

Stipulations & Findings of Fact:

1. The parties' stipulations expressly refer to the tax periods of January 1, 2006 through December 31, 2008 (Periods at Issue). Stip. ¶ 1.
2. Taxpayer is a wholly-owned subsidiary of XYZ Business, Inc. (XYZ Business). Stip. ¶ 2.
3. Taxpayer maintains its headquarters in another state. Stip. ¶ 3.
4. XYZ Business and its subsidiaries (collectively, XYZ Business) is a facility-based carrier engaged in the business of providing commercial mobile radio service (CMRS). Stip. ¶ 4.
5. Taxpayer is required to obtain licenses for the use of radio spectrum to provide CMRS to customers from the Federal Communications Commission (FCC) which allows Taxpayer to provide CMRS in certain specific areas within the United States (licensed service areas). Stip. ¶ 5.
6. Taxpayer provides CMRS directly to its end-user subscribers in its licensed service areas in the United States. Stip. ¶ 6.
7. Taxpayer, through its parent, XYZ Business, is licensed to provide CMRS in Illinois. Stip. ¶ 7.
8. Taxpayer also provides CMRS to end-user subscribers of other domestic and foreign carriers in its licensed service areas in the United States, when such end-user subscribers are either outside of their own domestic carrier's network or foreign carriers' licensed service area and network. Stip. ¶ 8.

Stipulations and Findings of Fact Regarding Taxpayer’s Provision of, and Charges for, Roaming Services

9. The FCC publishes a guide for consumers titled, Understanding Wireless Telephone Coverage Areas. Taxpayer Ex. K (hereafter, FCC Guide). That Guide provides the following description of roaming services:

Roaming

Roaming is the term that describes a wireless phone’s ability to make and receive calls outside the home calling area under your service plan. Roaming occurs when a subscriber of one wireless service provider uses the facilities of a second provider. While the subscriber usually has no pre-existing agreement with the second provider to handle calls, the subscriber’s provider may have a “roaming agreement” with the second provider. Under that agreement, the second provider agrees to handle calls placed by subscribers of the first provider and vice versa. When your phone is roaming, an indicator light on your phone may display the word “roam.” On occasion, your handset will not display a roaming indicator, even though it is in a roaming area. Also, some handset software needs to be updated monthly. Often this can be done by simply pressing a few buttons on the headset. Keeping that software updated can increase reliability and reduce incorrect roaming charges.

FCC Guide, p. 2.

10. Taxpayer has entered into agreements (Roaming Agreements) with foreign mobile telecommunication carriers (Foreign Carriers). Stip. ¶ 9; Taxpayer Ex. M (copy of executed agreement titled, International Roaming Agreement for GSM and/or 3GSM, between Taxpayer and Orange Romania S.A.).

11. The Foreign Carriers have customers (Foreign Customers or Foreign Carriers’ Customers) with whom they have contracted to provide CMRS. Stip. ¶ 10; Taxpayer Ex. M, § 3.2.

12. The Foreign Carriers' Customers originate or receive mobile calls while in Illinois by roaming within service areas in which the Foreign Carriers are not licensed. Stip. ¶

11.

13. Under the Roaming Agreements, the Foreign Carriers purchase mobile telecommunications services, to wit: roaming services, from Taxpayer. Stip. ¶ 12; Taxpayer Ex. M.

14. More specifically, the Roaming Agreement between Taxpayer and DEB Business provides, in pertinent part,

2. Introduction

2.1 The Memorandum of Understanding on GSM^[1] provides for the establishment of International Roaming Services whereby a subscriber provided with Services in one country by one of the network operators can also gain access to the Services of any of the other network operators in their respective countries.

2.2 In accordance with the above, the Parties have expressed their wish to make a bilateral agreement for the establishment of International Roaming Services between their GSM and/or 3GSM networks and it is therefore agreed as follows:

3. Definitions

For the purpose of the Agreement the following terms shall have the meanings set forth in their respective definitions, unless a different meaning is called for in the context of another provision in the Agreement:

3.2 "Roaming Subscriber" shall mean a person or entity with valid subscription for international use issued by one of the Parties and using a GSM SIM (Subscriber Identity Module) and/or a GSM USIM (Universal Subscriber Identity Module) who seeks GSM and/or 3GSM services(s) in a geographic area outside the area served by its HPMN Operator.

3.6 "HPMN Operator" shall mean a Party who is providing Services to its subscribers in a geographic area where it holds a license or has a right to establish and operate a GSM and/or 3GSM network.

¹ I take notice that GSM is a trademark issued to the GSM Association and stands for Global System for Mobile Telecommunications. <http://www.gsma.com/aboutus/gsm-technology/gsm/> (last accessed July 31, 2012).

3.7 “VPMN Operator” shall mean a Party who allows Roaming Subscribers to use its GSM and/or 3GSM network(s).

3.10 “IR” shall mean International Roaming, which shall include International GSM Roaming, International GPRS Roaming and International 3GSM Roaming.

3.12 “Services” shall mean the services for International GSM and/or International 3GSM Roaming as agreed upon in the parties in AA.14 and may include:

3.12.1 Circuit Switched based services, hereafter called “CS” and/or “3GSM CS” ... and/or

3.12.2 Packet Switched based services, hereafter called “GPRS” and/or “3GSM PS” ...

5. Scope of the Agreement

5.1 In respect of and subject to their licenses or rights and other national binding regulation to establish and operate GSM and/or 3GSM networks, the Parties to the Agreement agree to establish IR between their GSM and 3GSM network(s) in accordance with relevant Technical Specifications and GSM Association Permanent Reference Documents, including all the commercial aspects, as defined in the Annexes hereto or as may be amended from time to time.

