DEPARTMENT OF STATE REVENUE

40-20080417.LOF

Letter of Findings Number: 08-0417
Utility Receipts Tax
For Tax Years 2003 and 2004

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Utility Receipts Tax–Imposition.

Authority: IC § 6-2.3-1-4; IC § 6-2.3-1-13; IC § 6-2.3-1-14; IC § 6-2.3-2-1; IC § 6-2.3-3-4; IC § 6-2.3-3-5; IC § 6-2.3-4-2; IC § 6-2.5-1-27.5; IC § 6-8.1-5-1; IC § 8-1-2.6-0.1; IC § 8-1-2.6-0.3; 170 IAC 7-1.1-11; Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. (2007); 47 U.S.C. § 158 (2007); 47 U.S.C. § 159 (2007); 47 CFR § 54.712 (2005); 47 CFR § 61.3 (2005); 47 CFR § 69.131 (2005); 47 CFR § 69.158 (2005); Complete Auto Transit v. Brady, 430 U.S. 274 (1977); Poehlman v. Feferman, 717 N.E. 2d 578 (Ind. 1999); Mynsberge v. Indiana Dep't of State Revenue, 716 N.E.2d 629 (Ind. Tax Ct. 1999); Black's Law Dictionary (8th Ed. 2004).

Taxpayer protests the imposition of utility receipts tax on certain gross receipts.

STATEMENT OF FACTS

Taxpayer is a telecommunications company providing telephone services to Indiana customers. Taxpayer paid Utility Receipts Tax ("URT") on its gross receipts. After an audit, the Indiana Department of Revenue ("Department") assessed additional Utility Receipts Tax, penalties, and interest for the tax years 2003 and 2004. The Department found that Taxpayer had failed to include a variety of receipts as gross receipts subject to the URT. Taxpayer protested this assessment. An administrative hearing was held, and this Letter of Findings results. Further facts will be supplied as required.

I. Utility Receipts Tax–Imposition.

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

The Department found that Taxpayer had failed to include a variety of receipts as gross receipts subject to the URT.

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; and

(2) the taxable gross receipts derived from activities or businesses or any other sources within Indiana by a taxpayer that is not 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 from retail sales of utility services for consumption by the purchaser. The utility services subject to tax include telecommunication services. IC § 6-2.3-1-14(6).

In its protest, Taxpayer supports certain of its assertions by citing to other taxpayer's Letter of Findings and Revenue Rulings. Notwithstanding that Letter of Findings and Revenue Rulings are only binding with respect to the taxpayer to whom they are issued, Taxpayer facts are not the same as the taxpayers in the cited Letter of Findings and the Revenue Rulings. Therefore, the Department declines the opportunity to address them.

A. "End User Charges."

The Department found that Taxpayer had failed to include receipts that were received from "end user common line access charges" and "Federal Universal Service Fund charges" (hereafter, collectively, "end user charges") as gross receipts subject to the URT.

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"), these receipts are a "tax, fee, or surcharge" collected from the customer not subject to the 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 is stated as a separate line item on the customers' bill are excluded from the URT. Accordingly, the receipts must be from the collection of a tax, fee, or surcharge that is approved by the FCC or IURC in order to be excluded.

The end user revenue charges are not a "tax, fee or surcharge" 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. § 158-9 et seq. (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.") The FCC defines a "charge" as "the price for service." 47 CFR § 61.3(j) (2005).

Accordingly, the end user revenue charges are "charges" the customer pays for the provision of telecommunications services. Therefore, since the end user revenue does not result from the collection of a tax, fee, or surcharge approved by the FCC, it does not fall under the exclusion and is subject to the URT.

Taxpayer asserts that the Department's interpretation of IC § 6-2.3-3-4 does not represent the intent of the legislature or the plain meaning of the statue for receipts from "end user charges."

The Department refers to the Tax Court's decision in Mynsberge v. Indiana Dep't of State Revenue, 716 N.E.2d 629, 632-633 (Ind. Tax Ct. 1999), for the issue of statutory interpretation:

