

T-MOBILE USA, INC. V. DEPARTMENT OF FINANCE FOR BALTIMORE CITY: WHAT THE LATEST SALVO IN DISPROPORTIONAL CELLULAR PHONE TAXATION MEANS FOR THE FUTURE

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ABSTRACT

Seventeen percent of the average monthly cellular phone bill in 2004 was comprised of federal, state, and local taxes. As the number of wireless subscribers across the nation continues to increase, states, cities, and counties are increasingly seizing upon cellular taxation as a panacea for budget shortfalls. The Maryland Tax Court's recent decision in T-Mobile USA, Inc. v. Department of Finance for Baltimore City held state and county taxes on the sale of individual cellular lines as legal excise taxes rather than illegal sales taxes. This iBrief will highlight the origins of telecommunications taxation, examine the ruling in T-Mobile in detail, present the arguments in opposition to disproportional cellular taxation, and conclude by anticipating what the future might hold for the cellular industry.

INTRODUCTION

¶1 The cellular phone industry has experienced tremendous growth in the United States recently, with the number of subscribers nationwide increasing from 16 million in 1993, to 163 million in 2003,² to over 207 million by the end of 2005.³ State and local governments have rushed to meet this expansion in volume with taxation.⁴ Officials are particularly eager to tax cellular phones because the charges to individuals each month are often small enough to go unnoticed but in the aggregate are capable of

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² See Scott Mackey, *The Excessive State and Local Tax Burden on Wireless Telecommunications Service*, STATE TAX NOTES, Jul. 19, 2004, at 182.

³ Wireless Quick Facts, http://files.ctia.org/pdf/Wireless_Quick_Facts_April_06.pdf (last visited Nov. 16, 2006).

⁴ Ken Belson, *Cities with Budget Woes Hit Up Cell Phone Users*, N.Y. TIMES, May 16, 2005, at C6.

generating substantial revenue.⁵ This revenue is so substantial in practice, in fact, that cellular phone subscribers paid an estimated \$17.8 billion in federal, state, and local taxes in 2004.⁶ Several major taxes are primarily responsible for this staggering figure. First, the federal government applies a series of taxes to every cellular carrier, ranging from the federal regulatory fee imposed by the FCC to defray its operating costs, to the federal universal service fee, a tax designed to subsidize service to high cost service areas.⁷ These federal charges are variable but in 2005 totaled approximately 6% of the average bill.⁸ The U.S. Department of Treasury's recent decision to terminate collection of the 3% federal excise tax beginning July 31, 2006 after five Courts of Appeals declared it illegal will reduce wireless carriers' burdens accordingly.⁹

¶2 Second, after the federal taxes are applied to a wireless bill, state and local levies are administered. States, cities, counties, and municipalities tax cellular lines in a variety of ways, including sales taxes, use taxes, excise taxes, gross receipts taxes, and additional universal service fund fees.¹⁰ The sum of these charges varies dramatically from state to state, ranging from a low of 1.11% in Nevada to a high of 16.21% in Washington.¹¹

¶3 When these manifold state and federal taxes are combined, the results are quite dramatic—total cellular phone taxes in 2004 amounted to 17% of the average customer's bill.¹² This tax rate is roughly double that applied to other services and is surpassed only by the high tax rates¹³

⁵ *Id.*

⁶ *Id.*

⁷ See Cingular Wireless Additional Charge Details, http://www.cingular.com/customer_service/additional_charges_results (last visited Nov. 16, 2006).

⁸ Scott Woolley, *How to Duck Cell Phone Taxes*, FORBES, Jun. 6, 2005, http://www.forbes.com/technology/2005/06/06/cz_sw_0606cellphone.html.

⁹ See Deborah Pryce, Federal Government Hangs Up on the Tele Tax (June 9, 2006), http://www.house.gov/pryce/06%20releases/060906_tele_tax_op-ed.htm. This issue will be discussed further in this iBrief *infra* Part I, The Origins of Telecommunications Taxation.

