

[CORPORATE TAXPAYER],

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

[Corporate Taxpayer (the “Company”)], appeals from an assessment of service provider tax (“SPT”) made by Maine Revenue Services (“MRS”) for the period [year 1] through [year 4]. [The Company contends that] federal law preempts Maine’s imposition of SPT on certain fees charged and collected by [the Company] in association with its sales of telecommunications services [or, in the alternative, that] those fees, are not otherwise subject to SPT. We uphold the assessment in full.

I. Background

At all relevant times, [the Company] was a privately held telecommunications company with its principal office located [outside of Maine]. During the period at issue, [the Company] operated as a Maine competing local exchange carrier (“CLEC”), purchasing local telecommunications services from Maine local exchange carriers (“LECs”) and reselling them together with long-distance services to Maine multi-line business customers. Following an audit of [the Company]’s books and records for the subject tax years, MRS determined that [the Company] did not report and remit SPT regarding certain amounts that it charged its Maine telephone customers, and issued the subject assessment. A brief summary of the relevant history

and relationships involved in the business of telecommunications is helpful in understanding this case.

The telephone industry is comprised of two sets of carriers: local exchange carriers (“LECs”) provide local basic telephone service, while interexchange carriers (“IXCs”) offer long-distance service. Whenever someone makes a long-distance phone call, he or she taps into the local loop—the telephone wires running from a person’s telephone to the LEC’s equipment—and the call is then routed by the LEC to an IXC for transmittal to the local loop at the call’s destination.

The Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.) (the “1996 Act”), amended the Communications Act of 1934, 47 U.S.C. §§ 151-614, to make competition in the local basic telecommunications service market one of its principal goals. The 1996 Act encouraged incumbent local exchange carriers (“ILECs”)—local exchange carriers that owned the telecommunications infrastructure—to provide cost-based use of their networks to competing local exchange carriers (“CLECs”) wanting to enter the local service market. At that time, IXCs were already relying on the ILEC’s local loop infrastructure to originate and terminate long-distance calls. The costs incurred by the ILECs in providing the use of this infrastructure are called “loop costs,” and one source of revenue allowing ILECs to recover loop costs is the presubscribed interexchange carrier charge (“PICC”), a flat, per-line charge assessed by an ILEC upon the telephone customer’s IXC.¹ PICCs apply only to multi-line business accounts and not to single-line businesses or residential accounts. 47 C.F.R. § 69.153; *In re Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board On*

¹ If an end-user customer does not have an assigned IXC, the LEC may collect the PICC directly from the end user. 47 C.F.R. § 69.153(b).

Universal Service (CALLS I), ¶ 247, 15 FCC Rcd 12,962, 13,069 (2000). See also *In re Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC Caps; Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers (CALLS II)*, ¶ 17, 17 FCC Rcd 10,868, at 10,876 (2002).

At issue in this appeal is whether MRS incorrectly imposed SPT on the amounts that [the Company] charged its Maine telephone customers as PICCs (the “PICC amounts”).² [The Company] has the burden of proof to show that it is more likely than not that MRS erred in making the assessment. 36 M.R.S. § 151-D(10)(F).

II. Discussion

Subject to certain exemptions, SPT is imposed at the rate of 5% on the value of telecommunications services sold in Maine. 36 M.R.S. § 2552(1)(E). The value of the services sold is measured by the sale price. *Id.* § 2552(2). Liability for the tax is on the seller. *Id.* “Telecommunications services” is defined, in relevant part, as “the electronic transmission, conveyance or routing of voice, data, audio, video or any other information or signals to a point or between or among points.” *Id.* § 2551(20-A). “Sale price” is defined, also in relevant part, as “the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise, *without any deduction for the . . . expense[s] of the seller.*” *Id.* § 2551(15) (emphasis added).

² No evidence has been presented showing that the referenced amounts were required to be remitted by [the Company] to an ILEC or another carrier, or that those amounts otherwise meet the definition of PICCs under 47 C.F.R. § 69.153. Because the parties refer to the amounts at issue as PICCs, however, we refer to the tax base in this decision as the “PICC amounts.”

