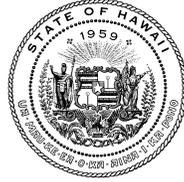


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## **TAX INFORMATION RELEASE NO. 2011-03**

RE: Effect of Act 105, SLH 2011, on General Excise Tax Liability of Mobile Telecommunications Service Providers

The purpose of this Tax Information Release is to clarify that gross receipts of Hawaii mobile telecommunications service providers acting as serving carriers providing interstate or foreign mobile telecommunications services to non-Hawaii home service providers are exempt from General Excise Tax under federal law. Act 105, Session Laws of Hawaii 2011, temporarily suspends language in the Hawaii Tax Law which codifies a federal exemption for gross receipts from such services. However, because this language is merely a codification of a federal exemption, the suspension under Act 105 does not render these gross receipts subject to general excise tax.

### **Applicable Hawaii Law**

Act 105, Session Laws of Hawaii 2011, temporarily suspends general excise tax exemptions for certain amounts received by certain persons from July 1, 2011 through June 30, 2013. One of the exemptions suspended by this Act is: "Gross receipts of home service providers acting as service carriers providing mobile telecommunications services to other home service providers as described under section 237-13(6)(D)."

Specifically, Section 237-13(6)(D) states:

Where any person is engaged in the business of a home service provider, the tax shall be imposed on the gross income received or derived from providing interstate or foreign mobile telecommunications services to a customer with a place of primary use in this State when such services originate in one state and terminate in another state, territory, or foreign country; provided that all charges for mobile telecommunications services which are billed by or for the home service provider are deemed to be provided by the home service provider at the customer's place of primary use, regardless of where the mobile telecommunications originate, terminate, or pass through. ... Gross income shall not include:

- (iv) Gross receipts of a home service provider acting as a serving carrier providing mobile telecommunications services to another home service provider's customer.

"Home service provider" is defined under section 239-22 to mean: "the facilities-based carrier or reseller with which the customer contracts for the provision of mobile telecommunications services."

"Mobile telecommunications service" is defined under section 239-22 to mean: "commercial mobile radio service, as defined in Title 47 Code of Federal Regulations section 20.3 as in effect on June 1, 1999." That section of the Code of Federal Regulations defines "commercial mobile radio service" as:

A mobile service that is:

- (a)(1) provided for profit, i.e., with the intent of receiving compensation or monetary gain;
  - (2) An interconnected service; and
  - (3) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or
- (b) The functional equivalent of such a mobile service described in paragraph (a) of this section.

"Serving carrier" is defined under section 239-22 to mean: "a facilities-based carrier providing mobile telecommunications service to a customer outside a home service provider's or reseller's licensed service area."

Chapter 239, the Public Service Company Tax, applies to intrastate mobile telecommunications services. Chapter 237, the General Excise Tax, applies to interstate and foreign mobile telecommunications services. See Tax Ann. 2002-14. Provisions similar to HRS § 237-13(6)(D) also apply for purposes of the Public Service Company Tax. See HRS § 239-2.

### **Discussion of Federal Law**

Effective August 2002, the federal Mobile Telecommunications Sourcing Act, 4 U.S.C. §§ 116 et seq. (the "MTSA"), clarified and simplified state taxation of wireless service by both expanding and limiting the permissible scope of state tax. The MTSA expanded state tax authority by permitting each state to tax all mobile telecommunications service that is provided by a customer's service provider if the customer has a "place of primary use" – that is, a home address or a primary business address, 4 U.S.C. § 124(8) – in the state. This expansion was effected through the second sourcing rule discussed below, and permits, for example, Hawaii to tax gross receipts from mobile telecommunications service that is provided to every customer with a Hawaii residential street address or primary business address, without regard to whether such service originates or terminates in Hawaii.

However, the MTSA also limited the permissible scope of state taxation. This limitation is effected through both of the two sourcing rules codified at 4 U.S.C. § 117.