¹⁰ Taxes and Fees Explained, http://www.stopaddingtomybill.com/about_taxexplained.aspx (last visited Nov. 16, 2006).

¹¹ Dennis Cauchon, *City, State Cell Phone Taxes on the Rise*, USA TODAY, May 8, 2005, http://www.usatoday.com/news/nation/2005-05-08-cellphone-taxes_x.htm.

¹² Belson, *supra* note 4.

¹³ See *infra* Part III, "The Arguments Against Disproportional Cellular Taxation."

assessed against the alcohol, drug, and petroleum industries.¹⁴ Taxation of wireless communication at such exorbitant levels is counterproductive and is unsupported by the historic justifications for telecommunications taxes.¹⁵ A brief survey of the history of taxation within this field serves to underscore this conclusion.

I. THE ORIGINS OF TELECOMMUNICATIONS TAXATION

¶4 Federal taxation of the telecommunications industry dates back to the early twentieth century.¹⁶ The recently eviscerated federal excise tax¹⁷ was established by the federal government in 1898 as a temporary levy on what was then a luxury service—long-distance telephone communication—in order to help fund the Spanish-American War.¹⁸ The excise tax was repealed in 1902 but was reintroduced during World War I.¹⁹ In 1941, it was expanded to apply to local telephone calls and was used to help finance World War II, the Korean War, and the Vietnam War.²⁰

¶5 In recent years, however, public outcry against the imposition of the federal excise tax has increased. Citizens objected to the disproportional taxation of communication in particular as it ceased to be a luxury service. This outcry was validated when five Courts of Appeals declared the federal excise tax illegal as applied,²¹ leading the U.S. Treasury Department to announce recently that it would no longer require providers to apply the tax to cellular and long-distance customers.²² This decision marks an appropriate return to the principles that animated federal

¹⁴ Belson, *supra* note 4.

¹⁵ See *infra* Part I, The Origins of Telecommunications Taxation.

¹⁶ Scott Palladino & Stacy Mazer, *Telecommunications Tax Policies: Implications for the Digital Age*, NATIONAL GOVERNOR'S ASSOCIATION, Feb. 2, 2000, available at <http://www.nga.org/portal/site/nga/menuitem.df1f119f25022e6ae8ebb856a11010a0/> (follow "All Publications" hyperlink; then follow "Telecommunications Tax Policies: Implications for the Digital Age" hyperlink).

¹⁷ See Pryce, *supra* note 9.

¹⁸ Louis Alan Talley, *The Federal Excise Tax on Telephone Service: A History*, CRS REPORT FOR CONGRESS 1 (Jan. 4, 2001), available at <http://openocrs.cdt.org/document/RL30553/>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *Reese Bros., Inc. v. United States*, 447 F.3d 229, 241 (3d Cir. 2006); *Fortis, Inc. v. United States*, 447 F.3d 190, 191 (2d Cir. 2006); *OfficeMax, Inc. v. United States*, 428 F.3d 583, 588 (6th Cir. 2005); *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328, 1334 (11th Cir. 2005); *Nat'l R.R. Passenger Corp. v. United States*, 431 F.3d 374, 374 (Fed. Cir. 2005).

²² See Pryce, *supra* note 9.

telecommunications taxation at its inception and constitutes a step towards the proper recalibration of such taxation to fit modern society.

¶6 State taxation of the telecommunications industry likewise dates to the early twentieth century and also has ceased to be supported by its original justifications.²³ In the industry's formative and developmental years, the general economic assumption was that the most efficient mechanism for growth was the granting of statewide monopolies.²⁴ In return for the exclusive right to furnish phone services within a given state's borders, a monopolist company would be subject to lofty industry-specific taxation.²⁵ This taxation was enacted and administered by states with the implicit provision that the telecommunications provider would then be permitted to set rates at a level that would allow it to recoup its fees from consumers.²⁶

¶7 With the advent of competitive markets in the telecommunications industry, the justifications for industry-specific taxation disappeared.²⁷ When cellular companies entered the market without state-granted monopolies, without the use of public rights-of-way, and without any of the previously attendant opportunities for recoupment, industry-specific taxation became an anachronism.²⁸ State taxation of telecommunications has simply failed to keep pace with the revolutionary changes in the market.²⁹ In fact, instead of decreasing, the effective rate of state and local taxation has *increased* in recent years.³⁰ This simply cannot be justified.

