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WV SECRETARY OF STATE
JANUARY 03, 2025 11:13 AM

REDACTED DECISION – DK# 19-479 SALES AND USE-REFUND

BY: A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON FEBRUARY 1, 2021
DECISION ISSUED ON APRIL 29, 2021
AMENDED DECISION ISSUED ON JUNE 1, 2021

NOTE: THIS ADMINISTRATIVE DECISION WAS APPEALED BEYOND THE OFFICE OF TAX APPEALS

AMENDED FINAL DECISION

On July 16, 2019, the Tax Account Administration Division of the West Virginia State Tax Commissioner's Office (the "Tax Commissioner" or "Respondent") issued a Refund Denial Letter to the Petitioner, Company A, LLC. This letter denied the Petitioner's request for a refund of Consumer Sales and Service Tax in the amount of $_____. This refund denial was issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq*, of the West Virginia Code.

Thereafter, on September 13, 2019, the Petitioner timely filed with this Tribunal, a petition of appeal. An evidentiary hearing was held in this matter on October 1, 2020, at the conclusion of which, the parties filed legal briefs. The matter became ripe for a decision at the conclusion of the briefing schedule. A Final Decision was entered on April 27, 2021. Thereafter, on May 6, 2021, the Petitioner filed a Motion for Reconsideration, where it argued that this Tribunal had not addressed one of its legal arguments. By this Amended Final Decision we grant the Petitioner's Motion.

FINDINGS OF FACT

1. The Petitioner, Company A, is a Virginia limited liability company, located in Edinburg, Virginia. Tr. P25 at 1-12.

2. The Petitioner's primary business is providing cell phone service, and it operates in Virginia, West Virginia, Maryland, Pennsylvania, Kentucky and Ohio. Tr. P25 at 20-22. These cell phone service operations are affiliated with Affiliate Company and contain the Affiliate Company branding. Tr. P27 at 14-23 & Tr. P30 at 15-17.

3. The Petitioner has a subsidiary business called Subsidiary Company. This business owns the towers that holds some of the Petitioner's transmission equipment. Tr. P28 at 3-9.

4. If a customer of the Petitioner makes a cell phone call in an area served by one of the aforementioned towers, then that call is handled by both the Petitioner and Affiliate Company. However, the Petitioner is not its own wireless company, and as such, no calls could be completed without its contractual (and technological) relationship with Affiliate Company. Tr. P27 at 14-23. If a customer makes a call outside of the area where the Petitioner's subsidiary has towers, those calls are handled by the nearest tower able to accept calls of Affiliate Company customers. Tr. P29 at 10-16.

5. In addition to owning cell phone towers, with the attendant equipment, the Petitioner operates retail cell phone service stores, in all the states listed above.

6. Sometime prior to the tax periods, in question in this matter, the Petitioner purchased approximately 30-35 retail locations operated by a competitor. These locations were affiliated with another wireless service company, called Competitor. Tr. P31 at 1-3.

7. Sometime during this acquisition/merger, it was discovered, that certain Competitor customers had phones that were not compatible with the Affiliate Company network. These customers were given free phones as an inducement to stay with the Petitioner and Affiliate Company. Tr. P33 at 5-14.

8. When these phones were provided to the former Competitor customers, no sales tax was charged, but the Petitioner did pay use tax on the purchases. Thereafter, the Petitioner

determined that it was entitled to a refund of this use tax, and it filed a claim as such. Tr. P33-34 at 9-1.

9. It is the Tax Commissioner's denial of this refund request that forms the basis of this appeal.

DISCUSSION

Generally, if a business in West Virginia were to buy a case of glass cleaner from ABC Cleaning Supplies in Anytown, U.S.A., one of two things would happen. Either ABC would charge the business West Virginia sales tax, or the business would later remit use tax to the Tax Commissioner pursuant to West Virginia Code Section 11-15A-2, which states:

> An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article.

