

By Mr. Vallee of Franklin, petition of James E. Vallee relative to the taxation of certain tangible property and services purchased through mobile telecommunications. Taxation.

The Commonwealth of Massachusetts

In the Year Two Thousand and Two.

AN ACT RELATIVE TO MOBILE TELECOMMUNICATIONS SOURCING.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 1 of Chapter 64H of the General Laws of
2 Massachusetts is amended to read as follows:

3 **CHAPTER 64H.**
4 **TAX ON RETAIL SALES OF CERTAIN**
5 **TANGIBLE PERSONAL PROPERTY.**

6 Chapter 64H: Section 1. Definitions.

7 Section 1. As used in this chapter the following words shall
8 have the following meanings:

9 "Business", any activity engaged in by any person or caused to
10 be engaged in by him with the object of gain, benefit or advan-
11 tage, either direct or indirect.

12 "Commissioner", the commissioner of revenue.

13 "Engaged in business", commencing, conducting or continuing
14 in business, as well as liquidating a business when the liquidator
15 thereof holds himself out to the public as conducting such a
16 business.

17 "Engaged in business in the commonwealth", having a business
18 location in the commonwealth; regularly or systematically solici-
19 ting orders for the sale of services to be performed within the
20 commonwealth or for the sale of tangible personal property for
21 delivery to destinations in the commonwealth; otherwise
22 exploiting the retail sales market in the commonwealth through

23 any means whatsoever, including, but not limited to, salesmen,
24 solicitors or representatives in the commonwealth, catalogs or
25 other solicitation materials sent through the mails or otherwise,
26 billboards, advertising or solicitations in newspapers, magazines,
27 radio or television broadcasts, computer networks or in any other
28 communications medium; or regularly engaged in the delivery of
29 property or the performance of services in the commonwealth. A
30 person shall be considered to have a business location in the com-
31 monwealth only if such person (i) owns or leases real property
32 within the commonwealth; (ii) has one or more employees located
33 in the commonwealth; (iii) regularly maintains a stock of tangible
34 personal property in the commonwealth for sale in the ordinary
35 course of business; or (iv) regularly leases out tangible personal
36 property for use in the commonwealth. For the purposes of this
37 paragraph, property on consignment in the hands of a consignee
38 and offered for sale by the consignee on his own account shall not
39 be considered as stock maintained by the consignor; a person
40 having a business location in the commonwealth solely by reason
41 of regularly leasing out tangible personal property shall be consid-
42 ered to have a business location in the commonwealth only with
43 respect to such leased property; and an employee shall be consid-
44 ered to be located in the commonwealth if (a) his service is per-
45 formed entirely within the commonwealth or (b) his service is
46 performed both within and without the commonwealth but in the
47 performance of his services he regularly commences his activities
48 at, and returns to, a place within the commonwealth. "Within the
49 commonwealth" means within the exterior limits of the common-
50 wealth of Massachusetts, and includes all territory within said
51 limits owned by, or leased or ceded to, the United States of
52 America.

53 "Gross receipts", the total sales price received by a vendor as a
54 consideration for retail sales.

55 "Home service provider", means the facilities-based carrier or
56 re-seller with which the customer contracts for the provision of
57 mobile telecommunications service.

58 "Mobile telecommunications service", commercial mobile
59 radio service, as defined in section 20.3 of title 47 of the Code of
60 Federal Regulations as in effect on June 1, 1999.

61 "Person", an individual, partnership, trust or association, with
62 or without transferable shares, joint-stock company, corporation,

63 society, club, organization, institution, estate, receiver, trustee,
64 assignee, or referee, and any other person acting in a fiduciary or
65 representative capacity, whether appointed by a court or other-
66 wise, and any combination of individuals acting as a unit.

67 “Place of primary use”, the street address representative of
68 where the customer’s use of the mobile telecommunications
69 service primarily occurs, which must be the residential street
70 address or the primary business address of the customer and
71 within the licensed service area of the home service provider.

72 “Purchaser”, a person who purchases tangible personal property
73 or services the receipts from the retail sale of which are taxable
74 under this chapter and includes a buyer, vendee, lessee, licensee,
75 or grantee.

76 “Retailer”, includes (i) every person engaged in the business of
77 making sales at retail; (ii) every person engaged in the making of
78 retail sales at auction of tangible personal property whether owned
79 by such person or others; (iii) every person engaged in the busi-
80 ness of making sales for storage, use or other consumption, or in
81 the business of making sales at auction of tangible personal prop-
82 erty whether owned by such person or others for storage, use or
83 other consumption; (iv) every salesman, representative, peddler or
84 canvasser who, in the opinion of the commissioner, it is necessary
85 to regard for the efficient administration of this chapter as the
86 agent of the dealer, distributor, supervisor or employer under
87 whom he operates or from whom he obtains the tangible personal
88 property sold by him, in which case the commissioner may treat
89 and regard such agent as the retailer jointly responsible with his
90 principal, employer or supervisor for the collection and payment
91 of the tax imposed by this chapter; and (v) the commonwealth, or
92 any political subdivision thereof, or their respective agencies
93 when such entity is engaged in making sales at retail of a kind
94 ordinarily made by private persons.

