

Letter of Findings Number: 06-0523
Utility Receipts Tax
For Tax Years 2003-05

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ISSUES

I. Utility Receipts Tax—Imposition.

Authority: IC § 6-2.3-1-4; IC § 6-2.3-1-6; IC § 6-2.3-1-13; IC § 6-2.3-2-1; IC § 6-2.3-3-2; IC § 6-2.3-3-4; IC § 6-2.3-3-10; Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. (2007); Internet Tax Freedom Act § 1100-06, 47 U.S.C. § 151 note (2007); 47 U.S.C. § 152 (2007); 47 U.S.C. § 158 (2007); 47 U.S.C. § 159 (2007); (2005); 47 CFR § 61.3 (2005); 47 CFR § 69.131 (2005); 47 CFR § 69.158 (2005); Order, Cause No. 40785 (Ind. Util. Regulatory Comm'n June 30, 1998).

The taxpayer protests the imposition of Utility Receipts Tax on certain gross receipts.

II. Utility Receipts Tax—Wholesale Revenues.

Authority: IC § 6-2.3-3-5.

The taxpayer protests the imposition of utility receipts tax on gross receipts from use of T-1 lines.

III. Utility Receipts Tax—Lost Services.

Authority: IC § 6-2.3-3-5.

The taxpayer protest the imposition of utility receipts tax on receipts for replacing a damaged telephone pole.

STATEMENT OF FACTS

The taxpayer is a telecommunications company providing telephone services to Indiana customers. After an audit of the taxpayer, the Indiana Department of Revenue ("Department") assessed additional Utility Receipts Tax ("URT"), penalties, and interest for the tax years 2003, 2004, and 2005 for each taxpayer. The taxpayer protested its assessment. Also, the taxpayer filed an amended return with the Department requesting a URT refund and received an order denying its refund. The taxpayer protested its order denying the refund. The taxpayer requested and received a joint administrative hearing, involving it and other related taxpayers, and this Letter of Findings results. Further facts will be supplied as required.

I. Utility Receipts Tax—Imposition.

DISCUSSION

The URT is imposed by IC § 6-2.3-2-1 as follows:

An income tax, known as the utility receipts tax, is imposed upon the receipt of:

(1) the entire taxable gross receipts of a taxpayer that is a resident or a domiciliary of Indiana;...

"Gross receipts" for purposes of the Indiana's URT is defined at IC § 6-2.3-1-4 as follows:

"Gross receipts" refers to anything of value, including cash or other tangible or intangible property that a taxpayer receives in consideration for the retail sale of utility services for consumption before deducting any costs incurred in providing the utility services.

In summary, the URT is an income tax imposed on the receipts received for providing utility services for consumption. The utility services subject to tax include telecommunication services.

A. Voice Mail Revenue.

The taxpayer protests the imposition of URT on receipts derived from voice mail revenue. The Department found that the taxpayer had not distinguished whether these receipts were for voice mail services or for the transmission of voice mail messages, which are taxable under IC § 6-2.3-1-13.

IC § 6-2.3-1-13, in relevant part, provides:

"Telecommunication services" means the transmission of messages or information by or using wire, cable, fiber optics, laser, microwave, radio, satellite, or similar facilities. The term does not include any of the following:

(1) Value added services in which computer processing applications are used to act on the form, content, code, or protocol of the information **for purposes other than transmission. (Emphasis Added).**

Accordingly, voice mail charges that are for the transmission of voice mail messages would be a telecommunications service and voice mail charges that are for the voice mail service itself would not be a telecommunications service subject to URT.

The taxpayer has provided sufficient information to establish that the receipts for voice mail revenue were for the voice mail services and were not for the transmission of the voice mail messages.

Therefore, the taxpayer's protest is sustained.

B. Directory Assistance Revenue.

The taxpayer protests the imposition of URT on receipts derived from directory assistance revenue. The

Department found that the taxpayer had not distinguished whether these receipts were for directory assistance services or for the transmission of the directory assistance information.

The taxpayer has provided sufficient information to establish that the receipts in its directory assistance revenue account were not for the transmission of the directory assistance information and were for directory assistance services.

Therefore, the taxpayer's protest is sustained.

C. End User Revenue.

The taxpayer protests the imposition of URT on receipts received from "end user revenue charges." The taxpayer asserts that since these charges were collected from the customers in a separately stated line item charge and were approved by the Federal Communications Commission ("FCC") or Indiana Utility Regulation Commission ("IURC"), the receipts are excluded from URT under IC § 6-2.3-3-4.