6. Implementation of the network and services

6.1 Network Implementation

The Parties agree to comply with the relevant requirements and procedures of the GSM Association Permanent Reference Documents agreed by the GSM Association from time to time and as amended by the GSM Association from time to time.

6.2 Services

6.2.1 The Services provided by each Party are defined in Annex 1.2 as may be amended from time to time.

6.2.2 The Services made available to individual Roaming Subscribers shall only be those for which the Roaming Subscribers have valid subscriptions in their HPMN.

6.2.3 A VPMN Operator providing Services to a GSM Operator or 3GSM Operator shall, under the same technical terms and conditions, offer the same Services to its other GSM roaming partners or 3GSM roaming partners respectively. The availability of Services may depend on the availability of appropriate functionality in the HPMN.

6.2.4 Both Parties agree that the subscribers, during roaming, may experience conditions of service different from the conditions in their HPMN. However, conditions of service shall not differ substantially from those provided to the subscribers of the VPMN Operator.

- 8. Charging, Billing and Accounting
- 8.1 Charging and tariffs
- 8.1.1 Both Parties agree that when a Roaming Subscriber uses the Services of the VPMN Operator, the Roaming Subscriber's HPMN Operator shall be responsible for payment of charges for the Services so used in accordance with the tariff of the VPMN Operator stated in Annex I.3.1.

Taxpayer Ex. M, §§ 2-8.1.1.

- 15. Because of the Roaming Agreements, the Foreign Carriers' Customers are able to originate or receive mobile calls in Taxpayer's licensed service areas in Illinois, and the Foreign Carriers pass these charges for roaming services on to their Foreign Customers. Stip. ¶ 13.
- 16. The commercial domicile of the Foreign Carriers is outside the United States. Stip. ¶ 14; *see also* Taxpayer Ex. M, p. 1 (parties to the Roaming Agreement are Taxpayer and "DEF Business S.A. (a company organized and existing under the laws of DEF)").
- 17. The residential or business street addresses of the Foreign Carriers' Customers are located outside of the United States. Stip. ¶ 15.
- 18. For the Periods at Issue, Taxpayer charged the Foreign Carriers, and the Foreign Carriers paid to the Taxpayer, Illinois Telecommunications Excise Tax (TET) with respect to the roaming services purchased by the Foreign Carriers pursuant to the Roaming Agreements. Stip. ¶ 16.
- 19. For the Periods at Issue, the Foreign Carriers were not registered with the Department, and they did not obtain resale numbers from the Department. Stip. ¶ 17; *compare also* Taxpayer Ex. M, p. 3 *with* 47 U.S.C. § 310(b)(2); 47 C.F.R. 20.5(a)(3)

("Commercial mobile radio service authorizations may not be granted to or held by:
... Any corporation organized under the laws of any foreign government")
(implementing 47 U.S.C. § 310(b)(2)).

Stipulations and Findings of Fact Regarding Taxpayer's Filed Illinois Returns and Refund Claims

20. Taxpayer timely filed original Illinois TET returns with the Department and remitted the TET that it had collected from the Foreign Carriers. Stip. ¶ 18.
21. On or about June 30, 2009, Taxpayer timely filed amended TET returns for the periods of January 1, 2006 through June 30, 2006 requesting a refund in the amount of \$XXXX plus applicable interest (First Refund Claim). Stip. ¶ 19; Stip. Ex. 1 (true and accurate copy of First Refund Claim and enclosures).
22. Along with the First Refund Claim, Taxpayer enclosed a detailed explanation as to why the tax was collected and remitted in error. Stip. ¶ 20; Stip. Ex. 1.
23. On or about December 18, 2009, Taxpayer timely filed amended TET returns for the periods of July 1, 2006 through December 31, 2008 requesting a refund in the amount of \$XXXX plus applicable interest (Second Refund Claim). Stip. ¶¶ 22-23; Stip. Ex. 2 (copy of Second Refund Claim).
24. On August 24, 2009, the Department issued a Notice of Denial (First Denial) in which it denied Taxpayer's First Refund Claim. Stip. ¶ 25.
25. The Department's First Denial stated that the Department denied the First Refund Claim because Taxpayer did not demonstrate that it had refunded the money to its customers prior to filing the claim. Stip. ¶ 26.
26. Taxpayer protested the Department's First Denial on October 23, 2009. Stip. ¶ 27.

