

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
1 STOP COMMUNICATION, LLC, ) OTA NO. 18083559  
TOTAL PCS SOLUTIONS, INC., ) 18083554  
 )  
 )  
APPELLANT. )  
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TRANSCRIPT OF PROCEEDINGS

State of California

Wednesday, April 20, 2022

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Proceedings, taken  
at 400 R Street, Sacramento, California,  
95811, commencing at 9:33 a.m. and  
concluding at 10:23 on Wednesday,  
April 20, 2022, reported by Ernalyn M. Alonzo,  
Hearing Reporter, in and for the State of  
California.

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APPEARANCES:

Panel Lead: ALJ MICHAEL GEARY

Panel Members: ALJ ANDREW KWEE  
ALJ JOSHUA ALDRICH

For the Appellant: MITCHELL STRADFORD  
JAMES DUMLER

For the Respondent: STATE OF CALIFORNIA  
DEPARTMENT OF TAX AND  
FEE ADMINISTRATION  
  
AMANDA JACOBS  
SCOTT CLAREMON  
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-6 were received at page 8.)

(Department's Exhibits A-Y were received at page 8.)

P R E S E N T A T I O N

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1 Sacramento, California; Wednesday, April 20, 2022

2 9:33 a.m.

3  
4 JUDGE GEARY: Welcome to the Office of Tax  
5 Appeals. We are here for the hearing in the Appeal of  
6 Total PCS Solutions, Inc., which is Office of Tax Appeals  
7 Case Number or OTA Case Number 18083554, and the Appeal of  
8 1 Stop communications, LLC, DBA 1 Stop Wireless, which is  
9 OTA Case Number 18083559. Those cases have been  
10 consolidated for this hearing. Today is Wednesday  
11 April 20th, 2022, and the time is approximately 9:33 a.m.

12 This hearing is being held in Sacramento,  
13 California. Today's hearing is being heard by a panel of  
14 three Administrative Law Judges. My name is Michael  
15 Geary, and I will take the lead in conducting the hearing.  
16 I'm joined on the panel by Judges Andrew Kwee, and Josh  
17 Aldrich. After the hearing the three of us will discuss  
18 the arguments and the evidence. Each of us will have an  
19 equal voice in those discussions, and at least two of us  
20 must agree on the issues presented.

21 Any of us on the panel may ask questions and  
22 otherwise participate in today's hearing to ensure that we  
23 have all the information needed to correctly decide this  
24 appeal. The Office of Tax Appeals is not a court. It is  
25 an administrative tribunal staffed by tax experts and is

1 completely independent of the State's tax agencies.

2 Now, let's have the parties identify themselves  
3 by stating their names and who they represent, beginning  
4 with the Appellant.

5 MR. STRADFORD: My name is Mitchell Stradford,  
6 and I'm representing Total PCS Solutions, Incorporated,  
7 and 1 Stop Communications, LLC.

8 MR. DUMLER: I'm James Dumler on behalf of  
9 Appellant as well.

10 JUDGE GEARY: Thank you. And may I ask the  
11 representatives of California Department of Tax and Fee  
12 administration to identify themselves.

13 MS. JACOBS: My name is Amanda Jacobs. I'm Tax  
14 Counsel with the California Department of Tax and Fee  
15 administration.

16 MR. CLAREMON: I'm Scott Claremon with the CDTFA.

17 MR. PARKER: I'm Jason Parker with CDTFA.

18 JUDGE GEARY: Thank you everybody. It's my  
19 understanding that there will be no witnesses testifying  
20 today. Is that correct, Mr. Stradford?

21 MR. STRADFORD: That's correct.

22 JUDGE GEARY: Am I correct, Ms. Jacobs, the  
23 Department has no witnesses?

24 MS. JACOBS: Correct.

25 JUDGE GEARY: Thank you.

1           The exhibits marked thus far for identification  
2           in this appeal consist of Appellant's exhibits marked 1  
3           through 6 for identification consisting of approximately  
4           159 pages and Respondent's Exhibits marked A through Y for  
5           identification and consisting of approximately 678 pages.  
6           All exhibits have been previously disclosed and discussed.  
7           The parties provided copies to each other and OTA, and OTA  
8           staff incorporated all proposed exhibits into an  
9           electronic hearing binder, which should be in the  
10          possession of the parties and my colleagues up here on the  
11          dais.

