

00-016

TAXATION: MISCELLANEOUS TAXES – CONSUMER UTILITY TAXES.

Universal service charge appearing separately as percentage on consumer's bill for local telecommunication service does not meet statutory definition of "gross charges" for purposes of calculating consumer utility tax. Universal service charge billed as flat monthly charge is gross charge for purposes of calculating tax.

The Honorable R. Wayne Compton
Commissioner of the Revenue for Roanoke County
July 24, 2000

You ask whether the universal service charge billed to customers by cellular telephone companies meets the definition of "gross charges" for purposes of calculating the consumer utility tax imposed pursuant to § 58.1-3812.

Section 58.1-3812(A) authorizes a locality to tax a telephone company consumer if the consumer's service address is located in such locality. The service provider of local telecommunication services collects the tax from such consumer "by adding the tax to the monthly gross charge for such services."¹ Section 58.1-3812(J) defines "gross charges" as "the amount charged or paid for the taxable purchase of local telecommunication services." Section 58.1-3812(J) specifies, however, that "gross charges" shall not include:

1. Charges or amounts paid that vary based on the distance and/or elapsed transmission time of the communication that are separately stated on the consumer's bill or invoice.
2. Charges or amounts paid for customer equipment, including such equipment that is leased or rented by the customer from any source, if such charges or amounts paid are separately identifiable from other amounts charged or paid for the provision of local telecommunication services on the service provider's books and records.
3. Charges or amounts paid for administrative services, including, without limitation, service connection and reconnection, late payments, and roamer daily surcharges.
4. Charges or amounts paid for special features that are not subject to taxation under § 4251 of the Internal Revenue Code of 1986, as amended.
5. Charges or amounts paid that are (i) the tax imposed by § 4251 of the Internal Revenue Code of 1986, as amended or (ii) any other tax or surcharge imposed by statute, ordinance or regulatory authority.
6. Bad debts.

Section 58.1-3812 clearly contemplates the imposition of the consumer utility tax on resident customers of a local telephone service provider who utilize such service.² You advise that Roanoke County has adopted an ordinance levying a utility service tax on purchasers of mobile

local telecommunications services in the amount of ten percent of the monthly gross charge made by the seller.³ You also advise that the universal service charge appears on the telecommunication company's monthly billing. Furthermore, you advise that this charge may be either a percentage of the customer's bill, typically between four and five percent, or a flat monthly charge, typically less than \$1.

Pursuant to the Telecommunications Act of 1996,⁴ the Federal Communications Commission has ordered all telecommunication companies, both local and long distance, to contribute to the local service subsidy pool of funds subsidizing communications services for schools, libraries, rural health care facilities, and rural and low-income residential customers.⁵ Telecommunications companies have the option of billing this cost to their customers.⁶ If a company recovers some or all of its universal service charge payment from its customers, it may choose to do so based on a flat amount per month or on a percentage basis,⁷ and it may refer to the charge by a variety of names.⁸

A primary goal of statutory construction is to interpret statutes in accordance with the legislature's intent.⁹ Whenever there is doubt, however, as to the meaning or scope of laws imposing a tax, such laws are to be construed against the government and in favor of the citizen.¹⁰ This rule of construction is consistently applied in interpreting the extent of the consumer utility taxes authorized by § 58.1-3812.¹¹

Statutes granting the power of taxation to localities are to be strictly construed, with any reasonable doubt to be resolved against the taxation.¹² Dillon's rule of strict construction likewise generally limits powers of local governing bodies to those conferred expressly by law or by necessary implication from express grants.¹³ Thus, the authority of a locality to impose a tax must be clear.

Section 58.1-3812(J) clearly and unambiguously mandates that "'gross charges' shall not include"¹⁴ "[c]harges or amounts paid that vary based on the distance and/or elapsed transmission time of the communication that are separately stated on the consumer's bill or invoice."¹⁵ "The manifest intention of the legislature, clearly disclosed by its language, must be applied."¹⁶ "[T]ake the words as written" ... and give them their plain meaning."¹⁷

You advise that the universal service charge may either be a percentage of the customer's bill, typically between four and five percent, or a flat monthly charge, typically less than \$1. I must, therefore, conclude that when the universal service charge is a percentage of the customer's bill and is separately stated on the consumer's bill, it does not constitute "gross charges" for purposes of calculating the consumer utility tax imposed under § 58.1-3812. When the universal service charge is a flat monthly charge, however, I must conclude that it meets the definition of "gross charges" for purposes of calculating the consumer utility tax imposed under § 58.1-3812.

¹Section 58.1-3812(F).

²See, e.g., 1993 Op. Va. Att'y Gen. 237 (concluding that cellular telephone customer of cellular telephone company which does not provide enhanced 911 emergency telephone service system is not "consumer" for purposes of § 58.1-3813 special tax on telephone consumers of such service).

³See Roanoke County, Va., Code ch. 21, art. I, § 21-3(a1) (1999) (codifying Ordinance No. 072799-4, adopted July 27, 1999).

⁴Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending Communications Act of 1934, 47 U.S.C. ch. 5, § 151 *et seq.* (1994)).

⁵See *In re Federal-State Joint Board on Universal Service*, No. 96-45, FCC Release No. 97-157, 1997 FCC LEXIS 5786, at *3 (May 7, 1997); see also 47 U.S.C.A. § 254 (West Supp. 2000) (authorizing Federal Communications Commission and states to implement and ensure delivery of such services).

⁶47 U.S.C.A. § 254(f).

⁷Common Carr. Bur. – Enf. Div., Fed. Comm. Comm'n, *The FCC's Universal Service Support Mechanisms* (July 1998) (retrieved July 12, 2000, from http://www.fcc.gov/Bureaus/Common_Carrier/Factsheets/univers_old.html).

⁸See, e.g., *Those FCC Charges You See on Your Telephone Bills* ¶ A(1)-(2), MA: 2000-2001 Cape & Islands Self-Reliance Corporation (retrieved July 14, 2000, from <http://www.reliance.org/Kitchentable/fcc.htm>).

⁹See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

¹⁰See *County of Henrico v. Mgt. Rec., Inc.*, 221 Va. 1004, 277 S.E.2d 163 (1981); *City of Richmond v. Valentine*, 203 Va. 642, 125 S.E.2d 854 (1962); 1993 Op. Va. Att'y Gen., *supra* note 2, at 239.

¹¹See 1993 Op. Va. Att'y Gen., *supra* note 2, at 240 n.4.

¹²See *Commonwealth v. General Electric Company*, 236 Va. 54, 372 S.E.2d 599 (1988); 1997 Op. Va. Att'y Gen. 186, 187, and opinions cited at 188 n.4.

¹³See *Commonwealth v. Arlington County Bd.*, 217 Va. 558, 232 S.E.2d 30 (1977); 1997 Op. Va. Att'y Gen., *supra*, at 187.

¹⁴The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory. See *Andrews v. Shepherd*, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) ("shall" is word of command, used in connection with mandate); see also *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) ("shall" generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att'y Gen.: 1998 at 56, 58; 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; *id.* at 127, 129, and opinions cited therein.

¹⁵Section 58.1-3812(J)(1).

¹⁶*Barr v. Town & Country Properties*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)).

¹⁷*Adkins v. Com.*, 27 Va. App. 166, 169, 497 S.E.2d 896, 897 (1998) (quoting *Birdsong Peanut Co. v. Cowling*, 8 Va. App. 274, 277, 381 S.E.2d 24, 26 (1989) (quoting *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985))).