27. On January 6, 2010, the Department issued a Notice of Denial (Second Denial) regarding Taxpayer's Second Refund Claim. Stip. ¶ 28.
28. The Department's Second Denial stated that the Department denied Taxpayer's Second Refund Claim because: (1) the Department had not established the tax was paid in error or that issuing a credit memorandum would not result in unjust enrichment to Taxpayer; and (2) Taxpayer did not attach supporting Schedule RT-2-M to each amended return. Stip. ¶ 29.
29. Taxpayer protested the Department's Second Denial on February 12, 2010. Stip. ¶ 30.
30. On March 18, 2010, Taxpayer provided the Department with a draft Credit Memorandum and Reimbursement Agreement (Agreement) for the Department's review. Stip. ¶¶ 31-32; Stip. Ex. 3 (copy of the Agreement).
31. The draft Agreement provides that the Taxpayer has a binding legal liability to refund the Telecommunications Excise Tax to each of the Foreign Carriers once Taxpayer's First and Second Refund Claims are allowed. Stip. ¶ 33; Stip. Ex. 3, p. 2.
32. The draft Agreement included as Stipulation Exhibit 3 is not signed by Taxpayer and does not name any of the Foreign Carriers. Stip. Ex. 3. There is no evidence that Taxpayer signed or issued any similar Agreement to any of the Foreign Carriers with whom it had Roaming Agreements. *See Stip., passim.*

Conclusions of Law:

This matter involves claims for refund of TET claimed to have been paid in error regarding the months of January 2006 through December 2008. Stip. ¶ 1; Stip. Exs. 1-2. The parties agree that the tax Taxpayer previously paid to the Department was measured by charges Taxpayer made to Foreign Carriers for roaming services that the Foreign

Carriers' Customers used when they were physically present within Taxpayer's licensed service areas. Stip. ¶¶ 11, 13, 16. The Department denied the requested refunds. Stip. ¶¶ 25, 28. Taxpayer protested those Denials and asked for a hearing. Stip. ¶¶ 27, 30.

Section 10 of the TETA authorizes a statutory credit or refund of tax paid in error by a retailer, under certain conditions. 35 ILCS 630/10. When a taxpayer seeks to take advantage of deductions, credits or other tax benefits allowed by statute, the burden of proof is on the taxpayer. Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1st Dist. 1981). There are two issues: (1) whether Taxpayer paid TET in error; and (2) whether granting the refunds would result in unjust enrichment. Taxpayer bears the burden on each issue. Balla, 96 Ill. App. 3d at 296, 421 N.E.2d at 238.

Issue 1: Did Taxpayer Pay TET in Error

Regarding the first issue, Taxpayer argues that the tax reported on its amended TET returns was paid in error because the Mobile Telecommunications Sourcing Act (MTSA), which became law in 2000, preempts a State's power to tax telecommunications services under the circumstances stipulated in this matter. Because Taxpayer's claim involves a question of federal preemption, resolving the first issue requires a consideration of the tax imposed by Illinois' Telecommunications Excise Tax Act (TETA), as well as a consideration of the purpose and text of the MTSA. *See Carter v. SSC Odin Operating Co., LLC*, 237 Ill. 2d 30, 39-40; 927 N.E.2d 1207, 1214 (2010) ("Federal law preempts state law under the supremacy clause in any one of the following three circumstances: (1) express preemption-where Congress has expressly preempted state action; (2) implied field preemption-where Congress has implemented a comprehensive regulatory scheme in an area, thus removing the entire field from the state

realm; or (3) implied conflict preemption-where state action actually conflicts with federal law.”).

Illinois’ TETA

Section 3 of the TETA imposes a tax upon the act or privilege of originating or receiving in Illinois intrastate telecommunications by a person in this State at the rate of 7% of the gross charge for such telecommunications purchased at retail from a retailer by such person. 35 ILCS 630/3. Section 4 imposes a similar tax upon the act or privilege of originating or receiving interstate telecommunications. 35 ILCS 630/4. To prevent actual multi-state taxation, TETA § 4 allows a credit for tax that a taxpayer has paid in another state on the same privilege, to the extent the tax was properly due and paid. *Id.* Both sections provide that, “such tax is not imposed on the act or privilege to the extent such act or privilege may not, under the Constitution and statutes of the United States, be made the subject of taxation by the State.” 35 ILCS 630/3; 35 ILCS 630/4.

The Illinois General Assembly included within the TETA definitions of certain terms used in the Act, as follows:

§ 2. As used in this Article, unless the context clearly requires otherwise:

(c) “Telecommunications”, in addition to the meaning ordinarily and popularly ascribed to it, includes, without limitation, ... cellular mobile telecommunications service; *** “Telecommunications” shall not include purchases of telecommunications by a telecommunications service provider for use as a component part of the service provided by him to the ultimate retail consumer who originates or terminates the taxable end-to-end communications. Carrier access charges, right of access charges, charges for use of inter-company facilities, and all telecommunications resold in the subsequent provision of, used as a component of, or integrated into end-to-end telecommunications service shall be non-taxable as sales for resale.

(h) “Taxpayer” means a person who individually or through his agents, employees or permittees engages in the act or privilege of originating or receiving telecommunications in this State and who incurs a tax liability under this Article.

(j) “Purchase at retail” means the acquisition, consumption or use of telecommunication through a sale at retail.

(k) “Sale at retail” means the transmitting, supplying or furnishing of telecommunications and all services and equipment provided in connection therewith for a consideration to persons other than the Federal and State governments, and State universities created by statute and other than between a parent corporation and its wholly owned subsidiaries or between wholly owned subsidiaries for their use or consumption and not for resale.

(l) “Retailer” means and includes every person engaged in the business of making sales at retail as defined in this Article. The Department may, in its discretion, upon application, authorize the collection of the tax hereby imposed by any retailer not maintaining a place of business within this State, who, to the satisfaction of the Department, furnishes adequate security to insure collection and payment of the tax. Such retailer shall be issued, without charge, a permit to collect such tax. When so authorized, it shall be the duty of such retailer to collect the tax upon all of the gross charges for telecommunications in this State in the same manner and subject to the same requirements as a retailer maintaining a place of business within this State. The permit may be revoked by the Department at its discretion.

