

**OP. NO. 04-044**

**TAXATION: MISCELLANEOUS TAXES – CONSUMER UTILITY TAXES.**

**Authority for county, city, or town to impose consumer utility tax on mobile service providers. When tax is imposed, requirement that service provider collect tax on each telephone number included in bundled mobile telecommunications service plan billed to mobile service consumer. Provider shall apply 10% tax to monthly gross charges not exceeding \$30 that are attributable to each itemized or nonitemized local mobile telecommunications service number included in bill. Application of this interpretation to any particular mobile telecommunications service plan is question of fact for determination by local tax official.**

The Honorable Sharon M. McDonald  
Commissioner of the Revenue for the City of Norfolk  
September 7, 2004

**Issue Presented**

You inquire concerning the proper interpretation and application of the consumer utility tax imposed pursuant to § 58.1-3812. You ask whether § 58.1-3812 requires mobile telecommunications service providers to collect a consumer utility tax on each telephone number included within a family service plan or against the aggregate nonitemized charge billed to the mobile service consumer.

**Response**

Section 58.1-3812 authorizes a county, city, or town to impose a consumer utility tax on mobile service providers. Should a county, city, or town impose such a tax, it is my opinion that § 58.1-3812 also requires a service provider to collect a consumer utility tax on each telephone number included in a bundled mobile telecommunications service plan billed to a mobile service consumer. According to Virginia law, the provider shall apply a 10 percent tax to monthly gross charges not exceeding \$30 that are attributable to each itemized or nonitemized local mobile telecommunications service number included in the bill. The

application of this interpretation to any particular mobile telecommunications service plan is a question of fact for determination by the local tax official.

### **Background**

You relate that service providers in Hampton Roads offer several mobile telecommunications service plans to consumers. Many providers offer a family plan of service, in which various services provided to a group of related individuals are bundled together. You state that family plans consist of two parts. The first part of the family plan defines the initial contract and details the number of minutes and features selected by the primary subscriber. A primary telephone number for account identification is assigned and one initial mobile telephone is activated. The second part of the family plan includes the additional secondary telephone components of the plan. A separate telephone number is assigned and activated for each secondary user phone. You advise that most service providers itemize the charges for secondary telephone lines and apply the tax rates and fees to the individual telephone numbers on the primary subscriber's monthly bill.

You identify a major service provider whose practice is not to itemize the charges for secondary mobile telecommunications service numbers. Instead, the service provider combines into a single account, the lines attributable to all secondary numbers, charges one fee, and assesses taxes on the aggregate monthly charge, disregarding the charges attributable to the individual secondary telephone lines. This practice has the effect of reducing local consumer utility tax revenue, because § 58.1-3812(A) limits the tax rate that may be billed for each mobile telecommunications service number to a maximum monthly gross charge of \$30.

### **Applicable Law and Discussion**

Article 4, Chapter 38 of Title 58.1, §§ 58.1-3812 through 58.1-3816.2, comprises the statutory scheme relating to local consumer utility taxes. Section 58.1-3812(A) provides that

any county, city or town may impose a tax on a taxable purchase<sup>[1]</sup> by a consumer of local telecommunication service if the consumer's service address is located in such county, city or town....  
[T]he tax may be imposed only at a rate equal to 10 percent of the monthly gross charge to a consumer of local mobile telecommunications service *and shall not*

*be applicable to any amount so charged in excess of \$30 per month for each mobile telecommunications service number billed to a mobile service consumer.*  
[Emphasis added.]

Section 58.1-3812(G) provides that "[a] service provider of local telecommunication services shall collect the tax from the consumer by adding the tax to the monthly gross charge for such services."  
Section 58.1-3812(L) explains the purpose of a "bundled transaction" and the charges attributable to such services:

*L. 1. For purposes of this article, a bundled transaction of services includes services taxed under this section and consists of distinct and identifiable properties, services, or both, sold for one nonitemized charge for which the tax treatment of the distinct properties and services is different.*

2. In the case of a bundled transaction described in subdivision L 1, if the charge is attributable to services that are taxable and services that are nontaxable, the portion of the charge attributable to the nontaxable services shall be subject to tax unless the provider can reasonably identify such nontaxable portion from its books and records kept in the regular course of business.

3. In the case of a bundled transaction described in subdivision L 1, *if the charge for such services is attributable to services that are subject to tax at different rates, the total charge shall be treated as attributable to the services subject to tax at the highest rate unless the provider can reasonably identify the portion of the charge* attributable to the services subject to tax at a lower rate from its books and records kept in the regular course of business for other purposes. [Emphasis added.]

