

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

WESTERN WIRELESS CORPORATION	)	DOCKET NO.:	CT-2005-1
(n/k/a WESTERN WIRELESS LLC,)		
)		
Appellant,)		
)		
THE DEPARTMENT OF REVENUE	)	FACTUAL BACKGROUND,	
OF THE STATE OF MONTANA,	)	CONCLUSIONS OF LAW,	
	)	ORDER and OPPORTUNITY	
Respondent.	)	FOR JUDICIAL REVIEW	

On October 20, 2005, this Board entered its "Opinion and Order on Motion for Partial Summary Judgment", copy attached, in favor of the appellant, Western Wireless Corporation, ruling that "FUSF charges collected by Western Wireless and remitted to USAC (Universal Service Administration Company) are not subject to the Montana Retail Telecommunications Excise Tax," (Order, pg.7).

Appellant has advised the Board of its conditional withdrawal and dismissals of the remaining count on appeal (involving taxation of exempt customers under the Montana Retail Telecommunications Excise Tax) and its requests for attorney fees and costs, effective upon the Board's entry of this final decision.

Upon consideration and good cause appearing therefore, the Board concludes that since all matters on appeal have been

concluded, final decision regarding this appeal should now be entered.

IT IS THEREFORE ORDERED that final decision is granted in favor of the appellant, Western Wireless Corporation (n/k/a Western Wireless LLC), on the grounds stated and for the reasons in the Board's "Opinion and Order on Motion for Partial Summary Judgment" dated October 20, 2005, the said Order is fully incorporated by reference into this final decision and the remaining ground for appeal and requests for attorney fees and costs are dismissed.

(S E A L)

GREGORY A. THORNQUIST, Chairman

JOE R. ROBERTS, Member

SUE BARTLETT, Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of March, 2006, the foregoing Order of the Board was served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

James P. Sites
Jared M. LeFebre
Crowley, Haughey, Hanson, Toole and Dietrich, PLLP
P.O. Box 2529
Billings, MT. 59103-2529

Jolynn E. Eggart
Keith A. Jones
Tax Counsels
Office of Legal Affairs
Department of Revenue
Mitchell Building
Helena, MT 59620

DONNA EUBANK
Paralegal

STATE OF MONTANA
STATE TAX APPEAL BOARD

WESTERN WIRELESS CORPORATION	)	Cause No. CT-2005-1
)	
Appellant,)	
)	
vs.	)	OPINION AND ORDER
	)	ON
STATE OF MONTANA, DEPARTMENT OF	)	MOTION FOR PARTIAL
REVENUE,	)	SUMMARY JUDGMENT
)	
Respondent.)	
_____)	

This matter came before the State Tax Appeal Board (“STAB”) upon motion of the Appellant Western Wireless Corporation (“Western Wireless”) for a partial summary judgment. After Appellant filed the motion for partial summary judgment with accompanying brief the Department of Revenue (“DOR”) filed its answer and brief in opposition to the motion.

As a preliminary matter the Board has determined that the issue raised by the Appellant Western Wireless is proper for determination by partial summary judgment since it is primarily a legal issue involving the construction of a statute implementing the Montana Retail Telecommunications Excise Tax (hereinafter referred to as the “RTE tax”). There appear to be few, if any, disputed facts necessary to construe the statute at issue.

The Board set the motion for oral argument by the parties and the hearing took place at the conference room of the State Tax Appeal Board on Wednesday, October 12, 2005. Mr. James Sites argued on behalf of Appellant Western Wireless and was assisted by co-counsel

Mr. Jared Le Fevre. Mr. Keith Jones argued for Respondent DOR, and was assisted by co-counsel Ms. Jolyn Eggert.

The issue raised in this motion is the interplay between the retail telecommunications excise tax (Chapter 53 of Title 15, MCA) and the Federal Universal Systems Fund (“FUSF”) provided for in 47 U.S.C. Section 254. In Section 15-53-130, MCA, the telecommunications excise tax of 3.75% is imposed upon the “sales price of retail telecommunication services.”

By federal statute, as referenced above, the FUSF requires every telecommunications provider to contribute a specified amount per customer to the fund for the purposes of implementing the universal system benefits. The provider, in this case Western Wireless, is authorized, but not required, to “pass on” the FUSF amount to its customers as a charge on their monthly bill. Western Wireless does this, and then is basically a conduit for the funds: it charges its customers the amount that is set by the FUSF fund managers, and it sends the identical amount to the entity that handles FUSF funds, known as the Universal Service Administration Company (“USAC”). Western Wireless does not charge or otherwise obtain any overhead or administrative fees for performing this function.

Relating this back to the Montana Retail Telecommunications Excise Act, the specific question is whether the Montana Legislature, in enacting the tax and levying it against the “sales price of retail telecommunications services”, meant to include these FUSF charges in the tax base.