(m) “Retailer maintaining a place of business in this State”, or any like term, means and includes any retailer having or maintaining within this State, directly or by a subsidiary, an office, distribution facilities, transmission facilities, sales office, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State.

(n) “Service address” means the location of telecommunications equipment from which the telecommunications services are originated or at which telecommunications services are received by a taxpayer. In the event this may not be a defined location, as in the case of mobile phones, paging systems, maritime systems, service address means the customer’s place of primary use as defined in the Mobile Telecommunications Sourcing Conformity Act. For air-to-ground systems and the like, service address shall mean the location of a taxpayer’s primary use of the telecommunications equipment as defined by telephone number, authorization code, or location in Illinois where bills are sent.

35 ILCS 630/2.

The MTSA

In 2000, Congress passed the MTSA, in response to “an explosion of growth in the wireless telecommunications industry ... [o]ver the last decade” MTSA H. Rep., 2000 U.S.C.C.A.N. at 509. The House Report written to describe Congress’ consideration and passage of the MTSA, describes the purpose and summary of the Act as follows:

PURPOSE AND SUMMARY

H.R. 4391, the Mobile Telecommunications Sourcing Act, provides a uniform method for fairly and simply determining how State and local jurisdictions may tax wireless telecommunications. Among its goals are to provide customers with simpler billing statements, reduce the chances of double taxation of wireless telecommunications services, and simplify and reduce the costs of tax administration for carriers and State and local governments.

MTSA H. Rep., 2000 U.S.C.C.A.N. at 508.

When describing the need for federal legislation, the House Report cited to the changing nature of wireless telecommunications, the different ways States and municipalities imposed tax on such telecommunications, the likelihood of multiple jurisdictions imposing tax on the same wireless calls, and the difficulties to providers, customers, and states, when monitoring the collection of such taxes. MTSA H. Rep., 2000 U.S.C.C.A.N. at 509. It then described Congress’ “proposed solution” as follows:

The Proposed Solution

Given these and other practical difficulties, the wireless industry sought development of a taxing system that would lessen the burden of having to determine the location of sale and purchase of each wireless call and the taxes applicable to each call. This effort captured the attention of State and local tax administrators who desire to have existing tax systems better match current business practices and reality. They jointly developed a proposed solution which is reflected in this legislation.

In a nutshell, the industry/government proposal would identify

the mobile telephone customer's "place of primary use" and require that taxation of calls made by that customer be imposed only by the taxing authorities which have jurisdiction in that location. It would also facilitate the creation and maintenance of a database which would indicate for each location what taxes apply. Using this system, it would no longer be necessary to determine where the call was placed.

MTSA H. Rep., 2000 U.S.C.C.A.N. at 510 (emphasis added).

Finally, in the section of the House Report titled, "Estimated Impact on State, Local and Tribal Governments[,]” Congress wrote:

H.R. 4391 would preempt state and local government laws by prohibiting jurisdictions from taxing mobile telecommunication services unless the jurisdictions contain the customer's place of primary use. Such a preemption would be a mandate as defined by UMRA. This change could initially benefit some taxing jurisdictions and harm others depending on the number of customers with places of primary use within each jurisdiction. The bill would not require or prohibit state and local governments from taxing telecommunications services or affect the rate at which such services could be taxed. It would, however, require a uniform basis for determining which jurisdictions may tax mobile telecommunications services.

MTSA H. Rep., 2000 U.S.C.C.A.N. at 513 (emphasis added).

The manner in which the MTSA sources mobile telecommunications services is set forth in § 117, which provides as follows:

§ 117. Sourcing rules

(a) Treatment of Charges for Mobile Telecommunications Services.—Notwithstanding the law of any State or political subdivision of any State, mobile telecommunications services provided in a taxing jurisdiction to a customer, the charges for which are billed by or for the customer's home service provider, shall be deemed to be provided by the customer's home service provider.

(b) Jurisdiction.—All charges for mobile telecommunications services that are deemed to be provided by the customer's home service provider under sections 116 through 126 of this title are authorized to be subjected to tax, charge, or fee by the taxing jurisdictions whose territorial limits encompass the customer's place of primary use, regardless of where the mobile telecommunication services originate,

terminate, or pass through, and no other taxing jurisdiction may impose taxes, charges, or fees on charges for such mobile telecommunications services.

4 U.S.C. § 117.

The Illinois Mobile Telecommunications Sourcing Conformity Act (IMTSCA)

After Congress passed the MTSA in 2000, the Illinois General Assembly enacted the Illinois Mobile Telecommunications Sourcing Conformity Act (IMTSCA), which provides, in pertinent part:

§ 5. Legislative intent. The General Assembly recognizes that the Mobile Telecommunications Sourcing Act, Public Law 106-252, codified at 4 U.S.C Sections 116 through 126, was passed by the United States Congress to establish sourcing requirements for state and local taxation of mobile telecommunication services. In general, the rules provide that taxes on mobile telecommunications services shall be collected and remitted to the jurisdiction where the customer's primary use of the services occurs, irrespective of where the mobile telecommunications services originate, terminate, or pass through. By passing this legislation in the State of Illinois, the General Assembly desires to implement that Act in this State by establishing the Mobile Telecommunications Sourcing Conformity Act and to inform State and local government officials of its provisions as it applies to the taxes of this State.