¶8 The city and local taxes at issue in *T-Mobile USA, Inc. v. Department of Finance for Baltimore City*³¹ are perfect examples of the recently prolific departure from the original rationale for disproportional taxation of the telecommunications industry. Instead of being related in any way to monopoly power or controlled ratemaking, such taxation simply represents an effort to remedy budget shortfalls by the arbitrary and convenient taxation of cellular providers.³²

²³ Palladino & Mazer, *supra* note 16, at 7.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 8.

²⁸ *Id.* at 7.

²⁹ *Id.*

³⁰ See Mackey, *supra* note 2, at 182.

³¹ *T-Mobile USA, Inc. v. Dept. of Finance for Baltimore City*, 2006 WL 1976188 at *1 (Md. Tax Ct. Jun. 29, 2006).

³² See Belson, *supra* note 4.

II. THE *T-MOBILE* DECISION

¶9 In July 2003, Maryland's Montgomery County amended its Telephone Tax ordinance to include the imposition of a \$2 per month tax on every cellular line sold to a resident of the county.³³ In August 2004, Baltimore implemented a Wireless Telecommunications Tax that levied a \$3.50 per month tax on each line sold.³⁴ These two jurisdictions enacted their respective taxes by taking advantage of their special status as Maryland's Charter Home Rule County and Charter Home Rule City, respectively.³⁵ This status allowed the two local governments to impose certain taxes without securing specific authorization from the Maryland General Assembly.³⁶

¶10 Cellular providers T-Mobile, Cingular, Sprint, and Verizon Wireless joined forces in opposing the two taxes, both as they were being drafted and after they were implemented.³⁷ The providers argued that because Maryland had designed a system in which the state taxed wireless communications while granting local governments the authority to tax public utilities, including land-line communications, the Baltimore City and Montgomery County levies imposed a burden upon cellular users that exceeded that imposed upon land-line users.³⁸ The providers asserted that this disproportional taxation unfairly resulted in one segment of taxpayers, namely the cellular industry and its customers, funding the general obligations of the local government.³⁹ These arguments fell on deaf ears, even as Baltimore collected \$9.98 million in the first year of its tax, and as Montgomery County took in roughly \$45 million from the tax's inception in 2003 to 2005.⁴⁰

¶11 In addition to arguing that these industry-specific taxes were inequitable, the four wireless companies asserted that the taxes were illegal

³³ Kenneth H. Silverberg & Todd Tidgewell, *Cellular Phone Companies Challenge Local Taxes in Maryland*, STATE AND LOCAL TAX ADVISOR (Nixon Peabody LLP), Mar. 23, 2005, at 1 available at http://www.nixonpeabody.com/linked_media/publications/SALTA_03232005.pdf.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 2.

³⁹ *Id.* at 1.

⁴⁰ See Doug Donovan, *Court OKs Tax on Cell Phones*, BALTIMORE SUN, Jul. 4, 2006, at 1.B, available at <http://www.topix.net/content/trb/0865051572230623160616196674841822906940>.

as well.⁴¹ Maryland state law explicitly precludes cities and counties from imposing sales or use taxes, except on utilities, and wireless carriers are not encompassed by the statutory definition of “utilities.”⁴² Convinced of the merits of their case, the providers determined to seek legal relief.⁴³ Because Maryland law requires taxpayers challenging local taxation to first seek administrative remedies, the carriers filed refund claims in December 2004 with the appropriate authorities of Montgomery County and Baltimore for the amounts paid under the respective taxes.⁴⁴ When both localities issued final determinations denying refund claims, the wireless companies filed suit in the Maryland Tax Court.⁴⁵