The first of these rules deems wireless service provided to a customer of a home service provider by the serving carrier to have been provided to the customer by the home service provider, if the customer is billed for the service by the home service provider, 4 U.S.C. §

117(a). In industry parlance, the customer of the home service provider is "roaming" on the serving carrier's network. By deeming the roaming service to be provided to the customer by the home service provider, the first MTSA sourcing rule prohibits a state from taxing the serving carrier as if it provided the service to the home service provider's customer.

The second MTSA sourcing rule provides that all charges for wireless service that are deemed to be provided by the customer's home service provider are authorized to be taxed by the taxing jurisdictions that encompass the customer's place of primary use address and that no other taxing jurisdictions may tax such charges, 4 U.S.C. § 117(b).

### **HRS § 237-13(6)(D)(iv) is Merely a Codification of a Federal Exemption**

Although the MTSA expanded the scope of permissible state and local taxation, it did not automatically extend the actual scope of any tax, 4 U.S.C. § 118(1). Most states were required to take legislative action to implement the MTSA. In Hawaii this was accomplished through Act 209, SLH 2002, which amended HRS § 237-13(6)(D) as highlighted above.

Of particular note, Act 209 added Section 237-13(6)(D)(iv) to the Hawaii Tax Law. Section 1 of Act 209 states: "The purpose of this Act is to enact statutory provisions to conform to the federal Mobile Telecommunications Sourcing Act ("MTSA"), P.L. 106-252 (July 28, 2000)[.]" In fact, the definitions for home service provider, mobile telecommunications service, serving carrier, and other definitions in Section 239-22, HRS, are taken directly from the Mobile Telecommunications Sourcing Act.

Act 209 was merely Hawaii implementing its taxing authority under the MTSA as well as a codification of Hawaii's inability to tax serving carriers for service rendered to customers with out-of-state or foreign home service providers. Thus, suspension of the language codifying this federal exemption has no effect on the taxability of mobile telecommunications service providers, because they remain exempt under federal law.

### **Gross Receipts Received for Acting as a Serving Carrier are Exempt under the MTSA**

Section 117(a) of the MTSA, 4 U.S.C. § 117(a), states: "Notwithstanding the law 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."

Section 122(a) of the MTSA, 4 U.S.C. § 122(a), states:

[A] taxing jurisdiction shall –

...

(2) not hold a home service provider liable for any additional taxes, charges, or fees based on a different determination of the place of primary use for taxes, charges or fees customarily passed on to the customer as a separate itemized charge.

As discussed above, Section 117(a) of the MTSA deems wireless service provided to a customer's home service provider by another serving carrier (i.e., roaming services) to have been provided to the customer by the home service provider, if the customer is billed for the service by the home service provider. By deeming the roaming service to be provided to the customer by the home service provider, the MTSA prohibits a state from taxing the serving carrier as if it provided the service to the home service provider's customer.

### **Examples**

#### *Example One:*

A customer with a Hawaii place of primary use address travels to California and makes or receives wireless calls. The customer is connecting to a California company's carrier network (the serving carrier). Under the MTSA, the service provided by the serving carrier is deemed to be provided by the customer's Hawaii mobile telecommunications service provider (the home service provider).

#### *Example Two:*

A customer with a California place of primary use address travels to Hawaii and makes or receives wireless calls. The customer connects to a Hawaii company's carrier network (the serving carrier). The Hawaii serving carrier collects a charge (a roaming charge) from the California customer's California mobile telecommunications service provider (the home service provider). Under the MTSA, the roaming charge collected by the Hawaii serving carrier is sourced to the California home service provider and therefore exempt from the Hawaii general excise tax.

### **Conclusion**

The language under HRS § 237-13(6)(D)(iv) is merely a codification of a federal exemption. Act 105's suspension of this language does not affect the general excise tax liability of mobile telecommunications service providers. Gross receipts of Hawaii mobile telecommunications service providers acting as serving carriers providing interstate or foreign mobile telecommunications services to customers with out-of-state or foreign home service providers are exempt from general excise tax under federal law.

For more information contact the Technical Section at (808) 587-1577 or e-mail at [Tax.Technical.Section@hawaii.gov](mailto:Tax.Technical.Section@hawaii.gov).

  
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