35 ILCS 638/5. The other sections of the IMTSCA incorporate the express text of the MTSA's provisions, albeit in a slightly different order. *See* 35 ILCS 638/10 to 638/85.

The laws described above provide useful labels for the persons involved in this dispute. Under the MTSA, Taxpayer is a home service provider for its own customers; that is, the customers with whom Taxpayer contracts to provide CMRS within the geographic area in which it is authorized by law to provide such services. 4 U.S.C. § 124(2), (5)-(7). Similarly, under the MTSA, the Foreign Carriers are the home service providers for their Foreign Customers. 4 U.S.C. § 124(2), (5).

For purposes of the TETA, Taxpayer is a retailer and its customers are taxpayers. 35 ILCS 630/2(h), (l). Under the TETA, the Foreign Carriers' Customers might also be considered taxpayers when they originate or receive CMRS within Illinois, unless the United States Constitution or federal statutes prohibit Illinois from taxing the privilege of originating or receiving intrastate or interstate telecommunications on such persons. 35 ILCS 630/3-4 ("However, such tax is not imposed on the act or privilege to the extent such act or privilege may not, under the Constitution and statutes of the United States, be made the subject of taxation by the State.").

The parties have stipulated that the residential or business street addresses of the Foreign Carriers' Customers are outside of the United States. Stip. ¶ 15. Thus, under the MTSA, the Foreign Carriers' Customers' place of primary use is outside the United States. 4 U.S.C. § 124(8)(A). Since the Foreign Carriers' Customers' place of primary use was outside the United States, it was not in Illinois. *Id.*; *see also* 35 ILCS 630/2 ("... in the case of mobile phones, ... service address means the customer's place of primary use as defined in the [MTSA]."). Under the MTSA, Taxpayer acts as a serving carrier for the Foreign Carriers and their Foreign Customers, when the Foreign Carriers' Customers are within Taxpayer's licensed service areas, and originate or receive CMRS. 4 U.S.C. § 124(11). Similarly, when Taxpayer's customers are physically present in a Foreign Carrier's licensed service area, and originate or receive CMRS, the Foreign Carrier would be acting as a serving carrier for Taxpayer's customers. *Id.*

Finally, under the international Roaming Agreements, Taxpayer was a HPMN Operator to its own customers, that is, to the customers to whom Taxpayer provides CMRS within its licensed service areas. Taxpayer Ex. M, § 3.6. Taxpayer was a VPMN

Operator when the Foreign Carriers' Customers originated or received CMRS within Taxpayer's licensed service area. *Id.*, §§ 3.2, 3.7. The Foreign Carriers are HPMN Operators for its subscribers, i.e., the Foreign Carriers' Customers. *Id.*, § 3.6. Under the international Roaming Agreements, "when a Roaming Subscriber uses the Services of [a] VPMN Operator, the Roaming Subscriber's HPMN Operator shall be responsible for payment of charges for the Services so used" *Id.*, § 8.1.1. That, no doubt, is the basis for the parties' stipulation that Taxpayer charged the Foreign Carriers for the services the Foreign Carriers' Customers used when they were physically present in Taxpayer's licensed service areas. Stip. ¶ 16. The Foreign Carriers passed the charges they incurred to their Foreign Customers. Stip. ¶ 13.

With this labeling done, it is time to address the parties' arguments over whether Taxpayer paid tax in error. The Department rejects Taxpayer's claim of preemption, and argues that the MTSA does not apply to the transactions comprising Taxpayer's claims, because the Foreign Carriers were acting as resellers, as that term is used in the TETA. Department's Brief, pp. 7-11. It contends that, while the TETA allows an exemption from TET for a retailer's sales for resale, that exemption applies only for sales to resellers who register with the Department, and receive a reseller's number from it. To support this argument, the Department cites to the House Report for the MTSA, which provides: "The bill is not intended to source cellular services provided to entities that resell those services." Department's Brief, p. 9 (*quoting* MTSA H. Rep., 2000 U.S.C.C.A.N. at 517).

Taxpayer replies that the Department is wrong to treat the Foreign Carriers as resellers under the TETA, since they are never physically present in Illinois to purchase CMRS from Taxpayer and then, to resell such services to their Foreign Customers.

Taxpayer's Reply Brief, p. 5. Taxpayer argues that the Department's claim that tax was due on its charges for roaming services to the Foreign Carriers ignores Congress' express sourcing rule set forth in MTSA § 117, as well as the Illinois General Assembly's intent expressed within § 5 of the IMTSCA. *Id.* Taxpayer argues that the federal sourcing rule acts as a total prohibition of Illinois' power to tax the services used by the Foreign Carriers' Customers while they were within Taxpayer's licensed service areas. *Id.*, p. 9.