A. The Maryland Tax Court’s Holding

¶12 The Maryland Tax Court is an “independent agency [that] provides the highest administrative level in the state and local tax-related appeals process.”⁴⁶ The Tax Court consolidated the individual carriers’ cases against Montgomery County and Baltimore for the purpose of determining the “only remaining legal issue,” in particular “whether the tax on mobile communications service is an impermissible sales tax.”⁴⁷ The court’s holding on this issue would be pivotal. A ruling that the city and county taxes were impermissible sales taxes would mark a substantial victory for the cellular industry, halting the tide of local taxation and making it substantially more difficult for localities to enact industry-specific levies. A ruling affirming the taxes as viable would have the opposite effect of encouraging counties, cities, and municipalities nationwide to augment their budgets by applying extensive taxation to the cellular industry while passing it off as unrelated to sales.

¶13 The Maryland Tax Court wasted little time in indicating that it would rule in favor of Baltimore and Montgomery County. In the first few paragraphs of its Memorandum of Grounds for Decision, it referred to the Baltimore City tax as an “excise tax” and emphasized that the Montgomery County tax was applied to any entity that “furnishes”—not “sells”—cellular lines.⁴⁸ Having established this groundwork, the court went on to apply

⁴¹ *Id.* at 2.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 3.

⁴⁵ *Id.* at 4.

⁴⁶ Maryland Tax Court, <http://www.txcert.state.md.us/> (last visited Nov. 16, 2006).

⁴⁷ T-Mobile USA, Inc. v. Dept. of Finance for Baltimore City, 2006 WL 1976188 at *1 (Md. Tax Ct. Jun. 29, 2006).

⁴⁸ *Id.*

Maryland precedent to hold the taxes in question permissible as local excise taxes, not sales taxes, and to reject the carriers' refund claims.⁴⁹

¶14 The court relied almost exclusively on a single case, *Montgomery County v. Maryland Soft Drink Ass'n, Inc.*⁵⁰ in reaching its conclusion. In *Soft Drink*, the Maryland Court of Appeals set forth a two-factor test for determining whether a given tax may properly be conceived of as a sales tax.⁵¹ The first requirement is that a taxable sale be the event that triggers payment of the tax.⁵² Second, the tax must be applied against the purchase price of the good or service involved in the taxable sale.⁵³

¶15 The Maryland Tax Court held that the levies in question in *T-Mobile* failed to satisfy either the "event" or "application" prong of the *Soft-Drink* test.⁵⁴ The cellular providers had argued that the relevant taxable event was the sale of a wireless line to a customer and that the tax was applied to the purchase price of each line.⁵⁵ Although this argument in fact captured the reality of the taxes being imposed, the court rejected it outright.⁵⁶ Instead it held that "the furnishing or providing the wireless line is the taxable event for the purposes of this tax . . . whether through a sale or otherwise" and that the tax was applied to "the number of lines furnished by the wireless company during the month."⁵⁷

B. Analysis of the Court's Reasoning

¶16 With respect to the first prong of *Soft Drink*—the taxable event—the court heavily emphasized the determination that both the Baltimore and Montgomery County taxes were applicable to all lines "provided or furnished, whether through a sale or otherwise."⁵⁸ The court even went so far as to state that "it is unnecessary to consider the economic transaction between the wireless company and the customer."⁵⁹ Yet, the very nature of the cellular phone industry makes disregarding the economic transaction entirely inappropriate. The localities were taxing each line that a carrier provided to a customer. Certainly, the wide variety of pricing plans in the cellular industry could lead to a situation in which a phone and number would be provided to a customer for free, if accompanied by the

⁴⁹ See *id.* at *2-*3.

⁵⁰ 377 A.2d 486 (Md. 1977).