IC § 6-2.3-3-4 provides, as follows:

(b) Gross receipts do not include collections by a taxpayer of a tax, fee, or surcharge that is:

- (1) approved by the Federal Communications Commission or the utility regulatory commission; and
- (2) stated separately as an addition to the price of telecommunications services sold at retail.

In other words, receipts that result from the collection of a "tax, fee, or surcharge" that was approved by the FCC or the IURC and that is stated as a separate line item on the customers' bill are exempt from the URT.

The taxpayer's end user revenue charges are not receipts from the collection of a "tax, fee or surcharge" that was approved by the FCC. The end user revenue charges are not "fees" because the FCC has not included them in either of the listed schedules of fees. See Telecommunications Act of 1996, 47 U.S.C. § 158-159 (2007). The end user revenue charges are not "taxes" charged to customers by the Federal or State government. The end user revenue charges are not "surcharges." The FCC and IURC both explicitly approved the "end user charges" as "charges." See 47 CFR § 61.3(j) (2005) (adopting the common line end user access charge as a "charge"); 47 CFR §§ 69.131, 158 (2005) (adopting the universal service end user charge as a "charge"); and Order, Cause No. 40785 slip op. at 17 (Ind. Util. Regulatory Comm'n June 30, 1998) (adopting the intrastate access charge as a "charge"). The FCC defines a "charge" as "the price for service." 47 CFR § 61.3(j) (2005).

Accordingly, the end user revenue charges are nothing more than "charges" the customer pays for telecommunications services. Therefore, since the end user revenues do not result from the collection of a tax, fee, or surcharge that was approved by the FCC or IURC, the receipts do not fall under the exclusion and are subject to the URT.

Therefore, the taxpayer's protest is respectfully denied.

D. Distributions from Federal and State Tariff and Revenue Pooling Systems.

The taxpayer protests the imposition of URT on receipts it receives from the federal and state tariff and revenue pooling systems. The Department found that the receipts that the taxpayers received from the Universal Service Fund ("USF") and Indiana's Traditional DEM Weighing Fund ("TDWF") are subject to the URT. The taxpayer asserts that since these revenues are derived from the USF and TDWF, the revenues are not retail revenues. Additionally, the taxpayer argues if these distributions are subject to the URT it would result in double taxation.

1. Receipts from the Pools.

As stated previously, the URT is an income tax imposed on the receipts received for providing utility services for consumption. Further, "receives," as defined for the purposes of the Indiana's URT, includes "the payment of a taxpayer's expenses, debts, or other obligations by a third party for the taxpayer's direct benefit." IC § 6-2.3-1-6(2).

Accordingly, when a taxpayer provides utility services and directly benefits from payments it receives for its expenses, debts, or obligations, then that taxpayer obtains gross receipts that are subject to the URT.

The taxpayer receives distributions from the TDWF and USF revenue pools to recover its expenses and obligations of providing retail utility services for consumption to high cost, typically rural, customers in Indiana. The Department found that since the USF and TDWF, which are third parties, pay something of value for the taxpayer's expenses and obligations from which the taxpayer receives a direct benefit, the receipts from the USF/TDWF are subject to the URT.

The taxpayer maintains that the distributions are received in a transaction that is separate and distinct from the retail sale and as such are not subject to the URT. However, but for the retail sale of the utility service to those customers, the taxpayer would not receive these distributions. The taxpayer agrees to provide telecommunication services to customers who agree to pay for telecommunication services. The taxpayer reports its revenue and cost information for providing telecommunications services to its customers to the USF and TDWF pools. The pooling systems make distributions based upon the information submitted. The taxpayer receives the funds from the USF/TDWF pooling systems because the taxpayer provided telecommunication services--i.e., "the retail sale of the utility service for consumption"--to certain high cost customers. If the taxpayer had not provided the telecommunication services to these customers, then the USF and TDWF pools would not make a distribution to the taxpayer.

Therefore, the receipts that the taxpayer receives from the TDWF and USF are gross receipts subject to the

URT.