When considering the Department's characterization of the Foreign Carriers as resellers of CMRS, I want to point out that the Department has not specifically argued, or cited to evidence, that the Foreign Carriers were physically present in Illinois. The factual basis for its characterization is the parties' Stipulation ¶¶ 12-13. Department's Brief, p. 7. In a nutshell, the Department's argument is that, since Foreign Carriers purchase telecommunications from Taxpayer pursuant to the Roaming Agreements, and since the Foreign Carriers provide CMRS services to its Foreign Customers, which the Foreign Customers use to originate or receive CMRS in Illinois, that means that the Foreign Carriers are resellers under the TETA. *Id.*

The term reseller is defined in the MTSA. 4 U.S.C. § 124(10). There, Congress defined a reseller as:

- (10) Reseller.—The term “reseller”—
- (A) means a provider who purchases telecommunications services from another telecommunications service provider and then resells, uses as a component part of, or integrates the purchased services into a mobile telecommunications service; and
 - (B) does not include a serving carrier with which a home service provider arranges for the services to its customers outside the home service provider's licensed service area.

4 U.S.C. § 124(10). Additionally, the FCC distinguishes between reselling CMRS versus roaming. The most recent expression of this distinction occurred when the FCC publicly

reported on comments solicited after proposing to amend some of its administrative regulations. In The Matter Of Amendment of Parts 1 and 63 of the Commission's Rules, 22 F.C.C.R. 11398 (adopted June 20, 2007) (hereafter, In re Commission's Rules, 22 F.C.C.R. at []). Specifically, the FCC wrote:

20. We agree with commenters that Commission rules governing the provision of CMRS distinguish between roaming and resale by CMRS carriers.[footnotes omitted] Roaming occurs when the subscriber of one CMRS carrier utilizes the facilities of another CMRS provider with which the subscriber has no direct pre-existing service or financial relationship to place an outgoing call, to receive an incoming call, or to continue an in-progress call. Typically, but not always, roaming occurs when a subscriber places or receives a call while physically located outside the service area of the "home" CMRS provider. **Resale has been described by the Commission as "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public (with or without adding value) for profit."** CMRS resale entails a reseller's purchase of CMRS service provided by a facilities-based CMRS carrier for the provision of resold service within the same geographic market as the facilities-based provider.

In re Commission's Rules, 22 F.C.C.R. at 11405 (emphasis added).

I further note that federal law prohibits foreign corporations from being licensed in the United States to provide CMRS. 47 U.S.C. § 310(b)(2); 47 C.F.R. 20.5(a)(3) ("Commercial mobile radio service authorizations may not be granted to or held by: ... Any corporation organized under the laws of any foreign government ...") (implementing 47 U.S.C. § 310(b)(2)). Because federal law does not allow foreign corporations to be licensed as providers of CMRS, the Foreign Carriers with whom Taxpayer entered into Roaming Agreements could not be resellers as defined in MTSA § 124(10). *Id.*; Stip. ¶¶ 9-15. And since the Foreign Carriers were not able to provide

CMRS within the United States, I am hesitant to accept the Department's argument that the Foreign Carriers should be treated as resellers as that term is used in § 8 of the TETA. 35 ILCS 630/8. The Department's argument treats the Foreign Carriers as pirate radio operators, that is, as persons who engaged in the business of providing CMRS to others, in Illinois, in violation of federal licensing and state registration laws. That is not what occurred here, at least not under the plain terms of the international Roaming Agreements. Taxpayer Ex. M, *passim*.

There is no doubt that the Foreign Carriers' Customers were originating or receiving telecommunications in Illinois. Stip. ¶¶ 11, 13. Technologically, what permitted the Foreign Customers to use Taxpayer's equipment in Illinois to originate or receive CMRS was the SIM (or USIM) card contained in each Foreign Customer's cellular device. Taxpayer Ex. M, § 3.2. Taxpayer and the Foreign Carriers were able to track the Foreign Customer's roaming usage because of the SIMs contained in the devices such Foreign Customers used, and because of Taxpayer's equipment. *Id.* Taxpayer and the Foreign Carriers agreed to charge each other when one of the particular carrier's customers was in the other's licensed area, and used roaming services. *Id.* at § 8.1.1. In short, the persons or things physically present in Illinois included Taxpayer's equipment, the Foreign Customers, and/or their SIMs and devices, but not the Foreign Carriers themselves. After taking into account the Roaming Agreements, as well as federal and state telecommunications law, I cannot conclude that the Foreign Carriers were engaged in the business of reselling CMRS to the public in Illinois. Taxpayer Ex. M, *passim*; 47 U.S.C. § 310(b)(2); 47 C.F.R. 20.5(a)(3); In re Commission's Rules, 22 F.C.C.R. at 11405.

In § 117 of the MTSA, Congress created a nation-wide sourcing rule that governs whether state and local government may impose a tax on mobile telecommunications services. 4 U.S.C. § 117. Again, § 117 provides:

§ 117. Sourcing rules

(a) Treatment of Charges for Mobile Telecommunications Services.—Notwithstanding the law of any State or political subdivision of any State, mobile telecommunications services provided in a taxing jurisdiction to a customer, the charges for which are billed by or for the customer's home service provider, shall be deemed to be provided by the customer's home service provider.

(b) Jurisdiction.—All charges for mobile telecommunications services that are deemed to be provided by the customer's home service provider under sections 116 through 126 of this title are authorized to be subjected to tax, charge, or fee by the taxing jurisdictions whose territorial limits encompass the customer's place of primary use, regardless of where the mobile telecommunication services originate, terminate, or pass through, and no other taxing jurisdiction may impose taxes, charges, or fees on charges for such mobile telecommunications services.

