

BEFORE THE INTERPRETATION AND APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition	)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment of	)	
	)	No. 96-090
	)	
	)	Registration No. . . .
...	)	FY. . . /Audit No. . . .
	)	
	)	
...	)	Registration No. . . .
	)	Audit No. . . .
	)	

RULE 245; RCW 82.08.0289: RETAIL SALES TAX -- EXEMPTION -- RESIDENTIAL CUSTOMER -- CELLULAR SERVICES. Customers of cellular telephone services are not entitled to the retail sales tax exemption for residential customers if the service provider has not established a separate and well-defined class of residential service.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

NATURE OF ACTION:

Two limited partnerships protest the disallowance of a residential retail sales tax exemption for customers utilizing cellular telephone services.<sup>1</sup>

FACTS:

Okimoto, A.L.J. -- . . . [Western] owned and operated a cellular (wireless) telephone service in Western Washington. Western's books and records were examined by the Audit Division (Audit) of the Department of Revenue (Department) for the period September 1, 1988 through December 31, 1992. The result was an assessment of additional taxes and interest in the sum of \$ . . . , under Document No. . . . Western protested the assessment and it remains due.

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<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

[Eastern] owned and operated a cellular telephone service in Eastern Washington. Eastern's books and records were examined by Audit for the period September 1, 1988 through December 31, 1992. Because Eastern had overreported some sales in error, this audit resulted in a credit to Eastern in the amount of \$ . . . .

Since both taxpayers are closely related and appeal the same legal issue, we will discuss both taxpayers together and will refer to them in the aggregate as "Taxpayer". Where it is necessary to identify an individual taxpayer, it will be referred to as indicated above.

#### TAXPAYER'S EXCEPTIONS:

##### Schedule III - Municipal Tax as Part of Gross Proceeds of Sales:

In this schedule, Audit assessed additional retailing business and occupation (B&O) tax and retail sales tax on separately itemized municipal utility taxes billed to cellular customers in addition to its charge for providing the cellular telephone services. Although Taxpayer had charged and collected retail sales tax on its fee for providing cellular services, it had not collected retail sales tax on recovered municipal utility taxes. Taxpayer does not dispute that the recovered municipal utility taxes must be included in its gross income, but argues that a portion of these recovered utility taxes were charged to individuals who subscribe to a residential class of "wired" telephone service with [the phone company]. Because these persons subscribe to a "residential class" of "wired" telephone service, Taxpayer argues that all other billings (except toll service) of network telephone services are exempt from retail sales tax under RCW 82.08.0289(1)(a). Taxpayer maintains that this includes "wireless" cellular network telephone service fees.

Taxpayer acknowledges that it does not currently separate residential cellular subscribers from non-residential subscribers. Instead, Taxpayer groups its subscribers by the following types of price-plan categories: Business, Consumer, Corporate, Other. Each category may contain both residential and non-residential subscribers.

#### ISSUE:

Are individual subscribers of cellular telephone services who charge their "wireless" services to their residence entitled to a retail sales tax exemption under RCW 82.08.0289(1)(a)?

#### DISCUSSION:

A "retail sale" is defined in RCW 82.04.050(5) as including "the providing of telephone service, as defined in RCW 82.04.065, to consumers." RCW 82.04.065 defines "telephone service" as "competitive telephone service or network telephone service, or both." It further states:

(2) "Network telephone service" means the providing by any person of access to a local

telephone network, local telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. . . .

Taxpayer acknowledges that it is providing a network telephone service which is subject to the retail sales tax and has consistently collected and remitted retail sales taxes on those charges. However, Taxpayer now claims that RCW 82.08.0289 grants a retail sales tax exemption to cellular customers who bill their cellular charges to their residences, if those individuals subscribe to a "residential class" of "wired" telephone service.

RCW 82.08.0289 states in pertinent part:

- (1) The tax levied by RCW 82.08.020 shall not apply to sales of:
  - (a) Network telephone service, other than toll service, to residential customers.

The term "residential customer" is further defined in RCW 82.08.0289(2)(b) to mean:

". . . an individual subscribing to a residential class of telephone service."

By including the statutory definition of "residential customer" in the exemption contained in RCW 82.08.0289, the following paraphrased exemption results:

Network telephone service. . . to [an individual subscribing to a residential class of telephone service.]

From this, it becomes apparent that in order for network telephone services to be exempt from retail sales tax, the subscriber must be: (1) an individual; and (2) subscribe to a residential class of telephone service.

Taxpayer argues that once an individual subscriber's "residential class" is established by its "wired" telephone service provider, all further network telephone charges billed to that address, including "wireless" services being provided by a separate entity, should qualify as a "residential class" of network telephone service. In essence, Taxpayer argues that only cellular subscribers who charge their "wired" service to a commercial and business account should be subject to the retail sales tax.

We disagree. Taxpayer's interpretation is much too broad. Exemptions to a tax are narrowly construed; taxation is the rule and exemption is the exception. Budget Rent-a-Car, Inc. v. Department of Rev., 81 Wn.2d 171, 174, 500 P.2d 764 (1972).

Instead, we believe that in order for the sales tax exemption to apply, the service provider must first define and establish a clear "residential class" of "wireless" network telephone service. It may not "piggyback" upon a designation placed upon the subscriber by a separate entity that is performing "wired" telephone services wholly unrelated to the services being provided by Taxpayer.

Accordingly, we conclude that Taxpayer, itself, must provide a "residential class" of network telephone service to the subscriber. Taxpayer has submitted insufficient documentation to establish that fact.

We further note that Taxpayer's activities do not appear to satisfy the definition of "residential service" pursuant to tariffs filed with the Washington Utilities and Transportation Commission by US West, Inc. for that provider's traditional "wired" network telephone service subscribers. That tariff states:

Service is classified as residence service and residence rates apply when the following two conditions exist:

(1) When the service is furnished at a premises used primarily for domestic purposes; a residence premises typically contains cooking and sleeping facilities.

...

(2) When the directory listing is to be a residential listing. A residence service may not have a business directory listing.

(Emphasis ours.)

We take administrative notice that cellular services are primarily furnished during periods of travel and at locations away from the normal residence of the subscriber. Cellular services provide access to telephone services at remote or inconvenient locations where normal "wired" telephone services are either unavailable or inconvenient. Whether this is in a remote campground, or on the freeway to town, such services are not furnished at a premises used primarily for domestic purposes. Accordingly, we find that Taxpayer's cellular subscribers do not meet the definition for a residential class of service pursuant to tariffs filed with the WUTC by "wired" telephone service providers.

Therefore, since Taxpayer has submitted insufficient documentation to establish that it is providing "wireless" network telephone services to a "residential class" of subscribers, and its cellular network telephone services do not satisfy the requirements for "wired" residential customers, we find that Taxpayer has not met its burden of establishing the sales tax exemption for residential customers allowed by RCW 82.08.0289. A party claiming a tax exemption has the burden of proving he or she qualifies for the exemption. Group Health Co-op. v. Tax Comm'n, 72 Wn.2d 422, 433 P.2d 201 (1967); Det. No. 89-268, 7 WTD 359 (1989). Accordingly, Taxpayer's petition is denied on this issue.

#### DECISION AND DISPOSITION:

[Western's] petition for correction of assessment is denied.

[Eastern's] petition for correction of assessment is denied.

DATED this 10th day of June, 1996.