

201711016L

November 27, 2017

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RE: Private Letter Ruling No. 150150546

Dear \*\*\*\*\*:

We issue this private letter ruling in accordance with Rule 3.1, Private Letter Rulings and General Information Letters. [ENDNOTE 1] We are responding to your request dated November 11, 2014, and your supplemental submissions dated August 26, 2015, and July 18, 2016. Detrimental reliance relief is provided in accordance with Rule 3.10, Taxpayer Bill of Rights.

You requested guidance, for franchise tax apportionment purposes, on the sourcing of revenue from \*\*\*\*\* (Taxpayer's), sales of wireless voice and data services to COMPANY A.

**Facts Presented**

The facts below are derived from your initial request and the supplemental information you provided, including a representative Wholesale Supply Agreement between Taxpayer and a mobile telecommunication carrier, and a Resale Agreement between Taxpayer and COMPANY A.

Taxpayer is a Delaware Limited Liability Company located in Texas. It has no employees or other locations outside the state.

Taxpayer neither owns nor operates a local exchange network in Texas. Taxpayer contracts with mobile telecommunication carriers to buy and resell voice and data services using the carriers' network infrastructure. Taxpayer purchases the following: Voice Service, including in-network calls, long-distance calls, and international calls; Short Message Service; Data Service, which includes Internet access; Roaming Service; Other Services, specifically caller-id and call waiting; and Voicemail Services.

Taxpayer sells the mobile voice and data services it acquires to COMPANY A, a mobile virtual network operator domiciled in Pennsylvania. COMPANY A rebrands and resells the services to its own customers. The Resale Agreement between Taxpayer and COMPANY A does not define voice services. It defines data services as “(i) Short Messaging Service or SMS; (ii) browsing the Internet using a browser-enabled, data-compatible handset; or (iii) using an appropriately enabled data-compatible handset and data connection device.”

Taxpayer receives invoices from mobile telecommunication carriers for the wireless voice and data services it purchases. These invoices show detailed usage information for COMPANY A's customers. Under the terms of the Resale Agreement with COMPANY A, when Taxpayer receives a carrier's invoice, it shares the detailed usage information with COMPANY A. COMPANY A then uses this information to bill its customers. Taxpayer does not process COMPANY A's customer information or perform a billing service.

### **Question, Ruling, and Analysis**

Our restatement of your question is below, followed by our response and analysis.

**Question:** Is Taxpayer's sale of wireless voice and data services to COMPANY A, who resells the services, a sale of an intangible asset sourced to the legal domicile of the purchaser and apportioned based on Rule 3.591(e)(21)(B) for Texas Franchise Tax purposes?

**Ruling:** Taxpayer's sale of mobile voice and data services to COMPANY A is a sale of internet access services and wireless telecommunication services, not the sale of an intangible asset. The receipts from the sale of an internet access service are apportioned to Texas when the receipts are earned from providing access to the internet in Texas. Rule 3.591(e)(12). The receipts from the sale of telecommunication services are apportioned to Texas when the services are performed in Texas. Rule 3.591(e)(30).

### **Analysis:**

The franchise tax applies to each taxable entity doing business in Texas or organized in Texas. Section 171.001 (Tax Imposed). The tax is imposed on the portion of the entity's receipts attributable to business done in Texas. Section 171.106 (Apportionment of Margin to this State).

Receipts from the sale of services are sourced to the location where the service is performed, unless a more specific sourcing rule applies. Rule 3.591(e)(26). Under Rule 3.591(e)(12), receipts from internet access fees charged to access the internet in Texas are Texas receipts. Receipts from the sale of telecommunication services are sourced to Texas only if the service is performed in Texas. Rule 3.591(e)(30).

Taxpayer asserts that the sale of mobile voice and data services is the sale of an intangible. Taxpayer cites Comptroller's Decision No. 108,113 (2013) for support. That decision considers whether a prepaid calling card is tangible personal property for purposes of calculating the

cost of goods sold deduction. It does not address the proper sourcing of receipts from prepaid calling cards for apportionment purposes.

Comptroller's Decision Nos. 111,864 - 111,869 (2016) address how to apportion receipts from the sale of prepaid calling cards. Specifically, the decision considers whether receipts from sales of prepaid calling cards are apportioned as receipts from the sale of a service or receipts from the sale of an intangible. In this more recent decision, the Administrative Law Judge (ALJ) notes the following in regard to Comptroller's Decision No. 108,113:

The 2013 decision state[s] that a prepaid calling card is an intangible, but...also state[s] or describe[s] how the sale is also a telecommunication service (which, based on the ordinary meaning of the term 'service,' is also a thing that is not tangible). The salient point for the instant matter is that the questions presented in [Comptroller's Decision No. 108,113] could be resolved without distinguishing an intangible and a service. That is not true of the issue presented in this case....

The ALJ concludes:

For purposes of Texas franchise tax, the sale of a prepaid calling card is the sale or resale of a telecommunication service and revenue from the sale of such cards should be sourced accordingly [under Rule 3.591(e)(30)].

Just as the seller of prepaid calling cards is selling a telecommunication service and not an intangible right to access a service, Taxpayer is also selling telecommunication services to COMPANY A. Taxpayer's contracts support this conclusion. Both Taxpayer's Wholesale Supply Agreement with the mobile telecommunication carrier to purchase and distribute services, and its Resale Agreement with COMPANY A to sell wireless voice and data services, demonstrate that Taxpayer's receipts are from the resale of services. Therefore, Taxpayer's receipts from the sale of its services must also be apportioned in accordance with Rule 3.591(e)(12) and (30).

Although the heading of subsection (e)(30) of Rule 3.591 refers to "telephone companies," and Taxpayer is not a telephone company, Taxpayer nonetheless sells the same kind of telecommunication services described in that subsection. We intend to propose amendments to the heading of Rule 3.591(e)(30) to reflect its application to all entities that sell telecommunication services.

Comptroller's Decisions cited are on the Comptroller's State Tax Automated Research (STAR) system. The Texas Tax Code, Texas Administrative Code, and the STAR system are accessible at [www.comptroller.texas.gov/taxes/](http://www.comptroller.texas.gov/taxes/).

If you have questions about this private letter ruling, please email us through our website at <https://comptroller.texas.gov/taxhelp/> and reference Private Letter Ruling #150150546.

Sincerely,

Tax Policy Division – Direct Taxes

Texas Comptroller of Public Accounts

## ENDNOTE

1. Unless otherwise indicated, all references to "Section" are to the Texas Tax Code, and all references to "Rule" are to Title 34 of the Texas Administrative Code.

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