4 U.S.C. § 117.

More importantly, the Illinois General Assembly has adopted the same sourcing rules as Congress has, within § 20 of the IMTSCA:

Sec. 20. Sourcing rules for mobile telecommunications services.

(a) Notwithstanding the law of this State or any political subdivision of this State, mobile telecommunications services provided in a taxing jurisdiction to a customer, the charges for which are billed by or for the customer's home service provider, shall be deemed to be provided by the customer's home service provider.

(b) All charges for mobile telecommunications services that are deemed to be provided by the customer's home service provider under this Act are authorized to be subjected to tax, charge, or fee by the taxing jurisdictions whose territorial limits encompass the customer's place of primary use, regardless of where the mobile telecommunications services originate, terminate, or pass through, and no other taxing jurisdiction may impose taxes, charges, or fees on charges for such mobile telecommunications services.

35 ILCS 638/20. Because the Illinois General Assembly has expressly implemented the same sourcing rules for purposes of Illinois' TETA, there is no need here to resolve any constitutional pre-emption question.

The parties' stipulations and the evidence of record establish that: (1) the Foreign Carriers were the home service providers for its Foreign Customers; (2) the Foreign Carriers billed its customers for roaming services that the Foreign Carriers' Customers used in Illinois; and (3) the Foreign Carriers' Customers' primary place of use was not in Illinois. Stip. ¶¶ 10, 13-16; Taxpayer Ex. M, *passim*; 4 U.S.C. § 117(a); 35 ILCS 630/2 (service address definition). Because the Foreign Carriers' Customers' place of primary use was not in Illinois, § 20 of the IMTSCA expressly prohibits Illinois from attempting to "impose taxes, charges, or fees on charges for such mobile telecommunications services." 35 ILCS 638/20; *see also* 4 U.S.C. § 117(a); MTSA H. Rep., 2000 U.S.C.C.A.N. at 513-14 ("H.R. 4391 would preempt state and local government laws by prohibiting jurisdictions from taxing mobile telecommunication services unless the jurisdictions contain the customer's place of primary use."). I conclude that Taxpayer paid tax in error for roaming charges that it billed to its Foreign Carriers, and which the Foreign Carriers passed on to their Customers, for roaming services that the Foreign Carriers' Customers used to originate or receive CMRS while they were physically present in Illinois.

Issue 2: Would Granting Taxpayer's Claims Result in Unjust Enrichment

The analysis of this issue must begin by acknowledging that this is a refund case, not an assessment or collection case. Taxpayer voluntarily paid tax on the roaming services used by Foreign Carriers' Customers. The parties' stipulations, the other

evidence of record, as well as federal law, show that that tax was paid in error. That is, Taxpayer mistakenly collected from others, and then paid over to the Department, tax that was not due.

That said, the reason why Taxpayer has the right to ask for a refund of tax voluntarily, but erroneously, paid to the Department is because the TETA includes a refund provision. 35 ILCS 630/10; Jones v. Department of Revenue, 60 Ill. App. 3d 886, 889, 377 N.E.2d 202, 204 (5th Dist. 1978) (“The obligation of a citizen to pay taxes is a purely statutory creation and, conversely, the right to a refund or credit can arise only from the acts of the legislature.”). Section 10 of the TETA provides, in pertinent part:

*** If it shall appear that an amount of tax or penalty or interest has been paid in error to the Department hereunder by a retailer who is required or authorized to collect and remit the tax imposed by this Article, whether such amount be paid through a mistake of fact or an error of law, such retailer may file a claim for credit or refund with the Department, provided that no credit or refund shall be allowed for any amount paid by any such retailer unless it shall appear that he bore the burden of such amount and did not shift the burden thereof to anyone else, or unless it shall appear that he or she or his or her legal representative has unconditionally repaid such amount to his customer (1) who bore the burden thereof and has not shifted such burden directly or indirectly in any manner whatsoever; or (2) who, if he or she shifted such burden, has repaid unconditionally such amount to his or her own customer; and (3) who is not entitled to receive any reimbursement therefor from any other source than from his retailer, nor to be relieved of such burden in any other manner whatsoever.

35 ILCS 630/10.

The parties entered into certain stipulations regarding this issue. Those stipulations include the following:

- On March 18, 2010, Taxpayer provided the Department with a draft Credit Memorandum and Reimbursement Agreement (“Agreement”) for the Department’s review. Stip. ¶ 31.
- A true and accurate copy of the Agreement is attached as Exhibit 3. Stip. ¶ 32.

- The Agreement provides that the Taxpayer has a binding legal liability to refund the Telecommunications Excise Tax to each of the Foreign Carriers once the Refund Claim #1 and Refund Claim #2 are allowed. Stip. ¶ 33.
- The Agreement attached as Exhibit 3 is in compliance with Title 86, Part 130, Section 130.1501(a)(2) of the Department's Regulations. Stip. ¶ 34.

Notwithstanding the text of Stipulation ¶ 34, in its brief, the Department argued that the Agreement did not comply with § 10 of the TETA. Department's Brief, pp. 4-5 (*citing* 35 ILCS 630/10). The Department argued that the Agreement could never comply with TETA § 10 because the Foreign Carriers are not the proper parties to whom repayment must be made. Department's Brief, p. 4. The Department argues that issuing a refund to Taxpayer to repay the Foreign Carriers would unjustly enrich the Foreign Carriers, unless it could be shown that they, too, have unconditionally repaid the tax to their customers. *Id.*, p. 5. Taxpayer, in turn, relies on the Department's stipulation, and refers to the Department's subsequent, contrary argument as a classic bait and switch. Taxpayer's Reply, p. 10.