A. Federal Preemption

[The Company] first argues that the amounts paid to it as PICCs are not subject to SPT because any state taxation of them is preempted by federal law. Federal law preempts state law in three alternative circumstances: (1) where a federal statute has an express preemption provision, (2) where Congress intends federal law to “occupy the field,” and (3) where, and to the extent, state law conflicts with federal law. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (citations omitted). [the Company] contends that all three circumstances operate to preempt the SPT in this case.

[The Company] maintains that the Federal Communications Commission (“FCC”) has expressly preempted state taxation of telecommunications PICCs. In support of this contention, [the Company] references paragraphs 19 through 44 and 118 of the *Access Charge Reform Order, Price Cap Reform Performance Review for Local Exchange Carriers, Transport Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213 and 95-72 (“Access Charge Reform Order”). Although [the Company] claims that these provisions contain statements to the effect that a state may not impose a tax on PICCs, a review of these paragraphs discloses no such prohibition. As [the Company] has not provided any other authorities for its claim that federal law directly forbids the subject assessment of tax, [the Company] has not shown that the assessed tax is expressly preempted.

[The Company] also argues that the federal government has, by statute and regulation, exclusively “occupied the field” of interstate telecommunication relating to PICCs. “Occupation of a field of law” has been described as “[t]he intent to displace state law altogether.” *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). Such intent may be “inferred from a framework of regulation ‘so pervasive . . . that Congress left no room for the States to supplement it’ or where

there is a ‘federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’” *Id.* (citations omitted). Contrary to [the Company]’s assertion that the federal government has excluded the states from involvement in the field of telecommunications, the United States Supreme Court has recognized and affirmed the states’ power to tax sales of both intrastate and interstate telecommunications. *Goldberg v. Sweet*, 488 U.S. 252 (1989). [The Company] has not shown that the federal government has so monopolized the field of telecommunications as to preempt the assessed tax.

[The Company] also contends that federal law preempts the SPT because it is impossible for [the Company] to comply with both the federal and the state law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Specifically, [the Company] argues that, for the PICC amounts to be subject to SPT, it must report them to MRS as being intrastate in nature, but because it must also report those same amounts as “interstate revenues” on its federal Universal Services Fund (“USF”) forms,³ it is faced with a reporting conflict with which it is legally impossible to comply. Contrary to [the Company]’s contention, however, the SPT law does not require [the Company] to characterize or report the PICC amounts as intrastate in nature; SPT liability is imposed on the value of all telecommunications services, without regard to USF reporting requirements. 36 M.R.S. § 2552(E). Because it can report the PICC amounts on its USF forms as interstate revenue without expressly or impliedly reporting them differently

³ An additional goal of the 1996 Act was to ensure access to universal telecommunications services for all Americans at affordable and reasonably comparable rates. Under the 1996 Act, all providers of telecommunications services are required to contribute to universal service “on an equitable and nondiscriminatory basis.” 47 U.S.C. § 254(b)(4), (d) (interstate carriers), (f) (intrastate carriers). The FCC created the USF in 1997 to help provide affordable telecommunications services to low-income customers, customers in rural areas, eligible schools, libraries and rural health care providers. The Universal Service Administrative Company (“USAC”) administers the USF and is responsible for collecting universal service contributions from telecommunications carriers and administering the universal support programs. The USAC, an independent corporation, does not make policy, interpret unclear provisions of statutes or rules, or interpret the intent of Congress. 47 C.F.R. § 54.702(c). With very limited exceptions, every provider of telecommunications services within the United States must file reporting forms and worksheets with the USAC on a quarterly and/or annual basis.

on its Maine SPT returns, [the Company] has not shown that it is unable to comply with the requirements of both the USF and the SPT. Consequently, the Board finds that [the Company] has not shown that the SPT is preempted by federal law. No adjustment to the assessment is warranted on this basis.