W. Va. Code Ann. §11-15A-2(a) (West 2010).

However, there are exemptions from the use tax, and one of those exemptions is if the property or service is exempt from sales tax, pursuant to Article 15 of Chapter 11. *See* W. Va. Code Ann. § 11-15A-3 (West 2013). Section 9 of Article 15, Chapter 11 contains the sales tax exemptions and subsection (b)(2) of Section 9 provides an exemption for:

> The following sales of tangible personal property and services are exempt from tax as provided in this subsection: . . . (2) Sales of services, machinery, supplies and materials directly used or consumed in the activities of manufacturing, transportation, transmission, communication, production of natural resources, gas storage, generation or production or selling electric power, provision of a public utility service or the operation of a utility service or the operation of a utility business, in the businesses or organizations named in this subdivision and does not apply to purchases of gasoline or special fuel;

W. Va. Code Ann. § 11-15-9(b)(2) (West 2018).

Additional guidance regarding what the phrase "directly used" means is contained in West Virginia Code Section 11-15-2 which defines the term as:

> "Directly used or consumed" in the activities of manufacturing, transportation, transmission, communication or the production of natural resources means used or consumed in those activities or operations which constitute an integral and essential part of the activities, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to the activities.

W. Va. Code Ann. §11-15-2(b)(4) (West 2018).

This Tribunal is fairly well versed in the law of this case. In the last few years, we have, twice, had the occasion to issue final decision regarding the direct use exemption. Both Docket No. 15-035 and No. 15-040 involved requests for the exemption by Taxpayers engaged in the activity of natural resource production. One of those cases involved the purchase of services, and the other was similar to the case before us, involving the purchase of tangible personal property. The services involved the rental of various equipment on a natural gas well pad. The property purchased in the other case was asphalt for road repair and maintenance to a natural gas well site. In both cases we took the phrases "integral and essential" and "incidental, convenient or remote" and applied their common ordinary meaning, and we do so here, as well.[1]

The Petitioner argues that these purchased phones were integral and essential, because without them the new Competitor customers would not be able to make calls. The Tax Commissioner argues that the phones were used for marketing purposes, in contravention of the legislative rules governing the combined sales and service and use tax.

[1] It should be noted that both decisions were appealed. In 15-040, the matter made its way to the West Virginia Supreme Court of Appeals. There the Court confirmed that West Virginia Code Section 11-15-2(b)(4) is clear and unambiguous and that the phrases at issue should be given their plain and ordinary meaning. *See* Antero v. Steager, 851 S.E.2d 527 (2020). The appeal of 15-035 is still pending in the Circuit Court of Kanawha County.

For the purposes of the direct use exemption, communication is defined as "Communication. - The activity of communication includes all telephone, radio, light, light wave, radio telephone, telegraph and other communication or means of communication, whether used for voice communication, computer data transmission, or other encoded symbolic information transfers." W. Va. Code R. § 110-15-123.4.5 (1993). Based upon the testimony in this matter, it appears that the Petitioner is involved in the activity of telephone communication, although the record is not entirely clear. The Petitioner's subsidiary owns cell phone towers, and on those towers is equipment owned by the Petitioner that facilitates calls placed by their customers. On the other hand, the Petitioner's witness testified that because they are not a wireless company, no calls can be completed without the assistance of Affiliate Company. We rule that the Petitioner is engaged in the activity of communication, and as such, is entitled to the direct use exemption. Specifically, we rule that if a piece of equipment on one of the aforementioned cell phone towers were in need of replacement, that purchase would be exempt, because it is integral and essential to the activity of telephone communications. However, the Petitioner is also engaged in other activities, specifically, it is a vendor of cell phone services, in tandem with Affiliate Company, and it is a retailer of tangible personal property.

It is well settled that the courts of this state can take judicial notice of historical facts. *See e.g.* State v. Ferree, 107 S.E. 126, 88 W.Va. 434 (1921); Hix v. Hix, 25 W.Va. 481 (1885). *See also* W. Va. R. Evid. 201 (Judicial Notice of Adjudicative Facts). Moreover, this Tribunal is not bound by the West Virginia Rules of Evidence. Thus, this Tribunal takes judicial notice of the fact that the definition of communication contained in Section 123.4.5 was enacted in 1993, before the time when cell phone service was common. In 1993, the "activity" of telephone communications in West Virginia was conducted almost exclusively by Bell Atlantic, one of the seven "Baby Bells" created in the 1980s after the break-up of AT&T. When Bell Atlantic engaged