> When the Court is confronted with a question of statutory interpretation, the Court's function is to give effect to the intent of the General Assembly in enacting the statutory provision. See Indianapolis Historic Partners v. State Bd. of Tax Comm'rs, 694 N.E.2d 1224, 1227 (Ind. Tax Ct. 1998). In general, the best evidence of this intent is found in the language chosen by the General Assembly. See Associated Ins. Cos., Inc. v. Indiana Dep't of State Revenue, 655 N.E.2d 1271, 1273 (Ind. Tax Court 1995), review denied. However, the legislative intent as ascertained from an act or statutory scheme as a whole will prevail over a strict literal reading of any one particular statutory provision. See Department of State Revenue v. Estate of Hardy, 703 N.E.2d 705, 710 (Ind. Tax Ct. 1998) (citing State Natural Resources Comm'n v. AMAX Coal Co., 638 N.E.2d 418, 429 (Ind. 1994); Indiana Eby-Brown v. Department of State Revenue, 648 N.E.2d 401, 403 (Ind. Tax Ct. 1995), review denied). Additionally, it is presumed that the General Assembly did not intend to enact a superfluous statutory provision, see Sangralea Boys Fund, Inc. v. State Bd. of Tax Comm'rs, 686 N.E.2d 954, 958 (Ind. Tax Ct. 1997), review denied, and therefore, the Court, when interpreting a statute, will endeavor to give meaning to every word in that statute. See Guinn v. Light, 558 N.E.2d 821, 823 (Ind. 1990). Finally, section 6-2.5-4-5 is a tax imposition statutory provision. Therefore, it is to be strictly construed against the imposition of tax. See State Bd. of Tax Comm'rs v. Jewell Grain Co., 556 N.E.2d 920, 921 (Ind. 1990); Tri-States Double Cola Bottling Co. v. Department of State Revenue, 706 N.E.2d 282, 285 n.9 (Ind. Tax Ct. 1999). However, the policy of strict construction will not override the plain language of a tax imposition provision. Cf. Hyatt Corp. v. Department of State Revenue, 695 N.E.2d 1051, 1053 (Ind. Tax Court 1998) (policy of strict construction should not be used to contradict plain language of a tax exemption provision), review denied.

Taxpayer defines a "surcharge" as provided in Black's Law Dictionary 1482 (8th Ed. 2004) as "an additional tax, charge, or cost" or as provided in Webster's Third New Int'l Dictionary as "a charge in excess of the usual or normal amount: an additional tax, cost, or impost." Taxpayer defines a "fee" as provided in Black's Law Dictionary 647 (8th Ed.) as "a charge for labor or services" or as provided in Webster's Third New Int'l Dictionary as "a charge fixed by law... for certain privileges or services." Taxpayer maintains that the "end user charges" would meet either of these definitions of surcharge or fee since the charges are stated separately on the customer's bill.

Under Taxpayer's definition anything listed separately on the bill would meet the generic definition of fee or surcharge and would be excluded from URT. Taxpayer's interpretation of a "fee or surcharge" would not be limited to those "approved by the Federal Communications Commission or the utility regulatory commission" as a "tax, fee, or surcharge" as required by the statute. Thus, Taxpayer's interpretation of the statue does not give the full effect of every word in IC § 6-2.3-3-4 and makes the words "approved by" superfluous statutory language. As stated previously, in Mynsberge the Tax Court found "it is presumed that the General Assembly did not intend to enact a superfluous statutory provision... and therefore, the Court, when interpreting a statute, will endeavor to give meaning to every word in that statute." Mynsberge, 716 N.E.2d at 633.

The Department's interpretation of IC § 6-2.3-3-4 gives the plain meaning and effect to every word of the statute. The Department in its plain meaning interpretation of IC § 6-2.3-3-4 looks, as the code suggests, to the statutes and authorities of the FCC and IURC to see how the charges were adopted by the FCC and IURC. The FCC explicitly adopted the "end user charges" as "charges." See 47 CFR § 61.3(j) (2005) (adopting the end user common line access charge as a "charge"); 47 CFR §§ 69.131, 158 (2005) (adopting the universal service end user charge as a "charge"). Since the "end user charges" were not approved as "surcharge or fee," the "end user charges" are subject to the URT.

Taxpayer further asserts that the "end user charges" listed on the customer's bill are for non-retail services because Taxpayer is required to provide access to the long distance companies and is required to make

contributions to the Universal Service fund. Taxpayer, therefore, maintains that the "end user charges" result from FCC mandates.

First, the "end user charges" are not customer charges mandated by the FCC or IURC. The statutes and authorities of the FCC and IURC both explicitly approved a discretionary charge to the customer's bill. See 47 CFR § 61.3(j) (2005) (providing the telecommunications "may" include an "end user access charge" on the customer's bill.); 47 CFR § 54.712(a) (2005) (providing USF contributions "may be recovered" by an universal service "end user charge").

In fact, the FCC in "Understanding Your Telephone Bill," provided on its website as a guide to consumers to understand telephone bills, in relevant part, as follows:

> The FCC allows local telephone companies to bill customers for a portion of the costs of providing access. **These charges are not a government charge or tax.** The maximum allowable access charges per telephone line are set by the FCC, but local telephone companies are free to charge less or not at all. Access charges for second or additional lines at the same residence are higher than the charges for the primary line. These charges can be describe by your telephone bill as "Federal access charge," "Customer or Subscriber Line Charge," "Interstate Access Charge," etc.
>
> ...
>
> Although not required to do so, many service providers chose to pass their contribution costs to the USF on to their customers in the form of a line time on customer bills....