⁵¹ *Id.* at 491.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *T-Mobile USA, Inc.*, 2006 WL 1976188 at *3.

⁵⁵ See *id.*

⁵⁶ *Id.* at *2.

⁵⁷ *Id.* at *2-*3.

⁵⁸ *Id.* at *2.

⁵⁹ *Id.*

commencement of a service agreement. But, phone lines and their accompanying service are not donated by cellular carriers to their customers; they are sold. The monthly tax is collected from each line, and each line is part of a sale of cellular phone service. Semantics aside, the first prong was determined to be unfulfilled erroneously.

¶17 With respect to the second prong, application to purchase price, the Tax Court held that “the telephone tax does not satisfy the second identifying characteristic of a sales tax as set forth in *Soft Drink*.”⁶⁰ The Court continued: “[R]egardless of whether a customer ever uses, or is billed for, a wireless line, the telephone tax is due at the stated rate per month.”⁶¹ Again, this ruling disregards the reality of the cellular industry. Adding a \$2.00 or \$3.50 surcharge to a monthly cellular phone bill is absolutely a tax upon that bill. While it is certainly true that the applied rate of tax is dependent upon the customer’s balance for a given month, it remains the case that the tax is being added each month to the price of the cellular phone line.

¶18 Nevertheless, the Maryland Tax Court disagreed and rejected the refund claims brought by T-Mobile, Cingular, Sprint, and Verizon Wireless. The court concluded in unequivocal fashion, decreeing that “[a] flat tax on a telephone line, which does not vary depending on customer usage, is an excise tax rather than a sales tax under Maryland law.”⁶² The ramifications of this decision are likely to be profound. The Tax Court has signaled to cities, counties, towns, and municipalities that their efforts to impose inordinately high tax rates upon the cellular industry will be rewarded. Rather than taking a step towards reducing the peculiarly high tax rates imposed upon a non-harmful, non-monopolistic industry, the Maryland Tax Court provided an invitation for local governments to lift those rates even higher.

III. ARGUMENTS AGAINST DISPROPORTIONAL CELLULAR TAXATION

¶19 The arguments in opposition to taxation of the cellular industry at rates that are disproportional to those applied to similar fields are manifold and will be briefly enumerated here.

¶20 First, disproportional taxation harms the telecommunications industry as it relates to other industries, placing a burden upon telecommunications that is simply not present in comparable fields.⁶³ The tax structure applied to telecommunications makes it among the highest

⁶⁰ *Id.* at *3.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Palladino & Mazer, *supra* note 16, at 7.

taxed industries in the U.S. economy.⁶⁴ Only the alcohol, tobacco, and petroleum industries have higher tax rates, and this is for socially and economically justifiable reasons.⁶⁵ Alcohol and tobacco taxes stem from their respective industries' extraordinarily high associated social and health costs.⁶⁶ Petroleum taxes are user fees or benefit taxes; the proceeds from such levies are often dedicated to maintaining and improving intra- or interstate transportation infrastructures.⁶⁷ There are no such considerations present in the cellular industry. Cellular phones do not impose these kinds of substantial health, social, or infrastructure costs on society; that their taxation is on par with products that do is unjustifiable.⁶⁸

¶21 Second, disproportional taxation harms the telecommunications industry internally by decreasing incentive for investment.⁶⁹ The imposition of excessive taxes upon cellular providers discourages them from increasing research and development expenditures and reduces their commitment to increasing and enhancing their infrastructure.⁷⁰ The irony is that state officials and economic experts are "intent on expanding investment in telecommunications infrastructure to expand the availability of 'broadband' service to more households and businesses."⁷¹ In fact, an animating concern in the federal government's recent repeal of the federal excise tax was just this; as Senator John McCain stated, "Today's telecommunications services should not be taxed as utilities so that companies can invest in broadband and other networks."⁷² If state and local governments are sincere in their interest in increasing industry-wide investment in infrastructure, they must abandon disproportional taxation.

