

STATE OF MAINE  
KENNEBEC, ss.

MAINE BOARD OF TAX APPEALS  
DOCKET NO. BTA-2013-7

[CORPORATE TAXPAYER],

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

## I. Background

[Corporate Taxpayer (the” Company”)] appeals from Maine Revenue Services’ (“MRS”) assessment of Maine service provider tax (“SPT”) and interest in the total amount of \$[amount] for the period [consisting of several months, commencing prior to July 18, 2008, and ending on a date or after July 18, 2008]. The issue raised by [the Company] on appeal is whether Carrier Cost Recovery Charges (“CCRC”) and Property Tax Recovery Charges (“PTRC”) are subject to SPT. [The Company] has the burden of proof to show that it is more likely than not that MRS erred in assessing SPT on the CCRC and PTRC. 36 M.R.S. § 151-D(10)(F).

## II. Facts

At all relevant times, [the Company] was in the business of providing local and long-distance telecommunications services to customers both in and outside Maine. MRS audited [the Company] for compliance with the SPT law for the period at issue, and determined that [the Company] had incorrectly failed to charge, report, and pay SPT on all CCRC and PTRC charges billed to its Maine customers. As a result, MRS issued the assessment under appeal herein.

MRS subsequently upheld the assessment in full on reconsideration, and [the Company] timely appealed that decision to the Board.

According to [the Company], it charged the CCRC and PTRC only on non-intrastate telecommunications services and it calculated the amounts of each charge based upon the cost of those telecommunications services, which are exempt from SPT.<sup>1</sup> Both the CCRC and PTRC charges are included on a tariff schedule approved by the Federal Communications Commission (“FCC”). The FCC left it to [the Company]’s discretion as to whether to build the CCRC into its per minute charge for non-intrastate telecommunications services, or to state that charge separately on customer billing.<sup>2</sup> [The Company] states that it chose to state the CCRC charge separately so that its customers would know both the amount of that charge and what it was for rather than to build it into the per minute rate for non-intrastate calls.

### III. Law

The assessment period under consideration in this appeal extends from [before July 18, 2008] through [a date on or after July 18, 2008]. The relevant statutes, 36 M.R.S. §§ 2551-2560, were amended effective July 18, 2008, by P. L. 2007, c. 627 (hereinafter “Chapter 627”). Thus, two different versions of those statutes apply to different parts of the audit period at issue in this appeal.

#### A. Statutory language applicable to the assessment period prior to July 18, 2008

Prior to July 18, 2008, Maine imposed SPT at the rate of 5% on the value of telecommunications services. 36 M.R.S. § 2552(1)(E). The law defined the term “telecommunications services” as “[t]he provision of 2-way interactive communications through

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<sup>1</sup> [Footnote omitted].

<sup>2</sup> [Footnote omitted].

the use of telecommunications equipment . . . [but] *does not include*: . . . service originating or terminating outside this State. . . .” 36 M.R.S. § 2551(20) (2003) (emphasis added). Thus, the term “telecommunications services” was limited to *intrastate* telecommunications services. The “value” of telecommunications services was “measured by the sale price” of those services. 36 M.R.S. § 2552(2). The term “sale price” was defined, in relevant part, as “the total amount of consideration, including cash, credit, property and services, for which . . . services are sold, leased or rented, valued in money, whether received in money or otherwise, *without any deduction for the cost of materials used, labor or service cost, interest, losses and any other expenses of the seller.*” 36 M.R.S. § 2551(15) (emphasis added).

B. Statutory language applicable to the audit period following July 17, 2008

By enacting P.L. 2007, chapter 627, entitled “An Act Concerning Technical Changes to the Tax Laws,” which took effect on July 18, 2008, the Legislature made several changes to the SPT law. First, it repealed section 2551(20)’s definition of “telecommunications services,” and replaced it with section 2551(20-A), which contained a new definition of “telecommunications services” that did not exclude non-intrastate telecommunications services.<sup>3</sup> Second, it enacted 36 M.R.S. § 2551(5-A) and (5-B), which defined the terms “international telecommunications service” and “interstate telecommunications service,” respectively.<sup>4</sup> Finally, it enacted 36 M.R.S. § 2557(33) and (34), which exempted sales of those non-intrastate telecommunications

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<sup>3</sup> In relevant part, the revised definition reads, “‘Telecommunications services’ means the electronic transmission, conveyance or routing of voice, data, audio, video or any other information or signals to a point or between or among points.”