2. Double Taxation: USF Tariff and Revenue Pooling System.

The taxpayer maintains that imposing the URT on the gross receipts from the USF would subject the receipts to double taxation. Double taxation means that the same receipts are subjected to the same tax twice--once on receipt from the customers and once again on receipt by the taxpayers. Since every telecommunications carrier that provides interstate telecommunications could contribute to the USF system, then telecommunication companies located across the United States contribute to the pools. As a result, the likelihood of the taxpayer receiving revenues contributed by Indiana taxpayers who were subject to the URT is impossible to determine with any accuracy.

Moreover, IC § 6-2.3-3-2 provides:

Notwithstanding any other provision of this article receipts that would otherwise not be taxable under this article are taxable receipts under this article to the extent that the amount of the nontaxable receipts are not separated from the taxable receipts on the records or returns of the taxpayer.

Accordingly, even if the taxpayer could somehow devise a formula to identify the small amount of receipts that were actually subjected to double taxation, the taxpayer has not kept these amounts separate in their records or on the returns. Thus, pursuant to IC § 6-2.3-3-2, the receipts, even if proved nontaxable, are taxable receipts at this point.

Furthermore, the USF requires companies to report their monthly total revenues as well as expenses involved in providing telecommunications services to customers. The USF bases the companies' contributions to and distributions from the pool on the total revenues and expenses reported. The USF equation includes a line in the expenses for taxes. When this fact is taken in consideration with the fact that the FCC included a state tax savings provision in the Telecommunications Act of 1996 § 601(c)(2), 47 U.S.C. § 152 note (2007) (Applicability of Consent Decrees and Other Law), it can be assumed that the FCC already gave this matter consideration and found the State could fairly tax these receipts.

Therefore, the receipts that the taxpayer received from the USF were not subjected to double taxation and are subject to the URT.

3. Double Taxation: TDWF Tariff and Revenue Pooling System.

The taxpayer maintains that imposing the URT on the gross receipts from the TDWF would subject the receipts to double taxation. Double taxation means that the same receipts are subjected to the same tax twice--once on receipt from the customers and once again upon distribution and receipt by the taxpayer.

The receipts that the taxpayer received from the TDWF are distributed from a pool that contains funds that all have already been subject to the URT when they were collected from the end users. However, the TDWF requires companies to report their total revenues as well as expenses involved in providing telecommunications services to customers. The TDWF bases the companies' contributions to and distributions from the pool on the total revenues and expenses reported. Since the TDWF equation includes a line in the expenses for taxes, it can be concluded that the IURC already gave this matter consideration and found the State could fairly tax these receipts.

Nonetheless, subjecting one hundred percent of the revenues to the URT once on collection from the customers before contribution to the pools and one hundred percent of the revenues to the URT a second time upon distribution from the pools would subject the TDWF to the URT twice. Therefore, gross receipts for URT purposes will only include the greater of the end user revenues collected for the TDWF (as discussed in subpart C above) or the distributions received from the TDWF revenue pool (as discussed in this subpart).

Therefore, the taxpayer's protest is sustained in part and denied in part.

E. DSL Service Revenue.

The taxpayer protests the imposition of URT on receipts derived from DSL Service revenue. The taxpayer maintains that since the DSL Service revenue is received for the provision of internet access services, which have been deemed by FCC as information services, the receipts are not received for telecommunication services and are not subject to the URT. See Internet Tax Freedom Act § 1100-06, 47 U.S.C. § 151 note (2007) (Excluding DSL services from tax in a four year extension of the Internet Tax Moratorium).

The taxpayer has provided sufficient documentation to establish that the receipts are not received for the provision of a telecommunications service. Since the receipts are not received for the provision of a telecommunications service, the receipts are not subject to the URT.

Therefore, the taxpayer's protest is sustained.

F. "Inside Wire" Account.

The taxpayer protests the imposition of URT on receipts in the "Inside Wire" accounts that the taxpayer receives, in a flat monthly service charge, from customers to provide repairs and maintenance to the "inside wires" that are located entirely inside the customers' home or business buildings. The receipts in this account do not cover any charges for repairs and maintenance that must be performed on wires or equipment that are used to deliver the service from the utility company to the customer's actual home or business buildings. Thus, the taxpayer asserts that receipts in the "Inside Wire" accounts are not for the type of maintenance and repairs that are subject to the URT under IC § 6-2.3-3-10.

