § 1139 (a) permits persons, like petitioner, who collect sales tax from customers, to apply for a refund of tax that has been so erroneously collected and remitted. That provision, however, conditions such refunds as follows:

> "No refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission, under such regulations as it may prescribe, that he has repaid such tax to the customer."

There are several provisions in the Division's regulations that address the repayment requirement in Tax Law § 1139 (a).

Specifically, the regulations related to the repayment of sales tax by a vendor[2] to a customer in the context of a refund application provide that such a person "must repay such tax to the customer before the Department of Taxation and Finance may refund any amounts to him" and that such a vendor must maintain accurate records of the "dates of the . . . repayment to each customer" and "proof of payment to each customer" (20 NYCRR 534.2 [c] [1] [v] and [vi]).

Regulations pertaining to the form of a refund claim application state that a vendor must provide "a certification and evidence satisfactory to the Department of Taxation and Finance that he has refunded the tax to his customer" (20 NYCRR 534.2 [a] [2] [i] [h]).

Division regulations at 20 NYCRR 534.8 (a) (2) and (3) further provide:

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[2] As a person making taxable sales of services, petitioner was a sales tax vendor (***see*** Tax Law § 1101 [b] [8] [i] [A]).

> "(2) Any person who has erroneously, illegally, or unconstitutionally collected a tax from a customer may, repay such tax to the customer and in turn claim a refund or credit of such tax from the Department of Taxation and Finance, provided the tax has been paid to the Department of Taxation and Finance.
>
> (3) No refund or credit may be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the Department of Taxation and Finance, as provided in section 534.2 of this Part [20 NYCRR 534.2], that he has in fact repaid such tax to the customer."

We agree with the Administrative Law Judge that the language of Tax Law § 1139 (a) is unambiguous, and that, accordingly, it must be construed so as to give effect to the plain meaning of the words used (McKinney's Cons Law of NY, Book 2, Statutes § 97; ***New York State Assn. of Counties v Axelrod***, 213 AD2d 18, 24 [1995], ***lv dismissed*** 87 NY2d 918 [1996]). We thus conclude, as did the Administrative Law Judge, that Tax Law § 1139 (a) requires actual repayment or reimbursement to have occurred before a refund may be granted. We note that this interpretation is consistent with the regulations promulgated under Tax Law § 1139, all of which clearly indicate that such repayment must occur prior to the granting of a refund. We note that, generally, regulations are upheld unless shown to be irrational and inconsistent with the statute (***Matter of Slattery Assoc. v Tully***, 79 AD2d 761 [1980], ***affd*** 54 NY2d 711 [1981]). There has been no such showing herein.

We thus find that the Global Settlement Agreement and the clarification agreement do not satisfy the repayment requirement of Tax Law § 1139 (a) and related regulations. While these agreements may constitute a legally binding promise to pay, such a promise is insufficient to satisfy the clear statutory language. We note, as did the Administrative Law Judge, that the Global Settlement Agreement did not purport to dictate to any state the substance of its laws with regards to refunds or refund procedures (***see*** finding of fact 5).

We note that we do not address the question of whether petitioner's funding of the escrow account under the facts and circumstances herein would be sufficient to satisfy the repayment requirement under Tax Law § 1139 (a). Given our denial of petitioner's motion to reopen, there is no evidence in the record of any such escrow account funding.

Petitioner interprets the word "made" as used in the repayment sentence in Tax Law § 1139 (a) ("No refund or credit shall be made . . .") to mean the actual refund payment and distinguishes such actual payment from the Division's approval or disapproval of the claim's legal and factual validity. Accordingly, under petitioner's proposed construction of Tax Law § 1139 (a), the Division would first make a determination as to whether a refund is due and in what amount. If the Division approves a refund in some amount, the refund applicant would then repay its customers to the extent of the approved claim. Following such repayment, the Division would "make" a refund (an actual payment) to the applicant.

Petitioner's proposed system of administering a vendor's refund claim, while not unreasonable, is nonetheless inconsistent with the statutory language. As discussed, the language of the statute and regulations support a literal reading and thus strongly indicate that a vendor must make an actual repayment to its customers before a refund may be granted.

Petitioner's proposed construction also runs afoul of Tax Law § 1139 (b). That provision requires the Division to "grant or deny" a refund application in whole or in part and that "[s]uch determination shall be final and irrevocable" unless the applicant timely files a petition with the Division of Tax Appeals. Logically, a "final and irrevocable" determination on a refund claim, whether in whole or in part, must include a decision on whether the applicant has satisfied all conditions necessary to the granting of the refund. In the case of a vendor's refund application,

one such condition is repayment. Tax Law § 1139 (b) is thus consistent with Tax Law § 1139 (a) and the regulations thereunder in indicating that repayment must precede the Division's decision to grant or deny the refund.

We disagree with petitioner's contention that, as the term repay is not defined in the statute or regulations, the literal definition proposed by the Division and accepted herein constitutes an improper promulgation of a rule under SAPA. Petitioner's position is premised on its contention that the Division has failed to promulgate regulations regarding the establishment of repayment by the applicant as directed by the statute (***see*** Tax Law § 1139 [a]). We disagree with this premise and thus reject petitioner's contention. The regulations do, in fact, note the manner by which an applicant may establish repayment to the Division's satisfaction. Specifically, 20 NYCRR 534.2 (c) lists various records that must be maintained to prove repayment. That regulation, together with the other regulations cited herein, as well as Tax Law § 1139 (a), all support a finding that an actual transfer of funds, and not a promise to transfer funds, is required for a vendor to obtain a refund of sales tax.

We agree with the Administrative Law Judge that the nonprecedential ***New Cingular Wireless PCS, LLC v Director, Division of Taxation*** (28 NJ Tax 1 [2014]) is distinguishable from the instant matter given the small, but significant difference in the comparable statutes (New Jersey statute requires repayment before "actual" refund). We also note that there is no indication in the New Jersey decision of any regulations regarding refund procedures. As discussed, New York's regulations strongly support a finding that repayment must be made before a refund may be granted.

Finally, we note our disagreement with petitioner's contention that there is an issue of fact

herein regarding whether the Division reviewed petitioner's refund claim prior to its issuance of the denial letter on August 6, 2012. Our review of the record indicates clearly that the Division reviewed the documentation provided with petitioner's refund claim. The fact that the Division continued to review documentation following the August 6, 2012 refund denial does not support a finding, as petitioner appears to assert, that no such review was conducted before August 6, 2012.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of New Cingular Wireless PCS LLC is denied;

2. The order of the Administrative Law Judge is affirmed;

3. The determination of the Administrative Law Judge is affirmed;

4. The petition of New Cingular Wireless PCS LLC is denied; and

5. The denial of petitioner's refund application, dated August 6, 2012, is sustained.

DATED: Albany, New York
February 16, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner
By BAV with permission

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner