

FINAL PRIVATE LETTER RULING

REQUEST LETTER

10-002

January 26, 2010

Attention: Technical Research
Utah State Tax Commission
210 North 1950 West
Salt Lake City UT 84134

RE: Internet Access & Bundled Services

To Whom It May Concern:

My company develops TYPE software for telecommunications carriers. We are attempting to determine how Utah sales taxes would apply to the transactions identified below. We respectfully request that the State Tax Commission provide us with a written response (preferably a private letter ruling) regarding the appropriate sales tax policies.

We would like to inquire as to the correct sales tax treatment of charges by wireless telephone service providers for plans that offer internet access services which are bundled with voice and other taxable services or sold separately. Wireless providers often market and refer to internet services as a data plan, but the service provided is essentially equivalent to that of a dial-up or broadband internet access plan which one might subscribe to through their local phone company or cable provider. It essentially allows the subscriber to browse the internet and send and receive e-mail in the same way they would on a land line connection, but on their wireless phone/device, instead of on their home PC. Additional charges may accrue for download of ringtones, songs, or other media to a wireless device.

We would like to know, to what extent, these services would be subject to Utah sales taxes under the following scenarios:

1. A phone plan which provides unlimited long distance, air time, call waiting, call ID, text messaging, and data (internet access) is sold for a single price of \$99/month.
2. A plan sold in addition to the basic wireless voice plan which provides unlimited data (internet access) only for \$29/month.
3. A plan sold in addition to the basic wireless voice plan which provides for a limited amount of data (internet access) 10MB for \$5/month, with each additional kilobyte at \$0.05.

4. A plan sold in addition to the basic wireless voice plan which provides for unlimited data (internet access) and picture messaging for \$29/month.
5. A plan sold in addition to the basic wireless voice plan which provides for data (internet access) based exclusively on usage at a rate of \$0.05/Kilobyte.
6. A plan sold in addition to the basic wireless voice plan which provides a limited menu of information including weather, trivia, sports, and stock information for \$4/month.
7. A plan sold in addition to the basic wireless voice plan which provides 24-hour access to health care professionals for medical questions for \$4/month.

Please let us know how these charges should be taxed so that we can ensure correct taxes are being collected from subscribers.

Our company requests anonymity should your response be made public. Please do not hesitate to contact us should you have any questions regarding our inquiry and please let us know if this inquiry should be directed elsewhere. You may call us at PHONE or via email at EMAIL.

Sincerely,

NAME
TITLE
COMPANY
ADDRESS
EMAIL

RESPONSE LETTER

August 10, 2010

NAME
TITLE
COMPANY
ADDRESS

RE: Private Letter Ruling Request–Sales Tax Treatment of Certain Charges by
Wireless Telephone Service Providers

Dear NAME:

You have asked the Commission to rule on the sales tax treatment of seven scenarios that you presented. Each of these scenarios includes a different combination of telecommunications and other services. You explained that your company develops billing software for wireless telephone service providers that sell such services.

I. Applicable Law

Utah Code § 59-12-103(1)-(1)(b)(ii) states:

- (1) A tax is imposed on the purchaser . . . for amounts paid or charged for the following transactions:
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 - (b) amounts paid for:
 - (i) telecommunications service, other than mobile telecommunications service, that originates and terminates within the boundaries of this state;
 - (ii) mobile telecommunications service that originates and terminates within the boundaries of one state only to the extent permitted by the Mobile Telecommunications Sourcing Act, 4 U.S.C. Sec. 116 et seq.; or
 - (iii) an ancillary service associated with a:
 - (A) telecommunications service described in Subsection (1)(b)(i); or
 - (B) mobile telecommunications service described in Subsection (1)(b)(ii) . . .

Utah Code § 59-12-102(116) defines telecommunications service in part as follows:

- (a) "Telecommunications service" means the electronic conveyance, routing, or transmission of audio, data, video, voice, or any other information or signal to a point, or among or between points.

- (b) "Telecommunications service" includes:
 -
 - (v) a mobile wireless service;
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- (c) "Telecommunications service" does not include:
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 - (ii) an ancillary service;
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 - (iv) a data processing and information service if:
 - (A) the data processing and information service allows data to be:
 - (I) (Aa) acquired;
 - (Bb) generated;
 - (Cc) processed;
 - (Dd) retrieved; or
 - (Ee) stored; and
 - (II) delivered by an electronic transmission to a purchaser; and
 - (B) the purchaser's primary purpose for the underlying transaction is the processed data or information;
 -
 - (vi) Internet access service;
 -

Utah Code § 59-12-102(10) defines ancillary service as follows:

- (a) "Ancillary service" means a service associated with, or incidental to, the provision of telecommunications service.
- (b) "Ancillary service" includes:
 - (i) a conference bridging service;
 - (ii) a detailed communications billing service;
 - (iii) directory assistance;
 - (iv) a vertical service; or
 - (v) a voice mail service.

Utah Code § 59-12-102(126) defines vertical service as follows:

- (a) "Vertical service" means an ancillary service that:
 - (i) is offered in connection with one or more telecommunications services; and
 - (ii) offers an advanced calling feature that allows a customer to:
 - (A) identify a caller; and
 - (B) manage multiple calls and call connections.
- (b) "Vertical service" includes an ancillary service that allows a customer to manage a conference bridging service.

Utah Code Ann. § 59-12-102(16)(a) defines the term "bundled transaction" in part, as follows:

"Bundled transaction" means the sale of two or more items of tangible personal property, products, or services if the tangible personal property, products, or services are:

- (i) distinct and identifiable; and
- (ii) sold for one nonitemized price.

Utah Code Ann. § 59-12-103(2)(d) prescribes how bundled transactions are taxed. Subsection (2)(d)(i) concerns food items and does not apply for this letter. The remaining subsections are as follows:

- (ii) Subject to Subsection (2)(d)(iii), for a bundled transaction other than a bundled transaction described in Subsection (2)(d)(i):
 - (A) if the sales price of the bundled transaction is attributable to tangible personal property, a product, or a service that is subject to taxation under this chapter and tangible personal property, a product, or service that is not subject to taxation under this chapter, the entire bundled transaction is subject to taxation under this chapter unless:
 - (I) the seller is able to identify by reasonable and verifiable standards the tangible personal property, product, or service that is not subject to taxation under this chapter from the books and records the seller keeps in the seller's regular course of business; or
 - (II) state or federal law provides otherwise; or
 - (B) [Not applicable for this private letter ruling.]
- (iii) For purposes of Subsection (2)(d)(ii), books and records that a seller keeps in the seller's regular course of business includes books and records the seller keeps in the regular course of business for nontax purposes.

II. Analysis

A. General Tax Treatment of the Services Included in the Seven Scenarios

Your seven scenarios are comprised of a variety of services, including unlimited long distance, airtime, text messaging, picture messaging, call waiting, caller ID, data (Internet access), information from a limited menu, and medical answers from health care professionals. The general tax treatment for these services is discussed below.

The unlimited long distance, airtime, text messaging, and picture messaging are telecommunications services. Under § 59-12-102(116)(a), a telecommunications service is “the electronic conveyance, routing, or transmission of audio, data, video, voice, or any other information or signal to a point, or among or between points.” Additionally, under § 59-12-102(116)(b)(v), a telecommunications service includes a mobile wireless service. The individual telecommunications services, identified above, are taxable if they are *intrastate*. Under § 59-12-103(1)(b)(ii), a “mobile telecommunications service that originates and terminates within the boundaries of one state” is taxable.

The call waiting and caller ID services are ancillary services. Under § 59-12-102(10)(a), an ancillary service is a service associated with, or incidental to, the provision of telecommunications service. Under § 59-12-102(10)(b)(iv), an ancillary service includes a vertical service. Under § 59-12-102(126), a vertical service is “offered in connection with [a] telecommunications service[]” and offers the customer “an advanced calling feature that allows a customer to: (A) identify a caller; and (B) manage multiple calls and call connections.” Call waiting and caller ID meet this definition. Thus, they are vertical services and also ancillary services. Under § 59-12-103(1)(b)(iii), ancillary services related to taxable *intrastate* mobile telecommunications services are taxable. Therefore, if the call waiting and caller ID services are associated with intrastate mobile telecommunications service, then the call waiting and caller ID services are taxable.

The services for data (Internet access), information from a limited menu, and medical answers from health care professionals are neither telecommunications nor ancillary services. Section 59-12-102(116)(c)(vi) specifically excludes Internet access service from the definition of telecommunications service. Thus, the data (Internet access) service is not a telecommunications service. Additionally, § 59-12-102(116)(c)(iv) excludes a data processing or information service from the definition of telecommunications service if the following conditions are met: first, the data processing and information service allows the data to be acquired, generated, processed, retrieved, or stored; second, the service allows the data to be delivered by an electronic transmission to a purchaser; and third, the purchaser's primary purpose for the underlying transaction is the processed data or information. For this ruling, the service allowing access to a limited menu of information and the service allowing access to medical answers from health care professionals meet the exception found in § 59-12-102(116)(c)(iv), and thus, are not telecommunications services. Furthermore, the services for data (Internet access), information from a limited menu, and medical answers are not ancillary services; they are not listed in § 59-12-102(10)(b) and are dissimilar to the services on that list. Therefore, these services are not subject to tax under § 59-12-103(1)(b), as telecommunications or ancillary services. However, they might be subject to tax as bundled transactions based on the Utah statutes, as further discussed below.

B. Tax Treatment of Bundled Transactions

In general, when a transaction includes the sales of both taxable and non-taxable items, the Utah statutes for bundled transactions may apply. A bundled transaction is defined in § 59-12-102(16)(a) as “the sale of two or more items of tangible personal property, products, or services if the tangible personal property, products, or services are: (i) distinct and identifiable; and (ii) sold for one nonitemized price.” Section 59-12-103(2)(d) states how bundled transactions are to be taxed. Subsection (2)(d)(ii)(A) applies to bundled transactions with both taxable and nontaxable non-food items, providing that, in general, “the entire bundled transaction is subject to taxation.” However, Subsection (2)(d)(ii)(A)(I) includes a limited exception if “the seller is able to identify . . . the . . . service that is not subject to taxation . . . from the [seller’s] books and records.” Subsection (2)(d)(iii) requires that these records be kept in the seller’s “regular course of business.” If a seller meets the exception of Subsection (2)(d)(ii)(A)(I), the seller would not be required to collect sales tax on the sales of the services that would have been nontaxable if they had been sold for an *itemized* price.

C. Analysis of the Seven Scenarios

We will now analyze each of your seven scenarios.

1. *A phone plan which provides unlimited long distance, air time, call waiting, call ID, text messaging, and data (internet access) is sold for a single price of \$99/month.*

This scenario involves a bundled transaction under § 59-12-102(16)(a) because all of the services are sold for one nonitemized price. Therefore, under § 59-12-103(2)(d)(ii)(A), the entire transaction is subject to tax unless the seller can identify from its books and records the value of the services that are not subject to tax. For this scenario, the services that would not be subject to taxation if separately identified in the seller's books and records are as follows: first, the *interstate* telecommunications services (long distance, air time, text messaging); second, the ancillary services associated with the *interstate* telecommunications services (call waiting and caller ID); and third the data (Internet access) service.

2. *A plan sold in addition to the basic wireless voice plan which provides unlimited data (internet access) only for \$29/month.*

This scenario focuses on the sale of the data (Internet access) service as a separate plan for a separate monthly price. The data service plan is not part of a bundled transaction under § 59-12-102(16)(a) because the data service plan is sold separately from the basic wireless voice plan. Furthermore, the data service plan is not taxable because Internet access service is not one of the services specifically listed in § 59-12-103(1) as taxable.

3. *A plan sold in addition to the basic wireless voice plan which provides for a limited amount of data (internet access) 10MB for \$5/month, with each additional kilobyte at \$0.05.*

This scenario is very similar to the second scenario. It focuses on the sale of a separate plan for data (Internet access) service for a separate price. This data service plan is not taxable under § 59-12-103(1).

4. *A plan sold in addition to the basic wireless voice plan which provides for unlimited data (internet access) and picture messaging for \$29/month.*

This scenario focuses on the sale of the data (Internet access) service and the picture messaging service for one non-itemized price. This sale is a bundled transaction. Therefore, the entire sale price is subject to tax unless the seller can separately identify from its books and records the value of the services that are not subject to tax. For this scenario, the services not subject to taxation if separately identified in the seller's books and records are the data (Internet access) service and the *interstate* picture messaging.

5. *A plan sold in addition to the basic wireless voice plan which provides for data (internet access) based exclusively on usage at a rate of \$0.05/Kilobyte.*

This scenario is very similar to the second and third scenarios. It focuses on the sale of a separate plan for data (Internet access) service for a separate price. This data service plan is not taxable under § 59-12-103(1).

6. *A plan sold in addition to the basic wireless voice plan which provides a limited menu of information including weather, trivia, sports, and stock information for \$4/month.*

This scenario focuses on the sale of a data processing and information service that is excluded from the definition of telecommunications service under § 59-12-102(116)(c)(iv). This plan for a limited menu of information is not part of a bundled transaction because it is sold separately. Furthermore, the plan is not taxable because a data processing and information service not one of the services specifically listed in § 59-12-103(1) as taxable.

7. *A plan sold in addition to the basic wireless voice plan which provides 24-hour access to health care professionals for medical questions for \$4/month.*

This scenario is very similar to the sixth scenario. It focuses on the sale of a separate plan for a data processing and information service. This plan is nontaxable.

III. Conclusion

When services *are not* part of a bundled transaction, the sales tax treatment of the services is as provided below:

Taxable

- *Intrastate* telecommunications services (unlimited long distance, air time, text messaging, picture messaging)
- Ancillary services associated with *intrastate* telecommunications services (call waiting, caller ID)

Nontaxable

- *Interstate* telecommunications services (unlimited long distance, air time, text messaging, picture messaging)
- Ancillary services associated with *interstate* telecommunications services (call waiting, caller ID)
- Data (Internet access) services
- Services allowing for access to information from a limited menu
- Services allowing for access to medical answers from health care professionals

When taxable and nontaxable services *are* part of a bundled transaction. The entire transaction is subject to taxation unless the seller can separately identify from its books and records the value of the services that are not subject to tax.

This ruling is based on current law and could be changed by subsequent legislative action or judicial interpretation. Also, our conclusions are based on the facts as described. Should the facts be different, a different conclusion may be warranted. If you feel we have misunderstood the facts as you have presented them, you have additional facts that may be relevant, or you have any other questions, you are welcome to contact the Commission.

For the Commission,

Michael J. Cragun
Commissioner

MJC/aln
10-002