Section 58.1-3812(M) defines the following terms as used in Article 4:

*"Consumer"* means a person who, *individually or through ... permittees*, makes a taxable purchase of local telecommunication services.

....

*"Gross charges"* means ... the amount charged or paid for the taxable purchase of local telecommunication services.<sup>[2]</sup>

....

*"Local telecommunication service,"* subject to the exclusions stated in this section, includes, without limitation, the two-way local transmission of messages through use of ... *local mobile telecommunications service.*

....

*"Mobile service consumer"* means a person having a telephone number for local mobile telecommunications service who has made a taxable purchase of such service or on whose behalf another person has made a taxable purchase of such service.

*"Mobile telecommunications service"* means commercial mobile radio service, as defined in 47 C.F.R. § 20.3, as in effect on June 1, 1999.

....

*"Service provider"* means every person engaged in the business of selling local telecommunication services to consumers. [Emphasis added.]

The plain and unambiguous language of § 58.1-3812(A) evinces the intent of the General Assembly that a 10 percent consumer utility tax be applied to the monthly charges for each mobile telecommunications service number billed to a mobile service consumer not exceeding the gross amount of \$30.<sup>3</sup> This language clearly applies to the described family plans.

Further evidence of this legislative intent may be gleaned from the definitions of "consumer" and "mobile service consumer" in § 58.1-3812(M). Essentially, a "consumer" is any person who, individually or through others, "makes a taxable purchase of local telecommunication services," which include "local mobile telecommunications service."<sup>4</sup> Others in a consumer's family or affinity group would be "permittees."<sup>5</sup> A "mobile service consumer," to whom such service is billed, includes any person "having a telephone number for local mobile telecommunications service who

has made a taxable purchase of such service or on whose behalf another person has made a taxable purchase of such service."<sup>6</sup>

These definitions, read together with the statutory scheme explained in the previous paragraph, include the type of family service plans you describe, wherein a service provider bills a primary subscriber for services rendered to other family or affinity group participants. Consistent with this interpretation, you relate that most service providers in the Hampton Roads area tax the individual secondary phone numbers billed to the primary subscriber of a family plan.

You cite the example of a service provider that makes one aggregate nonitemized charge for bundled services rendered to participants in the family plan. Notwithstanding this chosen method of billing, it is clear that the provider has included charges "for each mobile telecommunications service number"<sup>7</sup> within the aggregate amount billed to the subscriber, in order to provide other members of the family or group with mobile telecommunications service.

The provision for bundled transactions in § 58.1-3812(L) indicates an intention to include and tax family plans in accordance with the scheme set out in the statute. A "bundled transaction" "consists of distinct and identifiable properties, services, or both, *sold for one nonitemized charge* for which the tax treatment of the distinct properties and services is different."<sup>8</sup> Accordingly, a bundled transaction includes not only a combination of taxable and nontaxable services, but also those services or properties, or both, on which the tax treatment may be different. Different tax treatment may result from the imposition of different tax rates, or the application of different caps on the tax base. This would be the case for each telephone number in a family plan, inasmuch as the tax treatment of the taxable base would vary according to amount. Where the charges for distinct services may be reasonably identified from the service provider's books and records, different tax rates may apply to those services.<sup>9</sup> Where the charges for such services may not be reasonably identifiable, the total charge shall be attributed to the services subject to the highest tax rate.<sup>10</sup>

It is clear from the plain and unambiguous wording of § 58.1-3812 that the General Assembly intends to apply the consumer utility tax on a monthly basis to "each mobile telecommunications service number,"<sup>11</sup> whether itemized or not.<sup>12</sup> For purposes of § 58.1-3812, the "highest rate" for taxing mobile telecommunications service would be 10 percent on the nonitemized gross charges attributable to *each* number billed to a mobile service consumer. If the service provider has attributed charges to distinct services and numbers,

based on its books and records, the separate services and properties may be taxed at their respective tax rates. If the nonitemized charge cannot reasonably be broken down, the local taxing official must develop a reasonable method for identifying each telephone number included within the nonitemized charge so that services attributable to the number may be taxed. The gross charge for services must not exceed \$30.<sup>13</sup>

You state that the service providers in Hampton Roads offer a wide variety of services and rate plans for local mobile telecommunication services. It is beyond the scope of this opinion to provide specific guidance as to a method of imposing a consumer utility tax on any of these arrangements. Such determinations are to be made by the local tax official, based on the factual provisions of each plan.<sup>14</sup>

### **Conclusion**

Section 58.1-3812 authorizes a county, city, or town to impose a consumer utility tax on mobile service providers. Accordingly, should a county, city, or town impose such a tax, it is my opinion that § 58.1-3812 also requires a service provider to collect a consumer utility tax on each telephone number included in a bundled mobile telecommunications service plan billed to a mobile service consumer. According to Virginia law, the provider shall apply a 10 percent tax to monthly gross charges not exceeding \$30 that are attributable to each itemized or nonitemized local mobile telecommunications service number included in the bill. The application of this interpretation to any particular mobile telecommunications service plan is a question of fact for determination by the local tax official.