12                 Mr. Stradford, have you confirmed that  
13           Appellant's exhibits incorporated into the binder are  
14           complete and are as legible as the ones that you  
15           submitted?

16                 MR. STRADFORD: Yes, I have.

17                 JUDGE GEARY: Thank you.

18                 And, Ms. Jacobs, have you also confirmed that?

19                 MS. JACOBS: I can confirm.

20                 JUDGE GEARY: Thank you. Neither party has  
21           raised any objections to the proposed exhibits or  
22           indicated that there were any problems with the proposed  
23           exhibits as they appear in the binder.

24                 Ms. Jacobs, am I correct that Respondent has no  
25           objections to the admission of Appellant's Exhibits 1

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through 6?

MS. JACOBS: No objections. Thank you.

JUDGE GEARY: Thank you.

And, Mr. Stradford, am I correct that Appellant has no objection to the admission of Respondent's Exhibits A through Y?

MR. STRADFORD: That's correct.

JUDGE GEARY: Thank you. All those exhibits are now admitted into evidence.

(Appellant's Exhibits 1-6 were received in evidence by the Administrative Law Judge.)

(Department's Exhibits A-Y were received in evidence by the Administrative Law Judge.)

The audit liability in this case is comprised of three significant areas, and it is my understanding that only one of those reported service commissions is at issue here. So there is a single issue to be decided in these appeals, and that is whether amounts paid by wireless service provider MetroPCS should be excluded from the Appellant's respective taxable measures.

Mr. Stradford, have I correctly identified the issue?

MR. STRADFORD: Yes, you have.

JUDGE GEARY: And, Ms. Jacobs, do you agree?

MS. JACOBS: Yes.



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JUDGE GEARY: Thank you.

We have discussed in prehearing conferences the logistics of this hearing and have agreed that Appellants, who have two opportunities to argue their position, will have an opening argument that will be approximately 20 to 30 minutes. That will be followed by Respondent's only argument of approximately 20 to 30 minutes, followed, at Appellants' option, by a closing argument of approximately 5 minutes.

Be advised everyone that the judges can ask questions at any time. They will let the parties know if they have a question about their arguments. Any questions before we begin the argument?

Seeing nothing, Mr. Stradford, are you ready to proceed?

MR. STRADFORD: Yes, I am.

JUDGE GEARY: You may do so when ready.

MR. STRADFORD: All right. Thank you, Judge Geary.

PRESENTATION

MR. STRADFORD: I'm appearing on behalf of 1 Stop Communications and Total PCS Solutions, Incorporated. As you mentioned, there is a single issue at dispute with both of these cases. The issue at dispute is whether or

1 not the sale of wireless service for a single month from  
2 which Appellants received a commission equivalent to the  
3 sale of the first month of service is subject to tax. The  
4 sale of wireless service is not tangible personal  
5 property, and as a result, the sale of wireless service by  
6 Appellants is not subject to tax.

7 Appellants made sales of phones which are  
8 tangible personal property and which are subject to tax.  
9 Appellants also made sales of wireless service on behalf  
10 of then MetroPCS now T-Mobile, which are not. The  
11 transactions were separate and the phones and the wireless  
12 service are distinct. We will demonstrate that the  
13 measure pertaining to the commissions is directly and only  
14 related to the sale of wireless service. Because wireless  
15 service is not tangible, the commissions are not gross  
16 receipts as defined in Revenue & Taxation Code  
17 Section 6012. As a result, the commissions are not  
18 subject to tax and should be removed from the audit  
19 liabilities.

20 The first document we would like to reference to  
21 support our position is Joint Exhibit 1. The exhibit is  
22 the relevant MetroPCS dealer agreement from the periods in  
23 question. The first page states, "In relevant part,  
24 dealers will keep the first month's service, including all  
25 features sold except insurance and the handset margin."

1           In addition, the second page provided with  
2 Exhibit 1 outlines the dealer's compensation on the sale  
3 of the phones. The amount that the customer pays is the  
4 price of the handset plus MRC, which stands for the  
5 monthly recurring charge or the wireless service, plus  
6 features. And the dealer compensation is handset margin  
7 plus MRC, plus features, excluding insurance. The  
8 language in both cases is specific in its description that  
9 the dealer is compensated by keeping the first month of  
10 wireless service, the MRC or monthly recurring charge.