B. Statutory SPT Liability

[The Company] next argues that the PICC amounts it collected from its customers are not subject to the SPT because they are interstate in nature, although it points to no provision of Maine law in support of this limitation. It is true that some states impose tax only [sic] the sale of intrastate services, but that is a specific statutory limitation in those states. *See, e.g., AT&T Communications of the Mountain States, Inc., v. State Department of Revenue*, 778 P.2d 677 (Colo. 1989) (upholding the assessment) and *Qwest Corp. v. State ex rel. Wyo. Dep't of Revenue*, 2006 WY 35, ¶ 17, 130 P.3d 507 (cancelling the assessment). Under Maine's SPT law, however, all "telecommunications services," as defined under 36 M.R.S. § 2551(20-A), are subject to SPT.⁴

There is an exemption to the SPT provided by section 2557(34) for sales of "interstate telecommunications services," but that exemption is inapplicable here. Under 36 M.R.S. § 2551(5-B), an "interstate telecommunications service" is defined as "a telecommunications service that originates in one state, territory or possession of the United States and terminates in a different state, territory or possession of the United States." No evidence has been presented showing that the PICC amounts are charges for "telecommunications services" under section

⁴ "Ancillary [telecommunications] services" are also subject to SPT under section 2552(1)(L). Both [the Company] and MRS agree, however, that the PICC amounts at issue are not ancillary services under SPT law. Ancillary services are also expressly excluded from the definition of "telecommunications services" under section 2551(20-A)(H).

2551(20-A), that is, “the electronic transmission, conveyance or routing of voice, data, audio, video or any other information or signals to a point or between or among points.”

According to [the Company], the PICC amounts represent expenses that it incurred and passed through to its customers in the course of providing them with interstate telecommunications services, without articulating exactly what those expenses were for. Tax exemptions, however, are strictly construed in law. “The well settled principle that ‘taxation is the rule and tax exemption is the exception’ places the burden on the [taxpayer] to bring its request ‘unmistakably within the spirit and intent’ of the claimed exemption.” *SST & S, Inc. v. State Tax Assessor*, 675 A.2d 518, 521 (Me. 1996) (citations omitted). “[A]n exemption from taxation, while entitled to reasonable interpretation in accordance with its purpose, is not to be extended by application to situations not clearly coming within the scope of the exemption provision.” *Harold MacQuinn, Inc. v. Halperin*, 415 A.2d 818, 820 (Me. 1980). Thus, even if the PICC amounts were necessarily incurred to enable [the Company] to provide telecommunications services, they cannot be said to be charges for “telecommunications services” themselves as that term is defined under section 2551(20-A). For example, even if [the Company] paid a fee for access to a local loop and then passed that fee on to its customers,⁵ that access fee was not a charge for “the electronic transmission, conveyance or routing of voice, data, audio, video or any other information or signals to a point or between or among points.” Because the PICC amounts are not charges for telecommunications services, they likewise do not constitute charges for *interstate* telecommunications services, entitled to the exemption under 36 M.R.S. § 2557(34). As such, because SPT liability is imposed on the total sale price, without

⁵ Neither party presented evidence supporting these facts, which are assumed for purposes of this hypothetical only.

any deduction for the expenses of the seller, the PICC amounts are subject to SPT. 36 M.R.S. §§ 2552(2) and 2551(15). No adjustment to the assessment is warranted on this basis.

Insufficient evidence has been presented to show that [the Company] is not liable for the PICC amounts contained in the assessment.

III. DECISION

[The Company] has not shown that federal law preempts imposing SPT on the PICC amounts at issue. Furthermore, [the Company] has not shown that the PICC amounts contained in the assessment are not part of the taxable sale price of telecommunications and other services that it sold in Maine subject to SPT. Accordingly, we uphold the SPT assessment in full.

If no motion for reconsideration is filed within 20 days of the date of this proposed decision, it will become the Board's final administrative action. If you wish to appeal this decision to the Superior Court, you must do so within 60 days from the date this decision becomes final.

Issued by the Board: April 25, 2013