

Cite as Det. No. 14-0307R, 38 WTD 29 (2019)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Review of a) DETERMINATION
Written Ruling Issued to)
)
 No. 14-0307R
)
)
... Registration No. . . .
)

47 USC SEC. 151 NOTE, § 1105(5) (ITFA): INTERNET SERVICES – EXEMPTION. ITFA exempts basic transmissions of email from taxation; ITFA does not apply to preempt Washington's taxation of Taxpayer's email management/pooling services.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

Bauer, A.L.J. A provider of cloud-based services [asserts] . . . that its services . . . constitute nontaxable "internet access" under the [Internet] Tax Freedom Act (ITFA). [In Det. No. 14-0307, the Department held to the contrary. On reconsideration, the Taxpayer] argues that the Department should instead follow the broader interpretation of "internet access" by the [Out-of-State 1] and [Out-of-State 2] tax authorities that rendered rulings to the contrary. Taxpayer's petition is denied.¹

ISSUE

Did Det. No. 14-030[7] . . . [correctly] hold that the provider's digital communications services to businesses [are not exempt from Washington taxes as] . . . "internet access" [activities] under the 2007 amendment to ITFA, 47 USC 151 note, § 1105(5)(E)?

FINDINGS OF FACT

. . . (Taxpayer) provides various cloud-based services that include Notification/Broadcast Fax, Integrated Desktop Messaging, Notification Emails, and Production Emails.

[Notification/Broadcast Fax] is Taxpayer's cloud-based solution that automates the creation and delivery of outbound high-volume messages ("faxes") to a large number of recipients. Taxpayer's customers provide Taxpayer with a single message file, together with other text files. Taxpayer merges the files, thereby personalizing the messages, and delivers them to the

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

recipients. Taxpayer delivers faxes using communications channels provided by third party telecommunications carriers.

Integrated Desktop Messaging (IDM) enables a customer's employees (users) to receive and send digital fax documents (e-faxes) as electronic messages directly from their existing email accounts via their email application. Taxpayer obtains use of fax numbers from third party telecommunications carriers.

Notification/Broadcast Email is a cloud-based notifications solution that automates the creation and delivery of customers' customized outbound high volume emails.

Production Email is a cloud-based solution that automates the creation and delivery of customers' customized outbound emails. Production Email allows customers to provide a single message file in the form of a template with accompanying unstructured text files that contain the custom and personalized data for each recipient. Production Email populates the template with personalized data for each recipient as specified by the business rules and output needs provided by the customer.

Customers use their own telecommunication connectivity to submit data to Taxpayer's network. Customers may store files and business rules on Taxpayer's servers.]

Det. No. 14-0307 held that Taxpayer's digital services were not exempt "internet access" under 47 USC Sec. 151 note, § 1105(5) (ITFA).

Taxpayer, arguing that ITFA preempts taxation of its digital services, petitioned for reconsideration of Det. No. 14-0307 on December 8, 2014. Taxpayer argues that both [Out-of-State 2] and [Out-of-State 1] consider Taxpayer's services to be exempt under ITFA, and urges us to reconsider our position in light of the rationales used by those states.

ANALYSIS

As originally argued by Taxpayer, and as therefore noted in [Det.] No. 14-0307, the 2007 amendment to ITFA expanded the definition of "internet access," and thus added subsections (C) and (D) to 47 USC 151 note, § 1105(5):

(C) [internet access] includes services that are incidental to the provision of the service described in subparagraph (A) [that enables users to connect to the internet to access content, information, or other services offered over the Internet] when furnished to users as part of such service, such as a home page, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity . . .

(E) [internet access] includes a homepage, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips,

and personal electronic storage capacity, that are provided independently or not packaged with Internet access.

(Emphasis added.) In its original appeal, Taxpayer claimed that ITFA preempted the state from taxing its digital services because Taxpayer's service was inherently an "electronic mail service that provided both electronic mail and storage capacity, and that these were both exempt under subparagraph (E)."

Det. No. 14-0307 held that Taxpayer was not providing electronic mail, but rather an "email marketing service," and that Taxpayer's services to its customers also did not include the provision of "personal storage capacity" because such storage could not be purchased by individual consumers for their own personal use.