11           The commissions at issue are directly tied to the  
12 sale of wireless service. Further, the dealer also gets  
13 to keep the margin on the handset, and that is listed  
14 separately. The MetroPCS deal agreement is evidence that  
15 the sale of the phone and the sale of the wireless service  
16 are separate and that the dealer, in this case  
17 Appellant's, are compensated separately for each.

18           The next evidence that we'd like to reference is  
19 Appellant Joint Exhibit Number 3. Within Appellant Joint  
20 Exhibit Number 3 there's a variety of sales reports from  
21 both. I believe it's February 5th, 2017 and  
22 May 1st, 2017. The reports include a sales detail from  
23 two separate days that list the total number of phones  
24 sold, including accessories as well as wireless service.

25           The evidence provided demonstrates the following:

1 The sale of wireless service for a new MetroPCS customer,  
2 which is the matter in dispute, is a separate and distinct  
3 transaction into a separate and distinct system, in this  
4 case the Q-Pay system. The sale of wireless service is  
5 optional.

6 In each of the days provided, there was an  
7 example of a customer purchasing a new phone without  
8 purchasing wireless service. The examples that we  
9 provided is not from the periods under dispute. However,  
10 the policy regarding the commissions for the sale of the  
11 first month of wireless service is exactly the same as in  
12 the periods that are under dispute, and it continues to be  
13 the policy for T-Mobile dealers today.

14 The MetroPCS commission structure and the correct  
15 application of tax is also evidence by other taxpayers who  
16 have been audited by CDTFA. In connections with our  
17 briefs, we submitted a BOE 836, which is Appellant Joint  
18 Exhibit Number 2 in which the principal auditor states,  
19 "In this instance the retailer is not required to reduce  
20 the selling price of the phone in exchange for retaining  
21 the first month's service.

22 Therefore, it is my recommendation that the  
23 amount assessed is recorded manufacture rebates from sales  
24 of new phones with service plans be deleted from the  
25 assessed measure in the revised audit." Notably this

1 unrelated taxpayer was audited for the same periods at  
2 issue here by the same district office and is the same  
3 exact issue under review.

4 Further, another MetroPCS dealer had a hearing  
5 with the Office of Tax Appeals regarding an unrelated  
6 matter. Through a Public Records Acts disclosure we  
7 required the working papers and the BOE 836 related to  
8 their audit. Similarly, CDTFA found that the wireless  
9 service commissions were not subject to tax. In the audit  
10 working papers they state, "The commission model after the  
11 merger of T-Mobile on July 23rd, 2014 was examined. The  
12 taxpayer collects the first month service charge from the  
13 customer and receives this amount as a commission from  
14 MetroPCS."

15 JUDGE GEARY: Mr. Stradford, can I interrupt you  
16 just for a second.

17 MR. STRADFORD: Yes.

18 JUDGE GEARY: The document to which you just made  
19 reference, is that in any of the exhibit package?

20 MR. STRADFORD: Yes. It's Joint Exhibits 5 and  
21 6.

22 JUDGE GEARY: Okay. And you've been referring to  
23 them as joint exhibits. Didn't we decide earlier on that  
24 these were separate exhibits? They were simply your  
25 exhibits, Appellant's exhibits?

1           MR. STRADFORD: By joint, what I'm referring to  
2 is both for total PCS Solutions Incorporated and 1 Stop  
3 Communications, LLC.

4           JUDGE GEARY: It has a slightly different meaning  
5 here. Just refer to them as your exhibits.

6           MR. STRADFORD: Okay. Okay. Appellants'  
7 Exhibit 5 and 6 in this case then. I'm sorry.

8           JUDGE GEARY: Thank you.

9           MR. STRADFORD: I have to figure out where I was.  
10 Excuse me. Okay.

11           So the working papers from the unrelated case  
12 that was heard before the Office of Tax Appeals, the  
13 working papers state, "The commission model after the  
14 merger of T-Mobile on July 23rd, 2014, was examined. The  
15 taxpayer collects the first month service charge from the  
16 customer and receives this amount as a commission from  
17 MetroPCS."

