

[CORPORATE TAXPAYER],

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

I. Background

[Corporate Taxpayer] (the “Taxpayer”), a Maine corporation, appeals from an assessment of service provider tax (“SPT”) made by Maine Revenue Services (“MRS”) for [tax period]. An Appeals Conference was held [], at which the Taxpayer appeared through its president [] and MRS was represented by [MRS Representative]. The Appeals Officer [] presided.

The sole issue presented on appeal is whether, as MRS contends, certain “installation charges,” billed and collected by the Taxpayer from its customers, are subject to SPT. The Taxpayer 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. Facts

At all relevant times, the Taxpayer was a Maine internet service provider (“ISP”), supplying wireless internet service to customers in [] Maine. [] The technology used by the Taxpayer [] required a clear line of sight between a customer’s service location and [] transmitters []. Thus, not all prospective customers were capable of receiving internet service through the Taxpayer.

During the period at issue, whenever a potential customer approached the Taxpayer for service, the Taxpayer's representatives would first determine whether the customer's service location satisfied the clear-line-of-sight requirement. Using [] computer applications, the Taxpayer was able to determine the eligibility or ineligibility for service of many prospective customers without anyone having to leave its office. Other potential customers, however, required an on-site survey visit to determine whether they qualified for service. Once a customer had been qualified for service, the Taxpayer's employees installed a wireless "radio" on the exterior of the customer's premises, and connected it to the customer's computer router with a [] cable.[] The radio and the [] cable remained the property of the Taxpayer and were neither sold nor leased to the customer. Once the radio had been installed and connected, the Taxpayer provided the customer with a period of post-sales support services via telephone to assist the customer in troubleshooting any problems with the connection between the internet and the customer's home network. The Taxpayer also set up the customer in its electronic billing system and in its customer [] support system.

The Taxpayer assessed its customers a one-time "installation charge" (hereinafter, the "Fee")¹ [] to help the Taxpayer defray its new-customer setup costs. According to the Taxpayer, these costs included time spent in: (1) taking and processing new sales orders; (2) coordinating site visits; (3) conducting site visits to determine whether potential customers qualified for service and/or to install and connect the radio; (4) configuring the customer account in the Taxpayer's billing system; (5) providing post-sales support; and (6) operating and maintaining in-house systems for surveying, scheduling, configuring, monitoring, and supporting customers. The Taxpayer did not itemize or otherwise identify any of these setup costs when it invoiced its

¹ MRS indicated at the Appeals Conference that the name of the charge was not a factor in MRS's determination that SPT is owed as to it.

customers for the Fee. According to the Taxpayer, [it] recouped an average of [] [X]% [of these costs] through the Fee. Pursuant to an audit of the Taxpayer's books and records, MRS determined that the Fee constituted payment for the taxable service of installing telecommunications equipment, i.e., connecting the wireless radios to the customers' routers with the [] cable, and that SPT was therefore owed on the Fee amount. MRS further determined that, because the Taxpayer had not filed SPT returns during the period at issue, penalties for failure to file tax returns were applicable. On these bases, MRS issued the subject assessment for tax [], interest [], and penalties []. This timely appeal followed.

III. Law

Under Maine tax law, the "installation, maintenance or repair of telecommunications equipment" is a service subject to SPT. 36 M.R.S. § 2552(1)(F). For the period at issue, the rate of the tax was 5% of the sale price of the service. *Id.* Sale price is defined as

the total amount of consideration, including cash [and] credit, . . . for which . . . services are sold, . . . without any deduction for the cost of materials used, labor or service cost, interest, losses and any other expense of the seller. "Sale price" includes any consideration for services that are a part of a sale.

