

MINUTES OF THE SENATE ASSESSMENT AND TAXATION COMMITTEE.

The meeting was called to order by Chairperson David Corbin at 11:00 a.m. on February 13, 2002, in Room 519-S of the Capitol.

All members were present except: Senators Jenkins and Pugh

Committee staff present: April Holman, Legislative Research Department
Don Hayward, Revisor of Statutes Office
Shirley Higgins, Committee Secretary

Conferees appearing before the committee: Richard Cram, Kansas Department of Revenue
Mike Reece, AT&T
Mark Beshears, Sprint

Others attending: See attached list.

The minutes of the February 12, 2002, meeting were approved.

Senator Corbin opened a discussion on a previously heard bill, **SB 372—Sales taxation; sourcing of mobile telecommunications services.**

Richard Cram, Kansas Department of Revenue, responded to the suggested amendments offered by John Cmelak of Verizon Wireless at the hearing as follows (Attachment 1):

- Include federal law in the Kansas statute for the benefit of state tax law researchers.

The Department feels that persons dealing with mobile telecommunications services will need to be very familiar with the MTSA provision; therefore, the addition of this provision will not necessarily be clarifying.

- Modernize the terms “intrastate” and “interstate” as they relate to wireless calls.

Mr. Cram reported that Mr. Cmelak has agreed with the Department that it is not necessary to statutorily define the terms as they relate to wireless calls because they are not used in the Kansas statute imposing sales tax on mobile phone services.

- Repeal the requirement that the Department and a telecommunications retailer enter into a written agreement identifying the methodology to be used in determining the taxable portion of the selling price of bundled services.

The Department strongly opposes the request that the written agreement requirement be repealed because the requirement was negotiated with the telecommunications industry last year when **SB 1** was passed as a preventative measure to eliminate potential disputes that otherwise could arise at the time of audit. Mr. Cram called the Committee's attention to a copy of the proposed written agreement attached to his written testimony.

- Add a requirement that a mobile telecommunications service customer must first contact the home service provider in writing if a dispute arises concerning the tax, charge, or fee before a lawsuit can be filed.

Mr. Cram noted that the Department is neutral to this suggested amendment; however, he pointed out that, under current Kansas law, a consumer has an administrative remedy to seek a sales tax refund, and no suit can be filed on a sales tax refund claim unless the Department fails to act on the claim within six months.

CONTINUATION SHEET

MINUTES OF THE SENATE ASSESSMENT AND TAXATION COMMITTEE at 11:00 a.m. on February 13, 2002, in Room 519-S of the Capitol.

Mr. Cram noted that the suggestion that the act apply to customer bills issued after August 1, 2002, is consistent with the MTSA; therefore, the Department has no objections to that change.

Mike Reeht, AT&T, expressed concerns with regard to the bundling issue. He explained that, when the telecommunications industry brought the bundling issue to the Legislature in **SB 1** last year, it was brought with the understanding that books and records would demonstrate what was taxable and what was not taxable, and the ultimate authority of determining what was taxable and not taxable would still lie with the Department. He noted that the Department asked for an amendment requiring a written pre-audit agreement within 90 days of billing bundled services. Tax consultants at AT&T continue to be concerned about the pre-audit agreement even with the 90 day period. Mr. Reeht contended that whether proper records are presented before or after the audit does not make that much difference. He also noted that no other state requires a pre-audit agreement, and no other taxpayer in the state is required to enter into a pre-audit agreement in order to prevent problems from developing down the road.

Mark Beshears, Sprint, commented that Mr. Cmelak's suggested amendment to incorporate the federal act into the bill involves a stylistic issue; therefore, he deferred to the Revisor's decision on how it should be presented. He agreed with Mr. Cram's opinion that persons researching this area will find the correct reference. With regard to the definition of the terms "interstate" and "intrastate," he confirmed Mr. Cram's statement that Mr. Cmelak agrees with the Department that the terms are no longer an issue. With regard to the bundling provision, Mr. Beshears agreed with Mr. Reeht that no other state requires a written agreement. However, he noted that Sprint has not attempted to determine whether or not the written agreement would be workable. In looking at the sample agreement furnished by Mr. Cram, he believes that Sprint could resolve a few differences through an agreement with the Department rather than through statutory language. With regard to the suggested customer remedy provision, Mr. Beshears noted that the issue has never been a problem in Kansas wherein the local tax is centrally administered by the Department of Revenue, but has occurred in states such as Florida, Texas, South Carolina, Illinois, and Louisiana which have municipalities that administer local taxes. Mr. Beshears also agreed with Mr. Cram and Mr. Cmelak that the effective date should coincide with the federal enactment on August 1.