Appellant Western Wireless argues that there is no evidence the Legislature intended to include these FUSF funds within the reach of the tax. It cites the definition of “sales price” found in Section 15-53-129 (11), MCA, as specifically *excluding* “ federal excise taxes or

other federally imposed charges or fees collected for and remitted to the federal government.”
(Section 15-53-129 (11) (b) (iii), MCA.)

Appellant argues that FUSF charges fully meet the requirements of the statute in order to be excluded from the sales price of telecommunications services. The charges are imposed on Western Wireless by federal statute; Western Wireless passes these charges on to its customers as allowed by the federal legislation; and finally it collects and remits them to the entity set up by the federal government, namely the USAC. In its view, this totally exempts FUSF charges from the RTE tax.

DOR disputes this interpretation of the statute. It argues that, under the federal law, Western Wireless is only authorized, not required, to collect the FUSF charges from its customers. Since it is not mandatory for Western Wireless to charge its customers for the FUSF contribution, DOR maintains that it cannot be said to be a “federally imposed” charge.

We find that this is a strained interpretation of the Montana statute. When Western Wireless remits the payment of FUSF charges to the federally designated organization (USAC), it is doing so under the direction of the federal statute. This makes the action one which is “federally imposed” within the meaning of the exclusion to the “sales price of retail telecommunication services” contained in 15-53-129 (11) (b) (iii), MCA.

The other deficiency noted by DOR is that the entity receiving the funds from Western Wireless is not a federal agency and so does not qualify for exclusion from the tax. DOR also notes that USAC does not appear on a list of federal entities compiled by the Office of Management and Budget.

In reviewing the federal statute creating FUSF and providing for its administration (47 U.S.C. Section 254), the Federal Communications Commission (“FCC”) is given broad administrative control over the administering entity known as USAC. USAC is created by the federal legislation and is, in most significant respects, subservient to the Federal Communications Commission, including having all its directors appointed by the FCC . In reviewing the federal statutory scheme and the amount of control exercised by the FCC over USAC, we have no difficulty in finding that USAC is a “federal entity” within the meaning of the Montana statute.

We are not persuaded by DOR’s arguments that the FUSF charges are neither “federally imposed” nor remitted to an organization that is not a “federal entity”. Accordingly we find that the FUSF charges remitted by Western Wireless to USAC are excluded from the “sales price of retail telecommunication services” and are thus not subject to the RTE tax.

The Board’s duty in this case is to determine the intent of the Legislature when they adopted the Retail Telecommunications Excise Tax in 1999. Our reading of the relevant statutes is that they did not mean to include the federal FUSF charge within the ambit of the tax. In general, taxes and other charges mandated by one level of government and used for broad governmental purposes are not subject to taxation by another level of government. It is also instructive to note that the state has its own universal system benefit charges for intra-state telecommunications (69-3-844,MCA), and that such charges are specifically excluded from the reach of the RTE tax in Section 15-53-129 (11) (ii).

The case of Swartz v. Berg, 147 Mont. 178, 411 P.2nd 736 (1966) stands for the proposition that in determining whether or not a tax applies against a taxpayer the statute should usually be interpreted in favor of the taxpayer. Stated another way, in exercising the power to tax, the state's statutes imposing the tax should be clear and free of doubt. Such is not the case in the matter at issue in this appeal.

SUMMARY

It is always possible to parse words and speculate on the meaning of the English language. In the end, however, we need to make a good faith and common sense determination of what the Montana Legislature intended to do in this instance. Clearly, the Legislature excluded a federal excise tax from the state excise tax. It also, and logically so in our opinion, excluded a federal charge, such as FUSF, which the provider of telecommunications services merely collects and then passes on to a federal entity who uses the funds for the purposes provided in federal law. To require the provider to pay a tax in the instance where it is acting solely as a financial intermediary does not seem entirely logical or like sound tax policy. It is not to say the Montana Legislature could not do so; it's just that, in trying to determine its intention in an area that is not entirely clear, we will seek a result which conforms with reasonableness and what appears to be sound and accepted tax policy.

///

///

///

ORDER

The State Tax Appeal Board finds that FUSF charges collected by Western Wireless and remitted to USAC are not subject to the Montana Retail Telecommunications Excise Tax.

The parties are instructed to meet and attempt to resolve the remaining issues in this case. The previous Scheduling Order entered in this case, dated July 18,2005, remains in effect until otherwise dissolved or amended by this Board.

Dated this 20th day of October, 2005.

BY ORDER OF THE
STATE TAX APPEAL BOARD

(SEAL)

GREGORY A. THORNQUIST, Chairman

JOE R. ROBERTS, Member

SUE BARTLETT, Member