18           The service charge is collected on new  
19 activations with the sale of a new phone and reactivations  
20 with no sale of phone. As such, the commissions received  
21 are related to a sale of service and, accordingly, not  
22 taxable. Request of the commission model of MetroPCS  
23 prior to merger, the taxpayer was unable to find  
24 documentation for the commission model prior to the  
25 merger. Per discussion with taxpayer, this commission

1 model was the same for year 2012 and 2013. This was  
2 accepted based on reviewing the overall markup factor and  
3 payments received for the third-party rebates and  
4 commissions.

5 Further, the 836 in connection with that case  
6 states, "Based on the commission model presented, the  
7 commission received should be treated as nontaxable  
8 receipts." Even though the retailer receives the amount  
9 as the first month service and the commission is  
10 considered a profit center for the retailer, the  
11 commission is related to the sale of the service because  
12 it is charged indiscriminately to all customers.

13 Not only the wireless service and the related  
14 commission clearly exempt from tax, based on the nature of  
15 the transactions themselves, i.e., the service is not  
16 tangible, but CDTFA has already treated them as such in  
17 two other instances of taxpayers operating the exact same  
18 business from the exact same franchise for the exact same  
19 periods in one of the cases for the exact same charge.

20 All of the available evidence supports that  
21 commissions received by Appellant from MetroPCS are in  
22 connection with the optional sale of wireless service. As  
23 a result, we request that you find that the amounts be  
24 removed from the computation of the audit liabilities for  
25 Appellant.

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Thank you.

JUDGE GEARY: Thank you, Mr. Stradford.

Is Respondent ready to give its argument?

MS. JACOBS: Yes. Thank you.

JUDGE GEARY: Let me interrupt just for a second.  
Do either of my fellow judges have questions for  
Mr. Stradford about his argument?

JUDGE KWEE: I did have one question. This is  
Judge Kwee. So at the beginning of your argument you were  
referring to your Exhibit 1, which was the summary of the  
dealer agreement for the compensation model. And I was  
looking at page 3, and it listed the amount the customer  
paid as the price of the handset, and it listed the amount  
of the dealer compensation as the handset margin.

And I was wondering if you could explain the  
difference between what the price of the handset versus  
the handset margin is in terms of the dealer compensation  
versus what the customer is paying for the cell phone?

MR. STRADFORD: Sure. So if the dealer sells a  
cell phone for \$100, you know, that would be what the  
customer pays. Whereas, what the dealer would retain in  
this would be the margin, the difference between the  
selling price. Which let's just say was \$100 and the  
dealer's cost for the phone, which we'll say would be \$80,  
so the margin would be the \$20 difference. Does that make



1 sense? Or are you asking for some other --

2 JUDGE KWEE: Okay. That I see what you're  
3 saying: I just wasn't sure if that had anything to do  
4 with the change and the billing of getting the monthly  
5 service built into the price versus the monthly service  
6 being separated from the price in 2010.

7 MR. STRADFORD: I'm not sure. Like --

8 JUDGE KWEE: You answered my question. Thank  
9 you.

10 MR. STRADFORD: Okay.

11 JUDGE GEARY: Do you have any questions?

12 JUDGE ALDRICH: This is Judge Aldrich. No  
13 questions at this time. Thank you.

14 JUDGE GEARY: I have one question, I think. Am I  
15 correct that the portion of the -- we have a portion of  
16 the contract but not the entire contract in evidence?

17 MR. STRADFORD: That's correct.

18 JUDGE GEARY: Do we -- do you have the entire  
19 contract?

20 MR. STRADFORD: We don't. The pages that we got  
21 from this agreement were actually from an old case file,  
22 the unrelated account that we had the 836 from. So we --  
23 we weren't able to obtain the full dealer agreement from  
24 2010 from the -- our clients or the Appellant.

25 JUDGE GEARY: So your Appellant doesn't have the

1 entire agreement either?

2 MR. STRADFORD: No.

3 JUDGE GEARY: Okay. Thank you, Mr. Stradford.

4 Any other questions, judges?

5 All right. Ms. Jacobs, if you're ready, you may  
6 proceed.

7 MS. JACOBS: Thank you. Excuse me.

8

9 PRESENTATION

10 MS. JACOBS: This is Amanda Jacobs for CDTFA.

11 Both Appellants in these consolidated appeals operate  
12 retail stores selling cell phones and related accessories  
13 in California. The sole issue in both appeals is whether  
14 amounts paid to Appellant's by wireless service provider  
15 MetroPCS as determined by audit, are subject to tax.  
16 1 Stop Communications was audited for the period of  
17 July 1st, 2008, through June 30th, 2011, and Total PCS  
18 Solutions for the period of April 1st, 2007, through  
19 June 30th, 2010.