<sup>4</sup> “‘International telecommunications service’ means a telecommunications service that originates or terminates in the United States and terminates or originates outside the United States, respectively.” 36 M.R.S. § 2551(5-A). “‘Interstate telecommunications service’ means a telecommunications service that originates in one state, territory, or possession of the United States and terminates in a different state, territory or possession of the United States.” 36 M.R.S. § 2551(5-B).

services from SPT.<sup>5</sup> As part of a technical changes bill, the revisions were not characterized as having made any substantive changes to the application of the SPT law.

#### IV. Analysis

##### A. Summary of Arguments

MRS has not disputed [the Company]’s description of either the CCRC or PTRC charges. Rather, MRS argues both charges are part of the sale price of telecommunications services sold in Maine and thus subject to SPT. It reasons that Maine law imposes SPT on the value, measured by the sale price, of *all* telecommunications services sold in Maine, *see* 36 M.R.S. § 2552(1)(E), and then exempts non-intrastate telecommunications services, *see* 36 M.R.S. § 2557(33), (34). According to MRS, these exemptions must be narrowly construed as being limited to itemized charges specifically for non-intrastate telecommunications services because “[t]he well settled principle that ‘taxation is the rule and tax exemption is the exception’ places the burden on the [taxpayer] to bring its request ‘unmistakably within the spirit and intent’ of the claimed exemption.” *SST & S, Inc. v. State Tax Assessor*, 675 A.2d 518, 521 (Me. 1996) (quoting *Silverman v. Town of Alton*, 451 A.2d 103, 105 (Me. 1982) and *Holbrook Island Sanctuary v. Town of Brooksville*, 161 Me. 476, 483, 214 A.2d 660, 664 (1965), respectively) (citations omitted). MRS contends that neither the CCRC nor the PTRC come within the spirit and intent of the narrowly read exemption language of 36 M.R.S. § 2557 subsections 33 and 34, as neither charge is specifically for international or interstate telecommunications services.

[The Company] responded to MRS’s argument by explaining that if it billed a Maine customer solely for intrastate telecommunications services, that bill would not include either the CCRC or the PTRC. [The Company] also pointed out that under MRS’ narrow interpretation of

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<sup>5</sup> “The tax imposed by this chapter does not apply *in connection with*: . . . [s]ales of international telecommunications service . . . [or] [s]ales of interstate telecommunications service . . .” 36 M.R.S. § 2557(33), (34) (emphasis added).

the exemption statute, if it billed a Maine customer solely for exempt non-intrastate telecommunications services, it would have to tax the CCRC and PTRC charges even though it provided no taxable telecommunications services to its customer. In addition, [the Company] argued that both charges are part of the sale price of exempt non-intrastate telecommunications services. Finally, [the Company] argued that the facts show that neither charge is part of the sale price of taxable intrastate telecommunications services and thus are not properly subject to SPT.

B. Analysis applicable to the audit period prior to July 18, 2008

We first note that it is well-established under Maine law that

[t]he State's power to tax is strictly construed in favor of the taxpayer. *Carlton v. Newman*, 77 Me. 408, 417, 1 A. 194 (1885). The interpretation of statutes levying taxes should not extend their provisions by implication beyond the clear import of the language used. *Portland Terminal Co. v. Hinds*, 141 Me. 68, 39 A.2d 5, 7 (Me. 1944) (quoting *Commonwealth v. Hutzler*, 124 Va. 138, 97 S.E. 775, 776 (Va. 1919)).

*Community Telecommunications Corp. v. State Tax Assessor*, 684 A.2d 424, 426 (Me. 1996).

During the audit period prior to July 18, 2008, section 2552(1)(E) imposed SPT upon the sale of telecommunications services, which was defined as excluding non-intrastate telecommunications services. In MRS' Sales, Fuel & Special Tax Division, Instructional Bulletin No. 55 (December 20, 2006), MRS advised taxpayers that telecommunications services “includes all 2-way interactive communications that *begin and end within the State of Maine* (intrastate service). *Interstate service* and access services are *not* subject to the Service Provider Tax.” Sales, Fuel & Special Tax Division, Instructional Bulletin No. 55, § 1(E) (December 20, 2006) (emphasis added). Because we must strictly construe statutes levying taxes, we find that prior to July 18, 2008, the only telecommunications services upon which section 2552(1)(E) imposed SPT were intrastate telecommunications services.