95 “Retail establishment”, any premises in which the business of
96 selling services or tangible personal property is conducted, or, in
97 or from which any retail sales are made.

98 “Sale” and “selling” include (i) any transfer of title or posses-
99 sion, or both, exchange, barter, lease, rental, conditional or other-
100 wise, of tangible personal property or the performance of services
101 for a consideration, in any manner or by any means whatsoever;
102 (ii) the producing, fabricating, processing, printing or imprinting

103 of tangible personal property for a consideration for consumers
104 who furnish either directly or indirectly the materials used in the
105 producing, fabricating, processing, printing or imprinting; (iii) the
106 furnishing and distributing of tangible personal property or serv-
107 ices for a consideration by social clubs and fraternal organizations
108 to their members or others; (iv) a transaction whereby the posses-
109 sion of property is transferred but the seller retains the title as
110 security for the payment of the price; (v) a transfer for a consider-
111 ation of the title or possession of tangible personal property which
112 has been produced, fabricated or printed to the special order of the
113 customer, or of any publication; (vi) the furnishing of information
114 by printed, mimeographed or multigraphed matter, or by dupli-
115 cating written or printed matter in any other manner, including the
116 services of collecting, compiling or analyzing information of any
117 kind or nature and furnishing reports thereof to other persons, but
118 excluding the furnishing of information which is personal or indi-
119 vidual in nature and which is not or may not be substantially
120 incorporated in reports furnished to other persons, and excluding
121 the services of advertising or other agents, or other persons acting
122 in a representative capacity, and information services used by
123 newspapers, radio broadcasters and television broadcasters in the
124 collection and dissemination of news and excluding the furnishing
125 of information by photocopy or other similar means by not for
126 profit libraries which are recognized as exempt from taxation
127 under ss501(C)(3) of the Federal Internal Revenue Code; (vii) the
128 performance of services for a consideration, excluding (a) services
129 performed by an employee for his employer whether compensated
130 by salary, commission, or otherwise, (b) services performed by a
131 general partner for his partnership and compensated by the receipt
132 of distributive shares of income or loss from the partnership; and
133 (c) the performance of services for which the provider is compen-
134 sated by means of an honorarium, or fee paid to any person or
135 entity registered under 15 USC 80b-3 or 15 USC 78q-1 for serv-
136 ices the performance of which require such registration, for serv-
137 ices related thereto or for trust, custody, and related cash
138 management and securities services of a trust company as defined
139 in chapter one hundred and seventy-two.

140 "Sale at retail" or "retail sale", a sale of services or tangible
141 personal property or both for any purpose other than resale in the

142 regular course of business. The delivery in the commonwealth of
143 tangible personal property by an owner or former owner thereof,
144 or by a factor, or agent of such owner, former owner or factor, if
145 the delivery is to a consumer or to a person for re-delivery to a
146 consumer, pursuant to a retail sale made by a retailer not engaged
147 in business in the commonwealth, is a retail sale in the common-
148 wealth by the person making the delivery. He shall include the
149 retail selling price of the property in his gross receipts. The term
150 "sale at retail" or "retail sale" shall not include (a) sales of tickets
151 for admissions to places of amusement and sports; (b) sales of
152 transportation services; (c) professional, insurance, or personal
153 service transactions which involve no sale or which involve sales
154 as inconsequential elements for which no separate charges are
155 made; or (d) any sale in which the only transaction in the com-
156 monwealth is the mere execution of the contract of sale and in
157 which the tangible personal property sold is not in the common-
158 wealth at the time of such execution; provided, however, that
159 nothing contained in this definition shall be construed to be an
160 exemption from the tax imposed under chapter sixty-four I. In the
161 case of interstate telecommunication services other than mobile
162 telecommunications services, the sale of such services shall be
163 deemed a sale within the commonwealth if the telecommunication
164 is either originated or received at a location in the commonwealth
165 and the services are either paid for in the commonwealth or
166 charged to a service address located in the commonwealth. In the
167 case of interstate and intrastate mobile telecommunications serv-
168 ices, the sale of such services shall be deemed to be provided by
169 the customer's home service provider and shall be considered a
170 sale within the commonwealth if the customer's place of primary
171 use is located in the commonwealth. To prevent actual multi-state
172 taxation of any sale of interstate telecommunication service sub-
173 ject to taxation under this chapter, any taxpayer, upon proof that
174 the taxpayer has paid a tax in another state on such sale, shall be
175 allowed a credit against the tax imposed by this chapter to the
176 extent of the amount of such tax properly due and paid in such
177 other state. However, such credit shall not exceed the tax imposed
178 by this chapter. For purposes of collection of the tax imposed by
179 this chapter on such telecommunications services, the sale of such
180 services shall be deemed to occur on the date that the bill for such

181 services is first issued by the vendor in the regular course of its
182 business.

