

**Revenue Information Bulletin  
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Sales and Use Tax  
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**Preliminary Injunction Prohibits Louisiana from Enforcing  
The Provisions of Wireless Phone Exclusion**

On July 24, 2002, the Nineteenth Judicial District Court, Parish of East Baton Rouge, granted an injunction prohibiting the application and enforcement of Act 85 of the 2002 Regular Legislative Session. The Police Jury Association of Louisiana and the Louisiana Municipal Association requested the injunction in connection with a suit they filed challenging the constitutionality of the Act. Act 85 provides a state and local sales and use tax exclusion for transactions involving the transfer of cellular, PCS, or wireless phones and related devices that are given away or sold at below cost along with the purchase of a cellular, PCS, or wireless telephone service contracts.

This issue was litigated in *Calcasieu Parish School Board v. Mercury Cellular Telephone Company*, 2000-0318 (La. App. 3 Cir. 12/12/00), 773 So. 2d 914, *writ denied*, 2001-0126 (La. 3/16/01), 787 So. 2d 314. In that case, Mercury gave away or sold at below cost cellular, PCS, or wireless phones and accessories when customers purchased cellular, PCS, or wireless service contracts. The court ruled that Mercury used these items to market their services and was liable for use tax on the company's cost of the equipment provided to customers.

Section 1 of Act 85, which is intended to explain and clarify the original intent of the law notwithstanding the contrary interpretation given in the *Mercury Cellular* case, defines "sales price" as the amount received from the customer and does not include commissions, rebates, or fees received from other sources. It defines "use" to exclude cellular, PCS, or wireless phones or accessories given or sold to customers below cost in connection with the purchase of a service contract. This section applies to taxable periods that ended before January 1, 2001.

Effective January 1, 2002, Act 85 defines "sales price" as the greater of the actual amount received from customers or 25 percent of the cost of the phones. The Act also contains a limited amnesty provision that reduces the existing liabilities of cellular, PCS, or wireless dealers by 50 percent.

The Police Jury Association and the Louisiana Municipal Association contend that Act 85 is unconstitutional because:

- It retroactively eliminates sales or use tax owed by cellular, PCS, or wireless dealers in violation of Article VII, Section 15 of the Louisiana Constitution. Article VII, Section 15 provides that the legislature may not release or extinguish any indebtedness, liability, or obligation of a corporation or individual to the state.
- It changes the prescriptive period for collecting the taxes in dispute from three years to 18 months in violation of Article VII, Section 16, of the Louisiana Constitution. Article VII, Section 16 provides for a prescriptive period of three years for all taxes except for real property taxes.

- It discourages local authorities from initiating a legal challenge against the Act by including provisions that are more stringent against any authority that does so.

Because of the injunction, cellular, PCS, or wireless service providers and independent cellular, PCS, or wireless phone retailers should file their Louisiana state sales tax returns according to the law that existed prior to Act 85. These dealers may then submit refund claims for the state sales taxes paid that exceed the amounts that would have been due under Act 85. The Department of Revenue will begin processing refund claims only if Act 85 is ultimately declared constitutional in a final, nonappealable decision issued by the highest court to hear the matter. Cellular, PCS, or wireless dealers are encouraged to contact their parish tax authorities for information on how to file the local sales tax returns in light of the court injunction. Local ordinances may provide alternative procedures for resolving matters in dispute.

The Department of Revenue's filing procedure for cellular, PCS, or wireless telephone dealers covered by Act 85 is as follows:

**Cellular, PCS, or Wireless Telephone Equipment Acquired Directly from Cellular, PCS, or Wireless Service Providers**

Cellular, PCS, or wireless telephone service providers must charge three percent state sales tax on telecommunications services. However, the state sales tax rate on the sale of tangible personal property, including cellular, PCS, or wireless telephones, is four percent. When cellular, PCS, or wireless telephone service providers combine the sale of four percent taxable wireless telephone hardware with the sale of three percent taxable cellular, PCS, or wireless telephone services into "package" deals for their customers, a special method must be used by wireless telephone service providers to pay, collect, and remit the state sales and use tax on transactions if all of the following conditions are present:

- The cellular, PCS, or wireless telephone service provider sells or otherwise transfers ownership of the cellular, PCS, or wireless telephone to a customer;
- The telephone is transferred to a customer without specific charge for the phone, or at a price below the wireless telephone service provider's acquisition "cost price" of the telephone; and,
- As a condition of ownership of the phone without a specific charge, or at a sales price below the wireless telephone service provider's cost of the property, the customer must agree to subscribe to cellular, PCS, or wireless services for a minimum duration of time, as specified in a contract between the cellular, PCS, or wireless telephone service provider and the customer.

The cellular, PCS, or wireless telephone service provider must collect three percent tax on the telecommunications service and the below-market sale of the wireless phone. In addition, the cellular, PCS, or wireless telephone service provider must pay a one percent tax on the acquisition cost of the wireless telephone equipment that is furnished to the customer at below-market prices. If a cellular, PCS, or wireless telephone service provider remits advance sales taxes to its vendors of wireless equipment at rates greater than one percent, the excess tax paid can be claimed on the wireless service provider's sales tax return as an advance sales tax credit.

For local sales and use taxes, the service provider must pay use tax on the cost of the equipment furnished to the customer at below-market prices. Service providers are encouraged to contact their local authorities for details.

### **Equipment Acquired from Independent Retailers**

Independent retail dealers that sell cellular, PCS, or wireless telephones to customers at reduced prices, made possible because a wireless telephone service provider has contracted with the retail dealer to pay a portion of the sales price, must collect four percent state sales tax on the total selling price of cellular, PCS, or wireless equipment, including both the amounts paid by customers and the wireless telephone service provider. State sales tax remitted to suppliers on the purchase of these cellular, PCS, or wireless phones can be claimed for advance tax credit.

Independent retail dealers of cellular, PCS, or wireless phones are advised to contact the central sales tax collectors of their parishes for instructions on filing local sales tax returns, as parish and municipal ordinances may differ from state laws on this matter.

For additional information, please contact the Department of Revenue, Taxpayer Services Division, Sales Tax Section at (225) 219-7356.

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Secretary