With regard to the proposed effective date, Don Hayward, Revisor of Statutes Office, suggested that, the bill be amended on page 6, line 20, by striking "The" and inserting "On and after August 1, 2002."

Senator Lee moved to adopt the amendment to change the effective date of **SB 372** as proposed by Mr. Hayward, seconded by Senator Donovan. The motion carried.

Senator Lee moved to recommend **SB 372** favorably for passage as amended, seconded by Senator Clark. The motion carried.

The meeting was adjourned at 11:15 a.m.

The next meeting is scheduled for February 18.

STATE OF KANSAS

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Office of Policy & Research

February 13, 2002

To: Senator David Corbin, Chair
Senate Committee on Assessment and Taxation

From: Richard Cram

Re: Department of Revenue Response Concerning Issues Raised With Senate Bill 372

On February 4, 2002, John Cmelak of Verizon Wireless, on behalf of the wireless industry, appeared before the Committee concerning Senate Bill 372, suggesting an alternative version, as presented in his written testimony. As introduced, Senate Bill 372 amends K.S.A. 2001 Supp. 79-3603(t) to provide that the federal mobile telecommunications sourcing act (MTSA) shall be applicable to all taxable sales of mobile telecommunications services, and further authorizes the Secretary of Revenue to perform all necessary implementation acts. The MTSA provides the rules for sourcing mobile telecommunications calls (for purposes of determining the proper taxing jurisdiction), notwithstanding the sourcing rules of any state, and it applies to all customer bills issued after August 1, 2002. Thus, it is essential for each state imposing sales tax on mobile telecommunications services, as does Kansas, to conform to the sourcing rules stated in the MTSA by August 1, 2002. Senate Bill 372 is intended to accomplish that result.

Mr. Cmelak raised 4 points with Senate Bill 372, as introduced. Those points are listed below, along with the Department's response.

1. Certain concepts expressed in the federal law need to be expressly stated in the Kansas statute, for the benefit of state tax law researchers. Otherwise, mere reference to the MTSA in the Kansas statute will cause state tax law researchers to have to read the eight pages of the federal law.

Department's Response: Mobile telecommunications service providers, the retailers collecting and remitting the sales tax, will, in any event, need to be very familiar with the MTSA provisions, whether any concepts in the MTSA are expressly stated in Kansas law, or merely incorporated by reference. Senate Bill 372, as introduced, does give the Secretary implementation authority, which is absent from the draft proposed by the wireless industry.

2. The terms "intrastate" and "interstate" should be modernized as they relate to wireless calls. Otherwise, a question could be raised as to whether a Kansan who "roams" outside of Kansas and makes calls to locations outside of Kansas would be subject to tax. "Interstate" should be defined as "wireless calls that originate in one state and terminate in another state."

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Attachment 1*

“Intrastate” should be defined as “wireless calls that originate and terminate within the same state.”

Department’s Response: Upon further discussions with Mr. Cmelak, we agreed that because the terms “interstate” and “intrastate” are not used in the statute imposing sales tax on mobile phone services, K.S.A. 2001 Supp. 79-3603(t), it would not be necessary to statutorily define those terms as they relate to wireless calls.

3. The provisions in K.S.A. 2001 Supp. 79-3603(b)(3), referring to the requirement that the Department and a telecommunications retailer enter into a written agreement identifying the methodology to be used in determining the taxable portion of the selling price of bundled services within 90 days of billing for bundled services, should be repealed. The MTSA authorizes wireless providers to bundle taxable and nontaxable services, so long as the provider can reasonably identify charges not subject to tax from its books and records. The written agreement requirement is inconsistent with the federal law.

Department’s Response: The Department strongly opposes the request that the written agreement requirement contained in the bundling provision in K.S.A. 2001 Supp. 79-3603(b)(3) be repealed, or that any language be added to K.S.A. 2001 Supp. 79-3603(t) stating that “(b)(3) shall not apply.” The written agreement requirement was negotiated with telecommunications industry representatives last year, when 2001 Senate Bill 1 was passed. The written agreement provision is intended as a preventive measure to eliminate potential disputes that otherwise could arise at the time of audit concerning the methodology used for determining the taxable portion of the price for bundled services. Under the written agreement provision, the telecommunications retailer is required to disclose in writing to the Department its methodology within 90 days of billing bundled services. Attached is a draft of the proposed written agreement.

If the telecommunications companies are unable to explain or put in writing this methodology prior to billing bundled services, this raises the question, how is the Department going to successfully audit the telecommunications companies’ books and records to determine this methodology after the fact? Also, K.S.A. 2001 Supp. 79-3603(b)(3) requires a telecommunications company billing on a bundled basis to disclose to the customer upon request, the selling price for the taxable services contained in a bundle. How is the telecommunications company going to be able to do that if it cannot explain its methodology to the Department?