Federal Communications Commission Consumer & Governmental Affairs Bureau, Understanding Your Telephone Bill, http://www.fcc.gov/cgb/consumerfacts/understanding.html, *1 and 2 (last accessed on September 13, 2007) (**Emphasis in original**). Thus, the "end user charges" as shown as line item charges on the customer bills are not mandated by the FCC, but are discretionary charges to recover Taxpayer costs for the provisions of telecommunications services.

Second, while not determinative on the issue, the Indiana General Assembly defines "basic telecommunications service" to "include, at a minimum... access to interexchange service" and "switched and special access service." IC § 8-1-2.6-0.1(b)(3) and IC § 8-1-2.6-0.3(a)(4). Moreover, 170 IAC 7-1.1-11 provides, "[T]he minimum grade of local exchange telecommunications service that may be provided within Indiana shall include... local service [and]... [a]ccess to interexchange services." Furthermore, the Indiana Supreme Court has established "a strong presumption that when the legislature enacted a particular piece of legislation, it was aware of existing statutes relating to the same subject." Poehlman v. Feferman, 717 N.E. 2d 578, 582 (Ind. 1999). Therefore, since the "common line end user access charges" are for a telecommunications service provided by Taxpayer, the receipts are from utility services that are subject to the URT. Thus, the "end user charges" are for a retail transaction–i.e., Taxpayer provides telecommunications services to an end user who pays Taxpayer for providing the telecommunications services.

Lastly, Taxpayer in its assertion tries to exclude a receipt that it received to recover its cost of doing business–i.e., the provision of access to the long distance companies' services and its contributions to the Universal Service Fund–from its gross receipts that are subject to the URT. "Gross receipts" include "anything of value... 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." IC § 6-2.3-1-4 (Emphasis Added).

Regardless of whether Taxpayer is required to provide access to the long distance companies or to make contributions to the Universal Service Fund, these are costs that Taxpayer must bear to be in the business of providing retail telecommunications services. While Taxpayer is allowed by the FCC, at Taxpayer's discretion, to separately state a charge as a line item on its bill that represents amounts to recover these specific costs of doing business, the costs themselves are Taxpayer's costs. Since gross receipts include all of Taxpayer's receipts before any deduction for costs incurred in providing the utility services, the amounts representing Taxpayer's costs cannot be deducted. Accordingly, the "end user charges" are gross receipts subject to the URT.

Taxpayer further asserts that if the "end user charges" are "gross receipts," the "end user charges" are received in connection with interstate long distance services rendering them exempt from the URT under IC § 6-2.3-4-2.

IC § 6-2.3-4-2 provides:

> Gross receipts derived from business conducted in commerce between Indiana and either another state or territory or a foreign country are exempt from utility receipts tax to the extent the state is prohibited from taxing the gross receipts by the Constitution of the United States.

In other words, the receipts that are derived from activities in interstate commerce on which the United States Constitution prohibits the Department assessing URT are exempt from URT.

In Complete Auto Transit v. Brady, 430 U.S. 274 (1977), the United States Supreme Court found that "the mere act of carrying on a business in interstate commerce does not exempt a corporation from state taxation." Id. at 288. The Court reasoned that "it was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." Id. at 288 (citing Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938)).

The "end user charges" are paid by customers because the customers are receiving telecommunications

services. The charges do not represent the minutes charged for interstate long distance calls. Every customer pays the "end user charges" even if no long distance calls are ever made. Moreover, the telecommunications services are offered to the Indiana customers, which received phone bills with the "end user charges" on them at Indiana addresses and pay the charges for the provision of the telecommunications services. Thus, Indiana is the only state that could impose URT on these charges invoiced to and paid for by the Indiana customer. Therefore, the mere fact that these charges might be associated with interstate long distance calling does not mean that the charges are exempt under IC § 6-2.3-4-2.

Therefore, Taxpayer's protest is denied.

B. "Value-Added Services" Revenue.

The Department found that Taxpayer had failed to include certain receipts from "caller ID," "3-Way calling," "call forwarding," "call waiting," "auto redial," "automatic callback," "call return," "calling name display," "conference calling," "repeat dialing," and "speed dial" revenues as gross receipts subject to the URT.

Taxpayer asserts that its "voice mail," "caller ID," "3-Way calling," "call forwarding," "call waiting," "auto redial," "automatic callback," "call return," "calling name display," "conference calling," "repeat dialing," and "speed dial" revenues are receipts derived from "value-added services," which are not included as telecommunications services in 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**).

The Department determined that the "caller ID," "3-Way calling," "call forwarding," "call waiting," "auto redial," "automatic callback," "call return," "calling name display," "conference calling," "repeat dialing," and "speed dial" revenues were received for the transmission of messages or information. The Department found that the applications involve charges for the sending of transmission codes that are part of the transmission routing instructions for the telephone messages.