in the activity of telephone communication, as that term is used in Section 123.4.5, it was vastly different than the activities of the Petitioner in 2016. In 1993, the citizens of West Virginia did not have the plethora of options regarding phone service that the citizens have today. In fact, as far as telephone communications went, the only option was whatever company owned the wire outside of your house, generally that was Bell Atlantic.[2] Nor did Bell Atlantic operate retail stores, similar to those operated by the Petitioner. In fact, to the undersigned's memory, Bell Atlantic did not care what type of phone you had in your house. A customer could use the phone provided by the company, or if they so desired they could go to Circuit City, or J.C. Penny, or wherever, and buy a more fancy phone. Whatever the case, all phones were alike, and all had the same little plug, that goes into the wall, to allow calls to be made. As a result, this Tribunal is of the opinion that the term "telephone communications" as used in Section 123.4.5 cannot be found to include all of the activities of the Petitioner, because those activities did not exist for phone companies in 1993. Unless the Legislature and Tax Department had a crystal ball, they could not have intended such a ruling. To be clear, we are ruling that when the Petitioner purchased the phones to be given away, and the activity it was engaged in at that time was the retail sales of cell phone services. This ruling was not the activity of telephone communication, as that term is used in Section 123.4.5.

If we give the Petitioner the benefit of the doubt, and rule that all of its activities are communications, as defined in Section 123.4.5, we are still unable to rule in its favor. The Tax Commissioner argues that the phones at issue were used for marketing purposes, in violation of

[2] We are aware that there may have been small regional telephone companies operating in the rural areas of this state, however that fact does not alter the underlying premise that residents did not have an option when choosing a telephone company. We are also aware that the wires outside a person's home may not have always been owned by Bell Atlantic, but again, that does not impact on the question of choice.

West Virginia law, specifically Section 123.3.2.5 of Title 110, Series 15 of the West Virginia Code of State Rules, which states:

> 123.3.2. Uses of Property or Services Not Constituting Direct Use. - Uses of property or services which will not constitute direct use, thereby making the purchase subject to the sales and use tax shall include, but not be limited to the following: . . .123.3.2.5. Tangible personal property or services used in marketing, general management, supervision, finance, training, accounting and administration. For example, property purchased for use in research for a new or improved product would not be directly used.

W. Va. Code R. § 110-15-123.3.2.5 (1993). We agree with the Tax Commissioner, and find that these phones were used to market Affiliate Company to the new Competitor customers. The problem for the Petitioner is that everyone in the developed world, including the undersigned, knows how the cell phone business works. Every day, cell phone companies are giving away, (or practically giving away) phones as an inducement to either stay with the company, or to switch. The undersigned, recently had the occasion to switch cellphone providers, and the new company's inducement was "buy one get one free." As a result, two top of the line new phones were provided at a price just above free. However, sales tax was charged on the $1,600 retail price of these phones. The reason for the practically free phones is obvious, the inducement to sign with cell phone company X, as opposed to company Y. And that is what has happened in this matter, and the Petitioner's sole witnesses clearly testified as such.

> JUDGE POLLACK: Okay. All right. Then, as you testified, during the merger, there were certain customers whose phones were not compatible. They were given the opportunity to have a phone, given a ---
>
> MS. BARR: Correct.
>
> JUDGE POLLACK: --- be given a free phone? And to be clear, no sales tax was charged on those free phones?
>
> MS. BARR: No.
>
> JUDGE POLLACK: Why not?

> MS. BARR: Because the customer was given them for them to stay with our service, and so they were not paying for the phone, so there was no tax to be charged on them.

Tr. P33 at 5-14.

Finally, even if we were to find that giving the free phones to the new customers was not strictly marketing, as the term is used in Section 123.3.2.5, we still must determine if the phones were "critical and essential" to the Petitioner's activities, as opposed to "incidental, convenient or remote" as those terms are used in West Virginia Code Section 11-15-2(b)(4). As stated above, this Tribunal has issued two decisions in the last few years involving the direct use exemption, and in both we determined that Section 11-15-2(b)(4) was clear and unambiguous, and as such the terms critical, essential, incidental, convenient, and remote were to be given their plain and ordinary meaning.[3] Both of the recent direct use decisions from this Tribunal involved the activity of natural resource production, namely drilling for natural gas. One case involved the purchase of services by the natural gas company, and the other involved the sale of tangible personal property. In the first case, the services included the rental of porta-potties and trailers on the well pad site. Our analysis was simple, were the porta-potties and trailers critical and essential to the activity of drilling for the gas, or put another way, did the Petitioner have to have those services to engage in the activity? We ruled that you could not drill in remote locations without a place for employees to relieve themselves. Nor could they drill without a place to sleep for employees who were on site for weeks at a time. Our ruling was upheld by the West Virginia Supreme Court of Appeals