In its Petition for Reconsideration, Taxpayer now argues that Det. No. 14-0307 erred by narrowly focusing on 47 U.S.C. 151 note, §1105(5)(E) and ignoring the following other subparagraphs in 47 U.S.C. 151 note, §1105. DEFINITIONS:

(4) INTERNET. – The term "Internet" means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected worldwide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

(5) INTERNET ACCESS. – The term "Internet Access" –

(A) means a service that enables users to connect to the Internet to access content, information, or other services over the Internet;

(B) includes the purchase, use or sale of telecommunications by a provider of a service described in subparagraph (A) to the extent such telecommunications are purchases, used or sold –

(i) to provide such service; or

(ii) to otherwise enable users to access content, information or other services offered over the Internet.

Taxpayer argues that to narrowly focus on §1105(5)(E) circumvents the legislative intent of Congress in enacting and extending the ITFA. [The original determination holds] that the 2007 amendment that broadened the definition of "internet access" in 47 U.S.C. 151 note, §1105(5)(E), does not provide Taxpayer an exemption from Washington's tax under ITFA. Taxpayer argues the original [determination's] analysis is flawed because it focuses only on one subparagraph, and thus distorts the full scope of all of §1105 and the legislative intent of Congress. Further, Taxpayer argues that Det. No. 14-0307:

1. Did not give adequate consideration to the pertinent definition of Internet and Internet Access;
2. Attempted to define – by its own definition – the term "electronic mail";
3. Attempted to limit the type of content electronic mail should contain; and

4. Attempted to define the term “personal electronic storage capacity” to apply only to individuals, to the exclusion of businesses, although that term is not defined under the ITFA and businesses are one of the largest users of the Internet. It is Taxpayer’s opinion that Congress did not intend to discriminate against businesses.

We disagree. The term “electronic mail” is not defined in ITFA or in federal case law. BLACK’S LAW DICTIONARY 634 (10th ed. 2009) defines an e-mail (also termed “electronic mail”) as “a communication exchanged between people by computer, through either a local area network or the Internet.” While the legislative history of the expansion of the definition of “internet access” is somewhat sparse, the Congressional Record in 2007 (relating to the amendment that expanded the definition of “internet access” under ITFA) provides insight suggesting that what Congress was targeting in terms of email was the normal usage of email by the everyday person (including businesses), not the type of messaging/notifications services at issue here:

Can you imagine, can anyone out there imagine that if every time you sent an e-mail there was a tax that went on your credit card or something for using it, or every time you went on a Web site, there was a tax? That's absolutely unconscionable. Particularly today, when we realize how much of the economic growth we have experienced in this decade has come from the Internet and how much distribution of knowledge there has been and how it is a great equalizer that so many people at so many incomes and in so many locations are able to access knowledge that was previously unavailable. The Internet has been a great engine for economic growth and for the distribution of knowledge. We don't want to slow down that engine by taxing it.

Congressional Record, 110th Congress, 1st Session, Issue: Vol. 153, No. 166 — Daily Edition [Page H12163].

Email services such as . . . provide people with a way to send emails without charge. . . . , on the other hand, is an email service that provides email for a fee, and ITFA would in fact preempt state taxation of that service because it is the mere provision of an email service.

What Taxpayer provides, however, is a service beyond the mere provision of a standard email account. Instead of providing its customers with a way to send emails on their own, Production Email allows customers to provide a single message file in the form of a template with accompanying unstructured text files that contain the custom and personalized data for each recipient. Taxpayer’s software is able to take that single message file and data and convert it into a message for all of its customers’ intended recipients. That goes beyond simple email service and is more analogous to a mailing bureau service. Taxpayer’s digital notification and broadcast services are even further removed from “email,” because these services really take data from Taxpayer’s customers and customize that information into the format best suited to a particular customer’s clients, whether it is SMS text, fax, or voice.