¶22 Finally, as mentioned above, the justifications for supporting elevated rates of taxation in the telecommunications industry have long since vanished and cannot continue to be used as cover for state and local governments to remedy their budget shortfalls. Federal taxation of telecommunications was initiated via the federal excise tax in 1898 as a tax upon what was then a luxury good, for the purpose of financing the Spanish-American War.⁷³ The Spanish-American War is over, long

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See* Palladino & Mazer, *supra* note 16, at 7 (contrasting the nature of the cellular industry with industries subject to similarly elevated taxation).

⁶⁹ Mackey, *supra* note 2.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Anne Broache, *Senators Target Net, Phone Taxes*, ZDNET.COM, Jun. 28, 2006, http://news.zdnet.com/2100-3513_22-6089183.html.

⁷³ *See* Talley, *supra* note 18 at 1.

distance telephone calls are no longer a luxury item, and the federal government has appropriately abandoned application of this outdated tax to cellular communications. Anachronistic state and local rates of taxation, however, remain from the days of “Ma Bell,” telephone monopolies, and controlled ratemaking.⁷⁴ In fact, not only do these rates remain, but they are *increasing*, and almost exclusively because local governments have discovered the ease and profitability with which they can be collected.⁷⁵ The president of Baltimore’s City Council, Sheila Dixon, said it best in describing how the Wireless Communications Tax at issue in *T-Mobile* single-handedly remedied the city’s budget crisis, “I can’t remember the last time we had such an easy budget year. . . . [W]hen you can’t diversify and the federal and state taxes are drying up, you need other income.”⁷⁶ Until it is judicially or legislatively affirmed that the justifications for disproportionately high taxation of the cellular industry have long ceased to remain valid, city and local governments will continue their plunder.

IV. CONCLUSION

¶23 The future of telecommunications taxation is highly uncertain. State and local lawmakers in California, Massachusetts, New York, and other states are currently considering hundreds of new cellular tax proposals.⁷⁷ The decision handed down by the Maryland Tax Court in *T-Mobile* will only serve to embolden localities searching for a plentiful, legally-enforceable source of income. On the other hand, multiple bills seeking to limit or freeze such cellular phone taxation are in the works in Congress, including one that recently garnered the near-unanimous support of the Senate Commerce Committee.⁷⁸ That proposal, which passed by a twenty-two to one vote but is expected to encounter some resistance on the Senate floor, would enact a three-year moratorium on new state cell phone taxes, prohibiting states from instituting any levies that single out wireless providers for additional taxation.⁷⁹ The proposed legislation would not, however, prevent states from enacting new measures that affect the telecommunications industry uniformly, providing a loophole for levies that apply new charges to cellular communications and land-line

⁷⁴ See Palladino & Mazer, *supra* note 16, at 7.

⁷⁵ Belson, *supra* note 4.

⁷⁶ *Id.*

⁷⁷ Ben Charny, *Clash Over Cell Phone Fees*, CNET NEWS.COM, Mar. 17, 2005, http://news.com/Clash+over+cell+phone+fees/2100-1039_3-5623824.html.

⁷⁸ See Broache, *supra* note 72.

⁷⁹ *Id.*

communications equivalently.⁸⁰ It also would have no effect on existing laws against cellular providers.⁸¹

¶24 The next few years will likely be determinative of the future of cellular taxation. Perhaps cellular consumers, fed up with constantly increasing charges, will object loudly enough to halt or even reverse the trend of escalating taxation. On the other hand, perhaps consumer objection alone will not be capable of stemming the tide. It seems just as likely that in the absence of stronger, much more aggressive federal legislation, city and local governments will continue to administer elevated taxes against the telecommunications industry as the Maryland example proves. Localities need money to operate, and with wireless providers as an easy target, decisions such as *T-Mobile* will only encourage the trend of disproportional taxation to continue.

⁸⁰ *Id.*

⁸¹ *Id.*