[3] In both Docket No. 15-035 and 15-040 none of the parties argued that Section 11-15-2(b)(4) was ambiguous or that the rules of statutory construction were needed. As such, we are aware that the Tax Commissioner's reliance on W. Va. Code R. § 11-15-123.3.2.5 is not strictly necessary. *See e.g.* Griffith v. Frontier W. Virginia, Inc., 228 W. Va. 277, 719 S.E.2d 747, (2011) (the very function of administrative rules, be they interpretive or legislative, is to supply that which the Legislature has omitted from its statutory enactments).

in Antero Res. Corp. v. Steager, 851 S.E.2d 527 (W. Va. 2020). In the more recent case, we conducted the same analysis, this time the sale of asphalt, again to a company drilling natural gas wells. There, the evidence showed that without an agreement with the West Virginia Division of Highways, to repair public roads in and around the well site, the producer could not even obtain a permit to drill. Those facts made our critical and essential analysis easy, in that the activity was not even going to begin until this asphalt was purchased and laid down.

So, we ask the same question here, does the Petitioner **have to have** these phones to engage in the activity of telephone communications? We rule that it does not. In so ruling, we are well aware of the Petitioner's argument in this regard, namely that this one unique situation they had to offer the free phones, because the existing phones were incompatible with the Petitioner's equipment. However, unlike the natural gas drillers described above, the Petitioner in this matter was engaged in the activity in question, telephone communications, at all times. In plain English, before it bought the Competitor locations it was doing whatever technical things it needed to do (in conjunction with Affiliate Company) to make their customers calls go through. On the day after the Competitor sale was completed, the Petitioner was still engaged in the activity. Based upon these facts, and applying the same legal reasoning as we have previously, it is impossible to rule that the Petitioner had to have these free phones in order to engage in the activity of telephone communications. Instead, the record in this case shows that the Petitioner had a choice as to how to handle the incompatible phones, when it could have made other choices. For starters, it could have, like the undersigned's new service provider, given the phones away, but still charged sales tax. It could have charged the new customers for the phones, and given them a credit on their bills. The point being, that the business decisions made by the Petitioner to ensure the retention of customers, renders these phones incidental, convenient, and remote to the activity of communications. Finally, if we were to rule for the Petitioner, we start down a slippery slope

toward all cell phones, those that are free, or provided at a greatly reduced price, being essential and integral to the activity of communications. We do not believe that the Legislature intended such a result when it created the direct use exemption.

The Petitioner next argues that the phones were purchased for resale, and that as such the Petitioner need not have paid use tax when the phones were purchased. Here, the Petitioner relies on the exemption in West Virginia Code Section 11-15-9(a)(9), which states, "Sales of tangible personal property to a person for the purpose of resale in the form of tangible personal property." W. Va. Code Ann. § 11-15-9(a)(9)(West). At first blush, this would seem to be an argument easily swatted away, because, as stated above, the phones at issue were not resold, they were given away. However, the Petitioner's argument is more nuanced than it might appear at first blush. The Petitioner directs us to the Tax Department's regulatory provisions, to decisions issued by this Tribunal's predecessor, and to a decision issued by the Supreme Court of Ohio.

The regulatory provisions relied on are contained in Section 9.3.4.3 of Series 15, Title 100 of the West Virginia Code of State Rules.

> 9.3.4.3. For providers of taxable services and sellers of tangible personal property subject to the consumers sales and service tax or use tax, property purchased is presumed to be purchased for resale if the final consumer or end user of the property sold will obtain possession of the property upon consummation of the final sale of the property or service sold.
>
> 9.3.4.3.a. Example: Property sold for resale relating to sales of taxable services would include: sales of plastic dry cleaning bags and hangers to persons in the business of dry cleaning, sales of television picture tubes, solder and wire to television and electronics repair businesses and sales of primers and paint to persons in the automobile body repair business.
>
> 9.3.4.3.b. Example: Property not sold for resale to such service providers would include: sales of dry cleaning fluid, cash registers or other office equipment or dry cleaning equipment to persons in the business of dry cleaning, and sales of soldering irons,

> electronic test equipment, office or shop furniture or electronics manuals and technical books to television or electronics repair businesses.
>
> 9.3.4.3.c. Sales of carpet shampoo to persons in the carpet cleaning business would not constitute sales for resale because, although the shampoo is applied to the customer's carpet in the cleaning process, it is extracted from the carpet, allowed to evaporate or otherwise effectively used up in the process rather than being the subject of a transfer of possession.