<sup>1</sup>Section 58.1-3812(M) defines "taxable purchase" as "the acquisition of telecommunication services for consumption or use."

<sup>2</sup>Section 58.1-3812(M) excludes from the definition of "gross charges" certain charges/amounts and bad debts, which are not applicable to this opinion.

<sup>3</sup>The Supreme Court of Virginia has stated that, "[w]hen a statute's language is plain and unambiguous, we are bound by the plain meaning of that language. Therefore, when the General Assembly has used words of a plain and definite import, courts cannot assign to them a construction that would be tantamount to holding that the General Assembly intended something other than that which it actually expressed." *Mozley v. Prestwould Bd. of Dirs.*, 264 Va.

549, 554, 570 S.E.2d 817, 820 (2002) (citations omitted); see *also* 2000 Op. Va. Att'y Gen. 199, 200 (interpreting extent of consumer utilities taxes authorized by § 58.1-3812 and noting that, whenever there is doubt as to meaning or scope of laws imposing tax, such laws are to be construed against government and in favor of citizen).

<sup>4</sup>Section 58.1-3812(M) (LexisNexis Repl. Vol. 2004) (defining "consumer," "local telecommunication service").

<sup>5</sup>*Id.* (defining "consumer").

<sup>6</sup>*Id.*

<sup>7</sup>Section 58.1-3812(A).

<sup>8</sup>Section 58.1-3812(L)(1).

<sup>9</sup>See § 58.1-3812(L)(2).

<sup>10</sup>Section 58.1-3812(L)(3) (emphasis added). For example, a prior opinion of the Attorney General concludes that a "universal service charge" appearing separately as a percentage on a consumer's bill for local telecommunication service would not be considered part of the "gross charges" under § 58.1-3812, whereas if the universal service charge were to be included as a nonitemized flat monthly fee, such charge would be subject to tax. 2000 Op. Va. Att'y Gen., *supra* note 3, at 201.

<sup>11</sup>Section 58.1-3812(A).

<sup>12</sup>In its Legislative Summary for the 1994 Session of the General Assembly, which originally authorized localities to extend collection of the consumer utility tax "to all providers of cellular ... services," the Department of Taxation states that "[a] maximum tax of 10% of the service charge, up to \$3 per month, *for each mobile service consumer* would be established." (Emphasis added.) Tax Comm'r Rul. P.D. 94-227 (May 1994), *available at* <http://policylibrary.tax.state.va.us/OTP/Policy.nsf>. In its Fiscal Impact Statement for Senate Bill 858, introduced at the 2003 Session of the General Assembly, which ultimately became Chapter 160, the Department commented concerning taxation of bundled transactions:

"The local consumer utility taxes on telecommunications services apply to local telecommunications services and local mobile

telecommunications services, which are taxed at different rates *with different caps*. A growing trend in the telecommunications industry involves the bundling of these services with other communications services that are not subject to the local consumer utility taxes, such as long distance, cable, broadband and DSL services.

"Under this bill, a bundled transaction of communications services consists of distinct and identifiable property, services, or both, sold for one nonitemized charge for which the tax treatment of the distinct properties and services is different." (Emphasis added.) Tax Dep't 2003 Fiscal Impact Statement, at 2 (Feb. 24, 2003), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?031+oth+SB858FER161+PDF>.

<sup>13</sup>The General Assembly, as well as localities and telecommunications service providers, have been requested to prepare legislation "establishing a new system for taxing telecommunications services in the Commonwealth." 2004 Va. Acts ch. 634. "[T]he intent is for a new method of taxation to be enacted, effective July 1, 2005, to replace the ... local consumer utility tax on consumers of local exchange and wireless services ...." *Id.* (quoting enacting cl. 1, § 2).

<sup>14</sup>See Op. Va. Att'y Gen.: 2002 at 338, 341 (concluding that tax status of nonprofit Christian organization is factual determination to be made by local tax official); 1995 at 245, 247 (noting that whether contractor is engaged in business within locality, for purpose of imposing business license tax, is question of fact for determination by appropriate local tax official) *id.* at 268 (concluding that local tax official determines domicile of student, for purposes of personal property taxation, on case-by-case basis, considering all relevant facts).

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