

6/29/06
IN THE

T-MOBILE USA, INC., et al

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*

vs.

MARYLAND TAX COURT

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DEPARTMENT OF FINANCE
FOR BALTIMORE CITY, et al

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Nos. 05-MI-OO-0067 thru 0070
and 05-MI-OO-0100 thru 0103

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MEMORANDUM OF GROUNDS FOR DECISION

Petitioners have filed this action challenging the Respondents' imposition of a tax imposed on cellular telephone or other mobile telecommunications services as being a prohibited sales tax. The material facts are not in dispute, and the parties have further agreed that the only remaining legal issue to be determined by the Court is whether the tax on mobile communications service is an impermissible sales tax.

The State of Maryland has granted Baltimore City and Montgomery County, subject only to express statutory of limitations, "the power to tax to the same extent as the State of Maryland has or could exercise said power within the limits of Baltimore City or Montgomery County as a part of its general taxing power." The power to tax is set forth in the Baltimore City Charter, Article 2, Section 40; and in the Montgomery County Code at Section 52-17.

In 2004 Baltimore City enacted an excise tax, imposed monthly on "each person who leases, licenses, or sells a wireless telecommunications line to any customer . . . whose place of primary use (for that line) is in the City." Baltimore City Code, Article 28, Section 25-2. The rate of the tax on such persons is \$3.50 per month or part of the month, per wireless telecommunications line.

Similarly, Montgomery County by Resolution No. 15-173, set the telephone tax rate for wireless telephone lines at \$2.00 a month on each wireless telephone line effective July 1, 2003.

The Petitioners, four national wireless telecommunication companies, claim that the City and Country's tax on wireless lines is a sales tax. Petitioners contend that Maryland law prohibits Montgomery County and Baltimore City from imposing retail sales taxes on mobile communications service. They rely on Section 11-102(c)(1), Tax-General of the Maryland Annotated Code, which provides in part that "a county . . . or other political subdivision of a state may not impose a retail sales . . . tax." A retail sale is defined to include the sale of a taxable service, and taxable service is defined to include "mobile telecommunications service."

The Baltimore City telephone tax more specifically provides:

"A tax is levied and imposed on each person who leases, licenses, or sells a telecommunications line to any customer (1) for wired service, whose billing address or fixed service address is in the city; or (2) for wireless service, whose place of primary use is in the city."

The operative language in the Montgomery County Ordinance requires that:

"A person who . . . leases, licenses, or sells telephonic communication in the county must pay a tax on the following services furnished to customers with a billing address or fixed service address in the county . . . each wireless telephone line."

Petitioners argue that the triggering event for the imposition of the tax is the sale of service each month, and therefore the tax is a sales tax. The Montgomery County statute does use the word "furnishes" rather than "sells" in describing the taxable event, but the Court finds that for purposes of Petitioners' argument there is no distinction.

In *Montgomery County v. Maryland Soft Drink Association, Inc.* 281 Md. 116, 377 Atl.2nd 486 (1977), the Court of Appeals identified two characteristics that are commonly found in most sales tax taxes. First, there must be a taxable event which triggers payment of the tax, otherwise known as the sale. The second characteristic is the standard by which the tax was measured. Petitioners argue that the triggering event requiring payment of the tax is the sale of a telephone line, and the second prong is met by the volume of sales, which may be measured by a fixed amount of tax per unit sold. Thus, Petitioners contend that a tax imposed on a per unit basis will constitute a sales tax if payment of the tax is triggered by a sale of or furnishing of a telephone line to a customer.

The Court disagrees with Petitioners' interpretation of the facts and the law. The Maryland Retail Sales Act imposes a retail sales tax on the sale of personal property or a service and provides that the tax is paid by the buyer, collected by the vendor, and measured by the price of the commodity that the buyer purchases. The purpose of the Maryland Retail Sales Act in taxing retail sales, is to impose the tax on the final purchaser or ultimate consumer and avoid a pyramiding of the tax. In *Soft Drink*, the taxpayers, like the Petitioners in the present case, claimed that the beverage container tax was a sales tax. The county imposed the beverage container tax on every distributor who supplied a dealer in Montgomery County non-reusable beverage containers containing beverages. The tax rate was two cents for each container with a capacity of sixteen ounces or less and four cents for each container with a capacity in excess of sixteen ounces. The court ruled that the beverage container tax was not a sales tax and stated that the first and most obvious attribute of the sales tax is the taxable event, which triggers the payment of the tax, i.e., the sale. The second characteristic of the sales tax is that the amount of tax is

determined by applying the tax rate to the purchase price of the commodity. Since the beverage container tax did not arise from a sale and was not measured by a purchase price or for consideration, it was not a sales tax. The court stated that “. . . the tax is imposed regardless of the method by which the central distributor distributes the beverage to its own individual outlets. For purposes of the tax here, it matters only that the distributor supplies the beverage. This demonstrates, then, that the taxable event need not, and frequently will not, be a sale.”

The Court agrees that the City and County telephone tax is an excise tax on the privilege of furnishing or selling a wireless line. The relevant consideration is not whether there was a sale of wireless service to a customer, but rather what is the taxable event. The furnishing or providing the wireless line is the relevant taxable event for purposes of this tax. The tax is imposed prior to and regardless of any sale of wireless service to a customer. Once the line is provided or furnished, whether through a sale or otherwise, the tax is triggered. It is unnecessary to consider the economic transaction between the wireless company and the customer. It is important to note that the Petitioners pay the telephone tax before they consummate the sale of a wireless service by receiving payment from their customers. The bills that the Petitioners remit to the customers do not identify the telephone tax as a sales tax.

In addition, the telephone tax does not satisfy the second identifying characteristic of a sales tax as set forth in *Soft Drink*. The telephone tax is measured by the number of lines furnished by the wireless company during the month at a stated rate for each wireless telephone line. The telephone tax is not measured by the purchase price of or consideration paid for, a wireless line. Regardless of whether a customer ever uses, or

is billed for, a wireless line, the telephone tax is due at the stated rate per month. The tax is not measured by the number of minutes that a customer uses his or her phone, or even by the number of calls made. The per line charge is a flat charge based on the number of lines supplied by the Petitioners to its customers. A flat tax on a telephone line, which does not vary depending on customer usage, is an excise tax rather than a sales tax under Maryland law.

Accordingly, we shall pass an Order affirming the decisions of the Respondents in denying the refund claims of Petitioners.