[The Company] imposes the two charges at issue in this case, the CCRC and the PTRC, solely in connection with the sale of non-intrastate telecommunications services. Since neither the CCRC nor the PTRC were part of the consideration paid for the purchase of intrastate telecommunications services, they were not part of the taxable sale price of those services and no SPT is due on those charges for the period prior to July 18, 2008.

C. Analysis applicable to the audit period following July 17, 2008

As described above, Chapter 627 repealed the definition of “telecommunications services” that excluded non-intrastate telecommunications services and replaced it with a definition that did *not* exclude those services. Therefore, effective July 18, 2008, the unamended language of section 2552(1)(E), which previously did not impose SPT on non-intrastate telecommunications services, did impose SPT on those services. In order to continue to exclude those services from SPT, however, Chapter 627 enacted the exemptions set forth in section 2557, subsections 33 and 34.

Although this change is key to MRS’ argument in this case, MRS apparently did not believe that this statutory change was substantial in nature, as its revised Instructional Bulletin No. 55 once more advised taxpayers that

“[t]elecommunications services” includes all 2-way interactive communications, including, but not limited to voice, data, audio or video transmissions *that begin and end within the State of Maine (intrastate service)*. Interstate service and access services are not subject to the Service Provider Tax.

Sales, Fuel & Special Tax Division, Instructional Bulletin No. 55, § 2(E) (July 30, 2008) (emphasis added).

Because of the statutory changes made by chapter 627, the exemption provisions under section 2557, subsections 33 and 34 “must be strictly construed” when we consider the tax assessed for the audit period following July 17, 2008. *State YMCA of Maine v. Town of*

*Winthrop*, 295 A.2d 440, 441 (Me. 1972). According to MRS, this means that subsections 33 and 34 should be narrowly read to exempt only the portion of charges for non-intrastate telecommunications services itemized as such on a Maine customer’s bill.

The principle of narrowly construing tax exemptions, however, “does not require that the narrowest possible meaning must be given to [the] words [of the exemption and] [t]he strict construction [of the exemption statute] must still be a reasonable construction.” *Id.* at 442 (citing *Cedars of Lebanon Hospital v. Los Angeles County et al. (and five other cases)*, 35 Cal.2d 729, 221 P.2d 31, 15 A.L.R.2d 1045 (1950)). The exemptions in subsections 33 and 34 provide that SPT “does not apply *in connection with* . . . [s]ales of international telecommunications service . . . [and] [s]ales of interstate telecommunications service . . . .” 36 M.R.S. § 2557(33), (34). This exemption language is broader than that urged by MRS. The plain language of subsections 33 and 34 exempts *sales* of non-intrastate telecommunications services—not just the services themselves.

Because subsections 33 and 34 exempt the *sales* of non-intrastate telecommunications services, we conclude that those subsections must logically exempt the *sale prices* of those services. As both the CCRC and PTRC are charges that constitute part of the *sale price* of the exempt services, subsections 33 and 34 exempt both charges from SPT.

Finally, we agree with [the Company] that the CCRC and the PTRC are charges for non-intrastate telecommunications services. Faced with a similar case, the Supreme Court of Washington held that: “tariffs properly filed with the FCC consist of charges that are *necessarily* charges for interstate telecommunications services . . . [and thus exempt from taxation pursuant to Washington law].” *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 362, 166 P.3d 667, 673 (2007) (emphasis added). Both the CCRC and PTRC, like the access charges in *Qwest* are

“imposed pursuant to federal tariff.” We find the Supreme Court of Washington’s conclusion that such tariffs “are *necessarily* interstate in nature” persuasive, and therefore we determine that neither the CCRC nor the PTRC is subject to SPT. *See also Qwest Corp. v. State of Wyoming*, 2006 WY 35, 130 P.3d 507 (2006) (finding that because the End User Common Line (EUCL) charge was included on a federal tariff, it was not subject to Wyoming’s tax on intrastate telecommunications services).

For the reasons stated above, we hereby cancel the assessment in full.

#### V. Summary of Decision

No SPT is due on the CCRC and PTRC as they are not part of the sale price of intrastate telecommunication services. The assessment is hereby cancelled in full.

Issued by the Board: September 12, 2013