W. Va. Code R. § 110-15-9.3.4.3 (1993).

The two administrative decisions relied on by the Petitioner, were issued by the Tax Department's Office of Hearings and Appeals ("OHA"), and both involved the use tax exemption at issue, as applied to those in the car wash business. In both decisions, OHA ruled that engine sealers, armor all and various waxes were purchased for resale because they (as opposed to the soap used to wash the cars) remained on the car after the service was completed. Finally, in Cincinnati Reds LLC v Testa, 122 N.E.3d 1178 (2018), the Supreme Court of Ohio held that the baseball team did not need to pay use tax on all of the promotional items, such as ball caps, t-shirts, and bats given away at games. The Court reasoned that these items were purchased for resale, and that they were "sold" to the fans, as part of the consideration received by the team when tickets were purchased.

The Petitioner relies on Section 9.3.4.3 of the regulations, the OHA decisions and the Reds decision as standing for the proposition that if, during the provision of a service, the customer takes title to an item of tangible personal property then that property was purchased for resale. While we agree with the Petitioner's characterization of the regulations and the cases, that does not lead us to a ruling in its favor. This Tribunal has a mandate from the West Virginia Supreme Court of

Appeals to give effect to every word and part of a statute.[4] If we do that with Section 9.3.4.3, particularly Subsection a, it becomes clear that the Petitioner's reliance is misplaced. Subsection a provides an example of what is meant by Section 9.3.4.3, and starts off by describing the exempt tangible personal property as "Property sold for resale **relating to sales of taxable services.**" If one were to stop reading there, the provision seems to be helpful to the Petitioner's argument, because at first blush cell phones would seem to relate to the sale of cell phone service. This Tribunal has no doubt that upon appeal the Petitioner will loudly exclaim "what could relate more to cell service than the phone you have to have." However, the Subsection does not end there. It goes on to give specific examples of what property is exempt pursuant to the sale of a service and what is not. In keeping with the overall tenor of the regulation, the exempt property is that which the customer takes with them, such as dry cleaning bags, tubes used in T.V. repair, and paint for the autobody shop. The examples of non-exempt items are those that the customer does not take possession/title to, such as the cash register at the dry cleaners or the soldering iron at the T.V. repair shop.

The Petitioner cannot prevail in this argument, for the same reason discussed above, namely that we all know exactly how the cell phone business works. The West Virginia Supreme Court of Appeals has stated, in dicta, that courts should not abandon their common sense at the courthouse door. "Although a court may not read into a statute language purposefully omitted, courts of this state are not required to **"insulate themselves from all knowledge of happenings and events in the world about them, and pretend ignorance to that which among the mass of**

[4] It is well settled law in West Virginia that it is necessary to give effect to every word and part of a statute in order to effectuate its true meaning. *See e.g.* Jackson v. Belcher, 232 W. Va. 513, 753 S.E.2d 11 (2013); Jackson v. Kittle, 34 W. Va. 207, 12 S.E. 484 (1890).

citizens is common knowledge. . .” State v. Blatt, 235 W. Va. 489, 500, 774 S.E.2d 570, 581 (2015) (internal citations omitted) (emphasis added). To rule for the Petitioner on this purchase for resale argument would require this Tribunal to “pretend ignorance” to the common knowledge that when you go pick up your dry cleaning it comes on a hanger in a bag, and when you go to a Reds game sometimes you get a t-shirt or a toy bat, **but** when you go sign up for cell service, you don’t have an expectation of getting handed a free phone. Or put another way, the phones are not “related” to the sale of cell phone service, as that term in used in Subsection 9.3.4.3a, in the same way the bags and hangers are related to the sale of dry cleaning service. The Petitioner’s argument, in this regard, is further weakened by the fact that it was not in the habit of giving out free phones to its customers, and only did so for a specific subset, and for the purpose of enticing them to continue as customers.

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. §11-10-11(a) (West 2010).

3. “An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article.” W. Va. Code Ann. § 11-15A-2(a) (West 2010).

4. The use in this state of the following tangible personal property, custom software and services is hereby specifically exempted from the tax imposed by this article to the extent specified: . . .(2) Tangible personal property, custom software or services, the gross receipts from the sale of which are exempt from the sales tax by the terms of article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, and the property or services are being used for the purpose for which it was exempted." W. Va. Code Ann. § 11-15A-3(a)(2) (West 2013).

5. West Virginia Code Section 11-15-9(b)(2) provides an exemption from the consumers sales and service tax for sales of services, machinery, supplies and materials directly used or consumed in the activities of manufacturing, transportation, transmission, communication, or the production of natural resources.