Id. § 2551(15). The term "telecommunications equipment" means

any 2-way interactive communications device, system or process for transmitting or receiving signals and capable of exchanging audio, video, data or textual information. "Telecommunications equipment" includes all transmission media that are used *or capable of being used* in the provision of 2-way interactive communications, *including, without limitation, copper wire*

36 M.R.S. § 2551(19) (emphasis added).

IV. Analysis

The Taxpayer does not dispute the fact that the radio and the [cable] are "telecommunications equipment" as defined under section 2551. The Taxpayer contends,

however, that certain statutory provisions of the SPT law relating to the telecommunications industry are ambiguous and contradictory such that the assessment should be cancelled. The Taxpayer alternatively contends that only that portion of the Fee relating to the installing of telecommunications equipment is subject to SPT and, to the extent the assessment imposes SPT on the entire Fee, the assessment is overstated. We address the Taxpayer's arguments in order.

A. The SPT law relating to telecommunications.

The Taxpayer first argues that that the SPT statutory provisions contained in 36 M.R.S. §§ 2551 (definitions), 2552 (imposition), and 2557 (exemptions) are ambiguous and contradictory as they relate to telecommunications services. The Taxpayer begins by noting that the term "internet access service" is conspicuously absent from the section 2557 list of exempt services, although, as an ISP, the Taxpayer knows that internet access services are not taxable. *See also* MRS's Sales, Fuel & Special Tax Division Instructional Bulletin No. 56 § 1(D)(2) (June 12, 2009) (internet access charges are not subject to SPT). The term "internet access service" *does* appear, however, in section 2551(20-A)(F) as an exclusion from the definition of taxable "telecommunications services." The Taxpayer reasoned that because "internet access service"—which it knew to be nontaxable—only appears in the SPT statute as an exclusion from the definition of taxable "telecommunications services," this exclusion must be the mechanism for identifying certain services not subject to SPT. *See, e.g.,* 36 M.R.S. § 1752(11)(B) (exclusions from the definition of "retail sale" subject to sales tax (in addition to the exemptions listed in section 1760)). Also appearing as an exclusion from the definition of taxable telecommunications services, the Taxpayer observed, is the "installation or maintenance of wiring or equipment on a customer's premises." *Id.* § 2551(20-A)(B). Thus, the Taxpayer concluded, the "installation or maintenance of wiring or equipment on a customer's premises"

must also be nontaxable, despite the apparently conflicting language in 36 M.R.S. § 2552(1)(F) which separately imposes tax upon “the installation, maintenance or repair of telecommunications equipment.” The Taxpayer argues that, if deemed to be a taxable service, then the statutory provisions regarding the “installation or maintenance of wiring or equipment on a customer’s premises” are conflicting and ambiguous.

We first examine the plain language of the statute to determine whether that language is ambiguous, that is, susceptible to more than one meaning. *Hebron Acad., Inc. v. Town of Hebron*, 2013 ME 15 ¶ 8, 60 A.3d 774. Where no ambiguity exists, however, we consider the plain language of the statute, “in the context of the whole statutory scheme, and construe the statute to avoid absurd, illogical, or inconsistent results.” *Eagle Rental, Inc., v. State Tax Assessor*, 2013 ME 48 ¶ 11, 65 A.3d 1278 (quoting *Irving Pulp & Paper, Ltd. v. State Tax Assessor*, 2005 ME 96, ¶ 8, 879 A.2d 15). In the present case, there is no ambiguity in the SPT statute, and thus there is no need to look beyond the plain language of the applicable statutory provisions. Although the legislature chose to define “telecommunications services” as excluding the installation of telecommunications equipment, it also clearly chose to make such installation a separately taxable service. The exclusion of installation from the definition of “telecommunications services” does not create any ambiguity about the taxable status of installation by itself.

The legislature chose to clarify the definition of “telecommunications services” in section 2551(20-A) by expressly excluding the “installation or maintenance of wiring or equipment on a customer’s premises,” and this does not affect the taxability of that service under section 2552(1)(F).

In addition, MRS has highlighted the separate taxable status of installation in Bulletin No. 56 (applicability of SPT to the area of telecommunications). The introduction to that document clearly states that “[t]elecommunications services are subject to the Maine Service Provider Tax, as are ancillary services *and the installation, maintenance or repair of telecommunications equipment.*” (Emphasis added). The taxability of the installation of telecommunications equipment is reinforced by the note in section 1(A), which states that

[w]hile the definition of “telecommunications services” excludes the “installation or maintenance of wiring or equipment on a customer's premises,” the installation, maintenance or repair of telecommunications equipment is separately listed as a taxable service subject to the Maine Service Provider Tax.