4. Senate Bill 372 should be amended to add the requirement that a mobile telecommunications service customer first contact the home service provider in writing if a dispute arises concerning the “tax, charge or fee.” The home service provider has sixty days to respond. No suit could be filed before exhausting this remedy.

Department’s Response: The Department is neutral as to this suggested change. However, it goes beyond the issue that prompted Senate Bill 372, which was merely to adopt application of the provisions of MTSA, as required, by August 1, 2002. Under Kansas law, a consumer has an administrative remedy to seek a sales tax refund. K.S.A. 79-3609; 79-3650. The consumer files the refund claim with the retailer, who in turn files the refund claim with the Department. No suit can be filed on the sales tax refund claim unless the Department fails to act on the refund claim within six months.

The suggestion that this act should apply to customer bills issued after August 1, 2002 is consistent with the MTSA.

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Office of Policy & Research

COMBINED BILLING AGREEMENT PURSUANT TO K.S.A. 79-3603(b)(3)

This Agreement is made as of the _____ day of _____, 2001, by and between the Kansas Department of Revenue (the "Department") and _____ Corporation and its affiliates ("TELCO"), a telecommunications service provider.

WHEREAS

TELCO is engaged in the business of providing communications services to its customers in Kansas and nationwide; these communications services include but are not limited to wireline and wireless local and long distance (both intrastate and interstate) telecommunications services, Internet access and related services, cable services and other related goods and services (the "communications services");

TELCO desires to "bundle" taxable communication services with other nontaxable services and bill consumers on a combined basis; TELCO understands that pursuant to 2001 Kansas Senate Bill 1 ("Senate Bill 1") amending K.S.A. 79-3603(b)(3), it is required to enter into an agreement with the Kansas Secretary of Revenue (Secretary) within 90 days of such billing on a combined basis.

Under Senate Bill 1, TELCO has the responsibility to identify to the Secretary in the agreement the "methodology" to be used in determining the taxable portion of the selling price of those combined services bundles.

The Kansas Department of Revenue accepts TELCO'S "STATEMENT OF METHODOLOGY" dated the _____ day of _____, 2001.

The Department agrees that in the event of an audit of TELCO's sales tax returns or TELCO's books and records concerning these bundled communications services, the Department will conduct such audit upon the basis of whether TELCO correctly reported, collected and remitted sales taxes applicable to the taxable components of such bundles, at the rates specified under the applicable Kansas laws and municipal ordinances, and consistent with the "STATEMENT OF METHODOLOGY." This agreement, or STATEMENT OF METHODOLOGY attached hereto, shall not prohibit either TELCO or the Department from challenging, upon audit, the other's determination that a particular item, product or service is or is not subject to retailers' sales tax, or determination of the retail selling price of a taxable component of a bundle.

The Department agrees that TELCO may periodically review and change the total charge for a particular communications services bundle and the individual charges attributed by TELCO to the components included therein, based upon its normal business practices and market conditions.

TELCO may withdraw from or terminate its obligations under this Agreement at any time; provided, however:

- (a) Notification of such withdrawal or termination will be in writing and sent to the Department;
- (b) Such withdrawal or termination will be effective no earlier than 180 days after the receipt by the Department of written notification of such withdrawal or termination (to allow TELCO a reasonable amount of time to change its billing systems);
- (c) This Agreement shall remain in full force and effect as to the charges for any existing communications services bundle(s) by TELCO for the periods for which such bundle(s) is or are offered prior to the effective date of the withdrawal or termination; and
- (d) TELCO's authority to bundle taxable communication services with other nontaxable services and bill consumers on a combined basis shall end as of the effective date of such withdrawal or termination.

TELCO and the Department hereby warrant that each has full right and authority to agree to the terms set forth herein and that the person or persons executing this Agreement on its behalf is or are duly authorized and empowered to do so.

This **COMBINED BILLING AGREEMENT PURSUANT TO K.S.A. 79-3603(b)(3)** represents the entire agreement of the parties.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date hereinabove written.

Kansas Department of
Revenue

TELCO Corp. and Affiliates

By: _____

By: _____

STATEMENT OF METHODOLOGY

Please provide the following information:

1. Describe how your billing system determines:
 - a. Which services within a bundle are taxable;
 - b. How the retail selling price for a bundle will be allocated between the taxable and nontaxable components of the bundle.
2. Describe how the determinations contained in the response to number 1., are shown or reflected in your accounting records.
3. Describe how the taxable and nontaxable portions of a bundle will be taken from your accounting records and reported on your Kansas retailers' sales tax return.