6. Directly used or consumed is defined as "used or consumed in those activities or operations which constitute an integral and essential part of the activities, as contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to the activities." W. Va. Code Ann. §11-15-2(b)(4) (West 2018).

7. The activity of communication is defined as "all telephone, radio, light, light wave, radio telephone, telegraph and other communication or means of communication, whether used for voice communication, computer data transmission, or other encoded symbolic information transfers." W. Va. Code R. § 110-15-123.4.5 (1993).

8. The Petitioner in this matter is engaged in two activities, communication, as defined in Title 110, Series 15, Section 123.4.5 and the retail sales of cellular phone service and tangible personal property.

9. When the Petitioner in this matter provided free cellular phones to certain customers it was engaged in the activity of retail sales of a service. As such, the direct use exemption does not apply.

10. "Uses of Property or Services Not Constituting Direct Use. - Uses of property or services which will not constitute direct use, thereby making the purchase subject to the sales and use tax shall include, but not be limited to the following: . . .123.3.2.5. Tangible personal property or services used in marketing, general management, supervision, finance, training, accounting and administration. For example, property purchased for use in research for a new or improved product would not be directly used." W. Va. Code R. § 110-15-123.3.2.5 (1993).

11. The Petitioner utilized the phones at issue in this matter for marketing purposes, as that term is used Section 123.3.2.5 of Title 110, Series 15 of the West Virginia Code of State Rules, again rendering the direct use exemption unavailable to their purchase.

12. It is necessary to give effect to every word and part of a statute in order to effectuate its true meaning. *See e.g.* Jackson v. Belcher, 232 W. Va. 513, 753 S.E.2d 11 (2013); Jackson v. Kittle, 34 W. Va. 207, 12 S.E. 484 (1890).

13. "Essential" means "something necessary, indispensable, or unavoidable." Webster's Third New International Dictionary, 777 (16th ed. 1971). Incidental is a direct antonym to essential and means "subordinate, nonessential, or attendant in position or significance." Id, at 1142.

14. Assuming arguendo that the Petitioner's only activity is communication, and that the phones were not used for marketing purposes, the phones at issue in this matter are not essential, because the Petitioner is able to engage in the activity of telephone communications for its other customers without the phones. Therefore, the phones are not integral and essential as those terms are used in West Virginia Code Section 11-15-2(b)(4).

15. There is an exemption from West Virginia's sales and use tax in Section 9(a)(9) Article 15, Chapter 11, which exempts, "Sales of tangible personal property to a person for the purpose of resale in the form of tangible personal property." W. Va. Code Ann. § 11-15-9(a)(9)(West).

16. There is a presumption that tangible personal property is purchased for resale if "the final consumer or end user of the property sold will obtain possession of the property upon consummation of the final sale of the property or service sold." W. Va. Code R. § 110-15-9.3.4.3 (1993).

17. Subsection 9.3.4.3a gives examples of property that relates to the sale of certain services, such as sales of plastic dry cleaning bags and hangers to persons in the business of dry cleaning. Id.

18. The phones at issue here were not purchased for resale, because they were not resold.

19. It is well settled law in West Virginia that it is necessary to give effect to every word and part of a statute in order to effectuate its true meaning. *See e.g.* Jackson v. Belcher, 232 W. Va. 513, 753 S.E.2d 11 (2013); Jackson v. Kittle, 34 W. Va. 207, 12 S.E. 484 (1890).

20. Courts of this state are not required to "insulate themselves from all knowledge of happenings and events in the world about them, and pretend ignorance to that which among the mass of citizens is common knowledge, . ." State v. Blatt, 235 W. Va. 489, 500, 774 S.E.2d 570, 581 (2015).

21. Giving effect to all of the words of Section 9.3.4.3 of Title 110, Series 15 of the West Virginia Code of State Rules, and applying common sense, leads to the conclusion that the phones at issue here did not "relate" to the provision of cell phone service.

22. In a hearing before the West Virginia Office of Tax Appeals, the burden of proof is upon the Petitioner to show that any denial of a tax refund is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2019).

23. In this matter the Petitioner has not met its burden of showing that the Tax Commissioner's denial of the requested refund of combined sales and use tax was erroneous.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the July 16, 2019, Refund Denial to the Petitioner, Company A LLC. in the amount of $_____ is hereby **AFFIRMED.**

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. "Fenway" Pollack
Chief Administrative Law Judge

_____
Date Entered