183 “Sales price”, the total amount paid by a purchaser to a vendor
184 as consideration for a retail sale, valued in money or otherwise. In
185 determining the sales price, the following shall apply: (a) no
186 deduction shall be taken on account of (i) the cost of property
187 sold; (ii) the cost of materials used, labor or service cost, interest
188 charges, losses or other expenses; (iii) the cost of transportation of
189 the property prior to its sale at retail; (b) there shall be included (i)
190 any amount paid for any services that are a part of the sale; and
191 (ii) any amount for which credit is given to the purchaser by the
192 vendor; and (c) there shall be excluded (i) cash discounts allowed
193 and taken on sales; (ii) the amount charged for property returned
194 by purchasers to vendors upon rescission of contracts of sale when
195 the entire amounts charged therefor, less the vendors’ established
196 handling fees, if any, for such return of property, are refunded
197 either in cash or credit, and when the property is returned within
198 ninety days from the date of sale, and the entire sales tax paid is
199 returned to the purchaser; provided, however, that where a motor
200 vehicle is returned pursuant to a rescission of contract such motor
201 vehicle must be returned within one hundred and eighty days of
202 the date of sale; (iii) the amount charged for labor or services ren-
203 dered in installing or applying the property sold; (iv) the amount
204 of reimbursement of tax paid by the purchaser to the vendor under
205 this chapter; (v) transportation charges separately stated, if the
206 transportation occurs after the sale of the property is made; and
207 (vi) the amount of the manufacturers’ excise tax levied upon
208 motor vehicles under section 4061(a) of the Internal Revenue
209 Code of 1954 of the United States, as amended.

210 “Services”, a commodity consisting of activities engaged in by
211 a person for another person for a consideration; provided, how-
212 ever, that the term “services” shall not include activities per-
213 formed by a person who is not in a regular trade or business
214 offering his services to the public, and shall not include services
215 rendered to a member of an affiliated group, as defined by section
216 1504 of the Internal Revenue Code, by another member of the
217 same affiliated group that does not sell to the public the type of
218 service provided to its affiliate; and provided, further, that the
219 term services shall be limited to the following item: telecommuni-

220 cations services. Nothing herein shall exempt from tax sales of
221 tangible personal property subject to tax under this chapter.

222 "Tangible personal property", personal property of any nature
223 consisting of any produce, goods, wares, merchandise and com-
224 modities whatsoever, brought into, produced, manufactured or
225 being within the commonwealth, but shall not include rights and
226 credits, insurance policies, bills of exchange, stocks and bonds
227 and similar evidences of indebtedness or ownership. For purposes
228 of this chapter, "tangible personal property" shall also include gas,
229 electricity and steam.

230 "Tax", the excise tax imposed by this chapter.

231 "Taxpayer", any person required to make returns or pay the tax
232 imposed by this chapter.

233 "Use of a service", enjoyment of the benefit of a service.

234 "Vendor", a retailer or other person selling tangible personal
235 property or services of a kind the gross receipts from the retail
236 sale of which are required to be included in the measure of the tax
237 imposed by this chapter.

1 SECTION 2. Chapter 64H of the General Laws of Massachu-
2 setts is amended by adding the following new section 34, to read
3 as follows:

4 **CHAPTER 64H.**
5 **TAX ON RETAIL SALES OF CERTAIN**
6 **TANGIBLE PERSONAL PROPERTY.**

7 Chapter 64H: Section 34. Mobile Telecommunications Services.
8 Section 34.

9 (a) The federal Mobile Telecommunications Sourcing Act (4
10 U.S.C. section 116 -126) created a uniform methodology for
11 sourcing of mobile telecommunications services subject to state
12 and local taxes, fees, and charges. It is the intent of the General
13 Court that laws of commonwealth conform to the provisions of
14 this federal act.

15 (b) All definitions and provisions of the Mobile Telecommuni-
16 cations Sourcing Act (P.L. 106-252; 4 U.S.C. §116 et seq.), and
17 amendments thereto, are hereby adopted and incorporated into this
18 Chapter by reference.

1 SECTION 3. If a court of competent jurisdiction enters a final
2 judgment on the merits that is based on Federal law, is no longer
3 subject to appeal, and substantially limits or impairs the essential
4 elements of sections 116 through 126 of Title 4 U.S.C., then all
5 provisions and applications of this act are declared to be invalid
6 and have no legal effect as of the date of entry of such judgment.

1 SECTION 4. This Act shall apply to customer bills issued after
2 August 1, 2002.