STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
BCD-AP-19-01

STATE TAX ASSESSOR

Petitioner/counterclaim respondent

v.

ORDER ON MOTION TO COMPEL

TRACFONE WIRELESS, INC.,

Respondent/counterclaim petitioner

Before the court is Tracfone Wireless, Inc.'s ("Tracfone's") Motion to compel the production of documents. The State Tax Assessor (the "Assessor") is represented by Assistant Attorney General Thomas A. Knowlton. Tracfone is represented by Attorneys Jonathan M. Dunitz and Brian T. Marshall.

Background

On September 6, 2019, Tracfone filed a motion to compel responses to its second request for production of documents. In its motion, Tracfone asks the court to order the Assessor to produce documents related to taxpayers that are similarly situated to Tracfone. Tracfone believes that these documents will furnish evidence that the Assessor has only recently begun levying a tax assessment upon payments made to telecom companies. Tracfone contends that this evidence is relevant to the current proceeding because it will show that the Assessor changed its policies and practices without providing taxpayers notice of the change as required by 36 M.R.S. § 112. Tracfone argues that a failure to provide notice of such a change in policy and practice would render invalid two July 28, 2016 tax assessments the Assessor levied upon Tracfone.

During the course of reviewing Tracfone's motion, the court discerned that a threshold issue exists regarding whether the Assessor's failure to comply with the notice provisions of 36

M.R.S. § 112 can provide an entity with a defense to a tax assessment. If it cannot, then it is not likely that the documents Tracfone has requested would lead to the discovery of admissible evidence. The parties consented to this procedure which would require the Court to determine first as a matter of law if the notice provisions created a defense to a tax assessment, and the Court ordered supplemental briefing. For the following reasons, the court agrees with the Assessor that section 112 does not create such a defense.

Discussion

36 M.R.S. § 112 provides

> When a significant change has occurred in bureau policy or practice or in the interpretation by the bureau of any law rule or instruction bulletin, the assessor shall, within 60 days of the change, provide to [a] publishing entity or entities written notice, suitable for publication, of the change.

Tracfone argues that this language was intended to create a consequence for the Assessor's failure to provide notice. To support its argument, Tracfone points to section 112's use of "shall," the legislative history of section 112's enacting legislation, and the absence of language stating that section 112 does not affect the validity of an assessment.

For the purposes of this motion, the court assumes that a substantial change in Bureau practice, policy or interpretation has occurred. The issue this court must decide is whether section 112 prohibits the Assessor from assessing a tax because of the Assessor's failure to provide a written notice of the change to a publishing entity. This is a matter of statutory interpretation.

When interpreting a tax statute, the plain meaning of the statute controls if the statute is unambiguous. *Blue Yonder, LLC v. State Tax Assessor*, 2011 ME 49, ¶ 10, 17 A.3d 667. When an ambiguity exists, courts look to the legislative history of the statute to determine its meaning. *Id.* Courts seek to avoid "absurd, illogical or inconsistent results" when interpreting a statute and words in a statute "must be given meaning and not treated as meaningless and

superfluous." *Stromberg-Carlson Corp. v. State Tax Assessor*, 2001 ME 11, ¶ 9, 765 A.2d 566, 569. Courts, however, will not read additional language into a statute. *Id.*

The court does not discern any ambiguity in section 112. The language the parties dispute is the phrase "the assessor shall, within 60 days of the change, provide to [a] publishing entity or entities written notice, suitable for publication, of the change." While this language plainly directs the Assessor to provide notice of a substantial change within 60 days of the change, it does not prevent the Assessor from implementing the change if notice is not provided. This conclusion is bolstered by the fact that notice must only be provided after a substantial change in policy, practice or interpretation has occurred; notice is not required prior to the change taking effect.

Moreover, the plain language of section 112 provides no sanction or consequence for the Assessor's failure to provide notice. The court cannot read additional language into section 112 or create a remedy which is not supported by the plain language of the statute. *Stromberg-Carlson Corp.*, 2001 ME 11, ¶ 9, 765 A.2d at 569; *Bureau v. Staffing Network*, 678 A.2d 583, 590 (Me. 1996) (courts do "not create a remedy or penalty when a statute is silent regarding the sanction for failure of an agency to timely act"). The only remedy available for the Assessor's refusal to provide notice is an order requiring the agency to act. 5 M.R.S. 11001(2); *see also Guar. Trust Life Ins. Co. v. Superintendent of Ins.,* 2013 ME 102, ¶¶ 38-39, 82 A.3d 121. In this case, however, Tracfone is not seeking an order to requiring the agency to act. It is asking for an order prohibiting the Assessor from acting to assess the tax in question, and is effectively asking the Court to create a remedy which the Court has no authority to create.

The power of taxation is retained solely by the Legislature and the Legislature may not delegate it to other authorities. Me. Const. Art. IX, § 9; *Me. Milk Producers, Inc. v. Comm'r of Agric., Food & Rural Res.*, 483 A.2d 1213, 1220 n.10 (Me. 1984) (citing *Boston Milk Producers,*

Inc. v. Halperin, 446 A.2d 33, 40 (Me. 1982)). Whether Tracfone, or any other entity, is subject to a tax is dependent upon the language of the taxing statute and not the rules, policies or practices of the Tax Assessor. *See Hudson Pulp & Paper Corp. v. Johnson*, 147 Me. 444, 448, 88 A.2d 154, 156 (1952). Thus, it is the acts of the Legislature which provide notice to entities of their tax liability and not the practices, policies, or interpretive guidance offered by the Assessor. *Cmty. Telcoms. Corp. v. State Tax Assessor*, 684 A.2d 424, 427 (Me. 1996); *see also Blue Yonder, LLC v. State Tax Assessor*, 2011 ME 49, ¶ 6, 17 A.3d 667 (the Assessor is not accorded any deference when interpreting tax statutes). Finally, the Assessor is not prevented from enforcing the tax laws of the State of Maine simply because of its prior failure to enforce the law or because of its inconsistent interpretation of the law. *Cmty. Telcoms. Corp.*, 684 A.2d at 427 (collecting cases); *Stewart Title Guar. Co. v. State Tax Assessor*, 2009 ME 8, ¶ 35, 963 A.2d 169.

Conclusion

The plain language of 36 M.R.S. § 112 does not prohibit the State Tax Assessor from enforcing the Tax Laws of the State of Maine even though the enforcement may represent a significant change in policy, practice, or interpretation, and even if the Tax Assessor failed to provide notice of such a change. Consequently, the Assessor's failure to provide notice in accordance with section 112 does not provide an entity with a defense to a tax assessment. In light of this, the information concerning other taxpayers which Tracfone seeks in its second request for the production of documents does not appear to be relevant to the subject matter of this litigation and is therefore not subject to discovery. M.R. Civ. P. 26(b)(1); *Strong v. Brakeley*, 2016 ME 60, ¶ 14 n.5, 137 A.3d 1007.

The entry is

Tracfone Wireless, Inc.'s Motion to Compel is DENIED.

Date: 2/3/2020 **_____/s_____**
M. Michaela Murphy
Justice, Business and Consumer Court