IC § 6-2.3-3-10 provides:

Gross receipts include receipts received for installation, maintenance, repair, equipment, or leasing services provided to a commercial or domestic consumer that are directly related to the **delivery of utility services** to the commercial or domestic consumer or the removal of equipment from a commercial or domestic consumer upon the termination of service. **(Emphasis added)**.

Accordingly, taxable gross receipts would include receipts received for providing maintenance and repairs that directly pertain to the taxpayer's delivery of the utility service to the customer.

The taxpayer has provided sufficient documentation to establish that the receipts in the "Inside Wire" accounts do not "directly relate to the delivery of utility services." The receipts are for repairs and maintenance to the wires located completely within the customers' buildings. Therefore, if the taxpayer was receiving receipts from repairs and maintenance of wires that run from the taxpayer's place of business to the outside of the customers' buildings, then the taxpayer would be receiving receipts that are subject to the URT. Thus, the receipts in the "Inside Wire" accounts are not receipts that are subject to the URT.

Therefore, the taxpayer's protest is sustained.

G. "1 & 2 Phone" Account.

The taxpayer protests the imposition of URT on receipts in the "1 & 2 Phone" account that the taxpayer receives from sales of multi-line telephones. The taxpayer asserts that receipts in the "1 & 2 Phone" accounts are not for the type of equipment that is subject to the URT under IC § 6-2.3-3-10.

As provided previously, for URT purposes taxable gross receipts include receipts received for providing equipment that directly relates to the taxpayer's delivery of the utility service. IC § 6-2.3-3-10.

The taxpayer has provided sufficient documentation to establish that its equipment sales of "1 & 2 phones" do not "directly relate to the delivery of utility services." Since the "1 & 2 phones" are not equipment that relates to the taxpayer's delivery of the service, the receipts received from the sale of such equipment are not subject to the URT.

Therefore, the taxpayer's protest is sustained.

H. "Bus System" Account.

The taxpayer protests the imposition of URT on receipts in the "Bus System" account that the taxpayer receives from sales of business office telephone equipment. The taxpayer asserts that receipts in the "Bus System" accounts are not for the type of equipment that is subject to the URT under IC § 6-2.3-3-10.

As provided previously, for URT purposes taxable gross receipts include receipts received for providing equipment that directly relates to the taxpayer's delivery of the utility service. IC § 6-2.3-3-10.

The taxpayer has provided sufficient documentation to establish that its sales of business systems equipment do not "directly relate to the delivery of utility services." Since the business systems are not equipment that relates to the taxpayer's delivery of the service, the receipts received from the sale of such equipment are not subject to the URT.

Therefore, the taxpayer's protest is sustained.

FINDING

In summary, the taxpayer's protest of subpart C is denied, the taxpayer's protest of subparts A, B, E, F, G, and H are sustained, and the taxpayer's protest of subpart D is sustained in part and denied in part.

II. Utility Receipts Tax—Wholesale Revenues.

DISCUSSION

The taxpayer protests the inclusion of revenues from T-1 lines. The taxpayer argues that cellular phone companies pay the taxpayer for use of the taxpayer's T-1 lines whenever a cellular phone user makes a call to, or receives a call from, the taxpayer's customers. Thus, the taxpayer argues that the revenues they received were from a wholesale sale of telecommunications rather than a retail sale of telecommunications; therefore, the revenues should not be subject to the URT.

Under IC § 6-2.3-3-5(a), wholesale sales to another generator or reseller of utility services are not subject to the URT. In this case, the taxpayer has not provided sufficient information to conclude that its receipts from T-1 lines were from wholesale sales. Therefore, the taxpayer's protest is respectfully denied.

FINDING

The taxpayer's protest is denied.

III. Utility Receipts Tax—Lost Services.

DISCUSSION

The taxpayer argues that certain proceeds that it received from an insurance settlement were not subject to the URT. In particular, the taxpayer argues that the receipts from the insurance settlement were for replacing a telephone pole rather than the loss of utility revenues. Therefore, the taxpayer argues that these receipts should not be included for URT purposes.

IC § 6-2.3-3-3 provides that "Gross receipts include the amount of any legal settlement or judgment received to compensate the taxpayer for lost retail sales of utility services." The receipts in question were for the replacement of damaged property, not the loss of revenue from telephone or other utility services. Thus, the taxpayer has substantiated that the receipts in question were not subject to gross income tax.

FINDING

The taxpayer's protest is sustained.

Posted: 02/27/2008 by Legislative Services Agency
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