In *j2 Global Communications Inc. v. City of Los Angeles*, 218 Cal.App.4th 328, 329,33-335, 159 Cal.Rptr.3d 742 (2013), a California court provided the following analysis on this issue:

. . . is a company that provides “online fax, virtual phone systems, hosted email, email marketing, online backup and bundled suites of these services” to businesses and individuals worldwide. One of its core services is eFax, which “enable[s] users to receive faxes into their email inboxes and to send faxes via the Internet” from their computers. To provide this service, j2 purchases telephone numbers known as Direct Inward Dial (DIDs) from third-party telecommunication providers. It assigns one or more DID numbers (local or toll-free) to each customer, from which the customer may receive faxes or voicemail messages in the customer's email. . . . remains the customer of record for all of those DIDs, and derives “a substantial portion” of its revenues from its DID-based services.

* * *

Under [ITFA], Internet access “includes a homepage, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity, that are provided independently or not packaged with Internet access.” (47 U.S.C.A. § 151, note, § 1105, subd. (5)(E).) j2 argues that its services meet this definition because it “provides a ‘homepage’ and ‘electronic mail’ to its users,” since “eFax users receive faxes via email and access Web-based email and account interfaces via each service’s home page.” But sending an email to an eFax customer through that customer’s independently-obtained email service, and allowing customers to access their accounts through eFax’s home page do not constitute providing a homepage or electronic mail service to the customers. If it did, virtually all business conducted over the Internet would be exempt from taxation. We decline to interpret subdivision (5)(E) in such a way as to render ITFA’s definition of Internet access essentially meaningless.

In interpreting the newly-added subsection (E), the California Appeals Court determined that expanding what is “electronic mail” beyond its common understanding of “independently-obtained email service” such as . . . or . . . would risk exempting almost any service over the internet from taxation.

Taxpayer’s customers are not purchasing an email service, but an email management/pooling service that will streamline a mailing process that would otherwise take significant time and resources to perform on its own. Thus, from customers’ perspectives, they are not getting an email service such as . . . or . . . , but something different.

Taxpayer points to rulings from both [Out-of-state 2] and [Out-of-State 1] that it argues are persuasive. In a private letter ruling to Taxpayer, the [Out-of-State 2] Department of Revenue stated with respect to its Production Email:

The essence of this service is very similar to the ubiquitous email services of . . . and many other web-based providers. Users of such systems send data, including documents, image files, and wave files, to recipients via the Internet. If a customer were to customize each email and sent it individually to each desired recipient, any charges for those

communications would not be subject to tax. Therefore, we conclude that company's charges for Production Email are not subject to tax.

The [Out-of-State 2] ruling directly addresses Taxpayer's facts, but mistakenly broadens the definition of "electronic mail" to include services that assist with email management, such as Production Email. The ruling states that "[i]f a customer were to customize each email and sent it individually to each desired recipient, any charges for those communications would not be subject to tax," and therefore rules that the charges for the services that customize those mails for the customer are email services. The facts of the hypothetical that the [Out-of-State 2] ruling poses, however, are not the same as what Production Email provides, which is a service that performs that individual customization for them. It is not simply electronic mail, which one might commonly think of as . . . or . . . , but a layer on top of that service. Therefore, we do not adopt the rationale of the [Out-of-State 2] ruling.

As to the [Out-of-State 1] informational statements Taxpayer has provided, the first, dated May 2, 2008 -- TSB-M-08(4)C,(2)S -- provides that telecommunications services purchased, used or sold by ISPs to provide Internet access would continue to be subject to [Out-of-State 1's] excise tax until June 30, 2008. The second, dated August 29, 2008 -- TSB-M-08(4.1)C -- reverses the May 2, 2008, advisory, stating that such services would be considered to be preempted by ITFA as of November 1, 2005, and not August 29, 2008. The second advisory explained that the broadened definition of "internet access" includes the independent provision of email, homepage, and instant messaging. Such language merely reiterates the new, broader definition under ITFA of "internet access." Neither informational statement, however, directly addresses whether digital services such as Taxpayer's fall within the new broader definition. Because neither ruling is on point, they are not persuasive in changing our view.

For all the reasons stated above, we hold that because ITFA was intended to exempt only basic transmissions of email from taxation so that ordinary people could access the Internet and email each other without the risk of being taxed on those communications, ITFA does not apply to preempt [Washington's taxation of] Taxpayer's services. We therefore deny Taxpayer's petition for reconsideration of Det. No. 14-0307.

DECISION AND DISPOSITION

Taxpayer's petition for reconsideration is denied.

Dated this 5th day of June 2015.