Taxpayer asserts that these services utilize software applications located at or within an electronic telecommunications switch in order to provide customers "value-added features" offered in addition to their basic telephone service. Taxpayer further asserts that since these services relate to "routing and switching," the services are not "telecommunications services" subject to the URT. Taxpayer bases this assertion on a modification that was made to the definition of "telecommunications services" as found at IC § 6-2.5-1-27.5 (effective Jan. 2008), which is a sales and use tax provision. The definition for "telecommunications services" for sales and use tax, prior to this amendment, was the same as the definition for URT. The legislature amended the sales and use tax definition, but not the URT definition. Taxpayer maintains that since this amended definition references the "electronic transmission, conveyance, or routing," and the old definition only referenced the "transmission" that any routing services cannot be included under the previous definition.

The Department is unable to agree that the legislature's decision to change a sales and use tax provision necessarily affects the URT. Notwithstanding that the legislature's decision to change the sales and use tax does not affect the URT, the Taxpayer has failed to provide why "routing and switching," which are forms of transmitting messages or information are not the "transmission of messages or information by or using wire, cable, fiber optics, laser, microwave, radio, satellite, or similar facilities" as provided by IC § 6-2.3-1-13.

Moreover, the definition of "telecommunications services" does not exclude all "value-added services" but only those that are "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." IC § 6-2.3-1-13 (Emphasis Added). Therefore, if the purpose of the "value-added service" is transmission, then it is a telecommunications service. Thus, services such as "3-Way calling," "call forwarding," "call waiting," "auto redial," "automatic callback," "call return," "conference calling," "repeat dialing, " which are for purposes of transmission, are a telecommunications service subject to the URT.

However, the revenues for services–such as "caller ID," "calling name display," and "speed dial" where the service is offered for "purposes other than transmission" and Taxpayer has separately accounted for any transmission element that is present–are not telecommunication services subject to URT.

Lastly, the Department did not assess URT on "voice mail" revenues. As shown on page ten of the audit summary, Taxpayer was given credit in the form of a negative adjustment for those amounts of "voice mail" revenues that Taxpayer had included on its return as gross receipts subject to the URT.

Therefore, Taxpayer's protest is denied in part and sustained in part. Taxpayer's protest is denied for the receipts derived from "voice mail," "3-Way calling," "call forwarding," "call waiting," "auto redial," "automatic callback," "call return," "conference calling," and "repeat dialing" revenues. Taxpayer's protest is sustained for the receipts derived from "caller ID," "calling name display," and "speed dial" revenues.

C. "Wholesale Revenues."

The Department found that Taxpayer had failed to include receipts that were received from related entities of

the Taxpayer. The related entities provide "DSL-Internet services," "Frame Relay services," and "ATM data transfer services."

Taxpayer asserts these receipts are not from "retail sales," but are from "wholesale sales" that are not subject to the URT under IC § 6-2.3-3-5(a). Taxpayer maintains its sales of the telecommunications services are not "retail sales" because the related entities are "DSL-Internet services," "Frame Relay services," and "ATM data transfer services" providers that are not consumers of its telecommunications services. Taxpayer explains that the related entities are not consumers of the telecommunications services because the entities resell the telecommunications services in the form of "DSL-Internet services," "Frame Relay services," and "ATM data transfer services."

IC § 6-2.3-3-5(a) provides that "gross receipts do not include a wholesale sale to another generator or reseller of utility services." (Emphasis Added). While the related entities may be resellers of services, the related entities are not resellers of "utilities services." Therefore, since the related entities are not "another generator or reseller of utility services," Taxpayer sales to the related entities are not "wholesale sales" of "utility services" as required by IC § 6-2.3-3-5(a). Thus, Taxpayer receipts from the sales to the related entities are gross receipts subject to the URT.

Therefore, Taxpayer's protest is denied.

D. "Late Payment" Revenues.

The Department found that Taxpayer had failed to include receipts that were received from "late payment" revenues.

Taxpayer has provided sufficient information to establish that the "late payment" receipts are from charges to the customers for making untimely payments and are not from retail sales of telecommunications services.

Therefore, Taxpayer's protest is sustained.

FINDING

In summary, Taxpayer's protests in subparts A and C are denied; Taxpayer's protest in subpart D is sustained; and Taxpayer's protest in subpart B is denied in part and sustained in part. Taxpayer's protest in subpart B is denied for the receipts derived from "voice mail," "3-Way calling," "call forwarding," "call waiting," "auto redial," "automatic callback," "call return," "conference calling," and "repeat dialing" revenues. Taxpayer's protest in subpart B is sustained for the receipts derived from "caller ID," "calling name display," and "speed dial" revenues.

Posted: 12/17/2008 by Legislative Services Agency
An html version of this document.