While I am sympathetic to Taxpayer's response to the Department's about-face, I must also conclude that Stipulation ¶ 34 is one regarding whether a specific contract complies with the Department's regulation interpreting a statutory provision. That is, it was a stipulation regarding a question of law, and not a stipulation of a fact. Collins v. Hurst, 316 Ill. App. 3d 171, 174, 736 N.E.2d 600, 604 (3d Dist. 2000) ("Construction of contract language involves a question of law."); Warren v. Borger, 184 Ill. App. 3d 38, 46, 539 N.E.2d 1284, 1290 (5th Dist. 1989) (whether the contract in question complied with the Federal Truth in Lending Act was a question of law). Further, stipulations bind parties, but not the fact finder on a conclusion of law. American Pharmaseal v. TEC

Systems, 162 Ill. App. 3d 351, 356, 515 N.E.2d 432, 434 (2d Dist. 1987) (“... while parties may bind themselves by stipulation, they ‘cannot bind a court by stipulating to a question of law or the legal effect of facts.’ ”) (*quoting* Domagalski v. Industrial Commission, 97 Ill. 2d 228, 235, 454 N.E.2d 295, 298 (1983)).

As to the question of law that was the subject of Stipulation ¶ 34, the draft Agreement included as Stipulation Exhibit 3 is not signed by Taxpayer and does not identify any of the Foreign Carriers. Stip. Ex. 3. There is no evidence that Taxpayer executed any similar Agreement with any of the Foreign Carriers with whom it had Roaming Agreements. *See* Stip., *passim*. In short, it appears from the record that Taxpayer has proposed that it would complete and then execute contracts like the one included within the parties’ Stipulation Exhibit 3, in the event the Department issues a refund to it, but that it has not yet done so. Thus, even if Taxpayer were correct that the Agreement complies with ROTR § 130.1501(a)(2), Taxpayer has not, in fact, executed any enforceable, written promise to repay any Foreign Carrier for the tax monies it collected in error from such persons.

More to the point of the Department’s contention, the text of the draft Agreement does not provide that the Foreign Carriers would be obliged to use the amounts Taxpayer agreed to pay to them to repay their Foreign Customers, nor does it provide that the Foreign Carriers had already done so. Stip. Ex. 3. The text of ROTR § 130.1501(a)(2) is clear that “The Department cannot approve any claim for credit unless the proof submitted in support thereof clearly establishes that the claimant has borne the burden of the tax erroneously paid or that he has unconditionally repaid the amount of the tax to his vendee from whom he has collected such amount. *In the latter event, the claimant must*

also prove that his vendee has borne the burden of such amount or has unconditionally repaid persons to whom such vendee has shifted the burden of such amount.” 86 Ill. Admin. Code § 130.1501(a)(2) (emphasis added). The Foreign Carriers here stand in the place of the vendees referred to in the regulation. The record proves that the Foreign Carriers did not bear the burden of the tax they collected from their Foreign Customers, and the draft Agreement does not prove that the Foreign Carriers have unconditionally repaid the Foreign Customers to whom they had shifted the burden of the tax collected in error. The text of the Agreement, therefore, does not comply with ROTR § 130.1501(a)(2).

The Department determined and has argued that issuing the refunds to Taxpayer would result in unjust enrichment. Stip. ¶ 29; Department’s Brief, pp. 4-5. Moreover, whether or not a refund results in unjust enrichment must be viewed from the Illinois General Assembly’s perspective. That is, to argue that it would be unjust for the State to keep tax monies paid to it in error elides the Illinois General Assembly’s expressed intent. 35 ILCS 630/10. The text of TETA § 10 shows that the General Assembly intended that refunds of tax paid in error by a retailer be made if the retailer “bore the burden of such amount and did not shift the burden thereof to anyone else, or unless it shall appear that he or she or his or her legal representative has unconditionally repaid such amount to his customer (1) who bore the burden thereof and has not shifted such burden directly or indirectly in any manner whatsoever; or (2) who, if he or she shifted such burden, has repaid unconditionally such amount to his or her own customer; and (3) who is not entitled to receive any reimbursement therefore from any other source than from his retailer, nor to be relieved of such burden in any other manner whatsoever.” 35

ILCS 630/10. The Illinois General Assembly's repeated use of related phrases in this provision, like "bore the burden", "did not shift the burden", "unconditionally repaid to the customer", cannot be ignored or dismissed.

The plain text of TETA § 10 shows that what the legislature considered unjust was for the State to make *any* refund of TET paid in error, if the person who bore its burden has not been repaid. *Id.* Here, the Foreign Carriers' Customers bore the burden of the tax paid in error, and there is no evidence that they have been repaid, or that they would be repaid with the requested refunds. As a result, no refund should be issued to Taxpayer. *Id.* After considering the record and the text of TETA § 10 and ROTR § 130.1501(a)(2), I agree with the Department that issuing the refunds to Taxpayer would result in unjust enrichment.

Conclusion:

I recommend that the Director finalize the denials as issued.

August 22, 2012

John E. White
Administrative Law Judge