The Taxpayer has not shown that the referenced provisions of the SPT law are conflicting or are susceptible to more than one meaning. Accordingly, the Board declines to adjust the assessment on this basis.

B. The Sale Price Subject to SPT.

The Taxpayer also argues that, contrary to law, the assessment is based on the value of both taxable and nontaxable services and is therefore overstated. The Taxpayer concedes that a portion of the Fee is for the installation of telecommunications equipment, but contends that the vast majority of the Fee—[XX]% by the Taxpayer’s computation—is for other, nontaxable expenses incurred in setting up new customers with wireless internet service. The Taxpayer explains that it only recoups about [X]% of its actual setup costs through the Fee, as that is all the market will allow. Specifically, [] the Taxpayer’s president credibly stated [] the Taxpayer’s average cost for a site visit to install the radio and [] cable [] exclusive of travel costs, but the Taxpayer only recoups approximately [X]% of that amount through the Fee []. Thus, the Taxpayer reasons, [] less than [Y]% [of the Fee] is directly attributable to the act of installing telecommunications equipment, and only that portion should be subject to SPT. Thus, according

to the evidence and argument submitted by the Taxpayer, the Fee was the mechanism by which the Taxpayer recouped its new customer setup costs, including the cost of installing the radio and the [] cable. Had the Taxpayer not charged for the installation or not recouped its value, in whole or in part, through the Fee, there would be no sale price upon which to base the tax.² Such was not the case here, where the Taxpayer was clearly recouping at least part of its costs in providing the taxable service of installing telecommunications equipment.

Under Maine SPT law, 36 M.R.S. § 2552(1), SPT is imposed on the “value” of taxable services sold, that is, the “sale price” as defined in 36 M.R.S. § 2551(15). That section provides that the “sale price” on the sale of a service is the “total amount of consideration” for which the service is sold. Unless a given nontaxable service which is included in an invoice is differentiated from a taxable service on the same invoice, e.g., by being itemized, all costs appearing on the invoice are taken to be part of the sale of the taxable service and are thus subject to SPT as well. In this case, the Taxpayer’s invoices did not provide an itemization of the Fee that it charged. Moreover, SPT law provides for no “deduction [from the sale price of a service] for the cost of materials used, labor or service cost, interest, losses and any other expense of the seller” *Id.* Thus, payments to the Taxpayer for costs that it expressly stated were associated with providing installation services are subject to SPT, as are amounts that the Taxpayer received for costs incurred in providing setup services that it did not separately identify on its invoices, e.g., processing sales orders and coordinating and conducting site visits.

It is the Taxpayer’s burden to show that at the time the services were rendered, the entire Fee was not the “sale price” of the taxable sale of the installation services of telecommunication equipment. Because the Taxpayer did not identify and differentiate the various components of

² The sale price would also not be subject to SPT if the only services that were involved were nontaxable or exempt services. 36 M.R.S. §§ 2552(1), 2557(1).

the Fee on the invoices it sent its customers, the Taxpayer has not carried its burden in this regard. Accordingly, the Board declines to adjust the assessment on this basis.

V. DECISION

Based upon the evidence presented, the assessment is upheld in full.

The Board may, in limited circumstances, reconsider its decision on any appeal. If either party wishes to request reconsideration, that party must file a written request with the Board within 20 days of receiving this decision. Contact the Appeals Office at 207-287-2864 or see the Board's rules, available at <http://www.maine.gov/boardoftaxappeals/lawsrules/>, for more information on when the Board may grant reconsideration. 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 either party wishes to appeal the Board's decision in this matter to the Maine Superior Court, that party must do so within 60 days of receiving this decision. During the 60-day period in which an appeal may be filed with the Superior Court, [the Taxpayer] may contact Maine Revenue Services at 207-624-9725 for the amount of tax that is currently due, together with any interest or penalties owed. After that 60-day period has expired, Maine Revenue Services will contact [the Taxpayer] with an updated amount of tax and any interest or penalties due at that time.

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