20 As relevant to this appeal the Department  
21 established a deficiency measure of unreported taxable  
22 commissions of \$539,210 for 1 Stop Communications, LLC,  
23 and \$602,566 for Total PCS Solutions Incorporated.  
24 Appellants made retail sales of MetroPCS cell phones,  
25 which during the audit period were locked to the MetroPCS

1 network. Meaning that there was a technical restriction  
2 built into the phone by the manufacturer to restrict the  
3 use of the phone to the MetroPCS network.

4 In performing the audits, the Department noted  
5 that there was a decrease in the reflected markup factor  
6 on the sale of cell phones for both Appellants in 2010.  
7 Based on the Departments experience auditing other  
8 MetroPCS retailers, this indicated that Appellants  
9 received rebates or commissions on phone sales. See  
10 Exhibits J, M, V, and Y.

11 According to the available evidence, in January  
12 2010, there was a change in how MetroPCS cell phone sales  
13 were structured. Exhibits M, page 3, V, page 1, and W,  
14 page 2. As Appellants stated in their reply briefs filed  
15 on July 12, 2019, prior to 2010 retailers like Appellants  
16 charged a relatively higher markup on the sale of cell  
17 phones, approximately 60 percent, and the first month of  
18 wireless service was free. Then starting in 2010  
19 Appellants charged a lower price for the phones relative  
20 to the price charged in 2009, approximately 20 percent  
21 markup, and the first month of wireless service was no  
22 longer free.

23 This is seen in the Total PCS July 2019 reply  
24 brief, page 3, lines 18 through 24, and 1 Stop reply --  
25 July 2019 reply brief, page 4 lines 1 through 8. However,

1 Appellants received additional compensation for selling a  
2 phone in the form of commissions for MetroPCS as set forth  
3 in Appellants' Exhibit 1. In effect, the total payment  
4 for the exact same transactions stayed relatively  
5 constant, and Appellants' total compensation from the sale  
6 of a phone also remained basically the same as it was  
7 pre-2010.

8           Neither Appellant has provided any evidence  
9 regarding the commission amounts received from MetroPCS  
10 from January 1st, 2010, through the end of the audit  
11 period, which is June 30th, 2010, in the case of Total  
12 PCS, and June 30th, 2011, in the case of 1 Stop. And  
13 Appellants have not provided any records of individual  
14 transactions within the liability period showing when a  
15 phone was purchased with or without activation. Total PCS  
16 July 2019 reply brief page 3, lines 1 through 9, 1 Stop,  
17 July 2019 reply brief page 3, lines 11 through 18.

18           The verification comments in Schedule 12 of the  
19 1 Stop revised audit work papers state the taxpayer did  
20 not maintain books and records adequate for sales and use  
21 tax audit purposes and that no documents were provided to  
22 support a change to the audit liability Exhibit L, page 2.  
23 See also Exhibits M, page 3, and N, page 1. Similarly,  
24 Schedule 12 of the Total PCS audit states that Appellant  
25 did not provide any information on the amount received

1 from MetroPCS for the commission rebates in relation to  
2 the phone sales; Exhibit W, page 2.

3 Because Appellants did not provide any specific  
4 information about the commission amounts, they received  
5 for cell phones sold after January 1st, 2010, the  
6 Department inquired with MetroPCS about the commissions  
7 paid to authorized dealers for each phone they sell. As  
8 noted in the schedule 12 verification comments of the  
9 Total PCS audit, according to MetroPCS, MetroPCS pays the  
10 dealer about \$40 for new account phone sales and \$30 for  
11 existing account phone upgrades.

12 The MetroPCS phone technology only works on  
13 MetroPCS network, which results in customers prepaying for  
14 one month of service at the time of the phone sale;  
15 Exhibit W, page 2. This is also noted in Schedule 12-D of  
16 the 1 Stop audit; Exhibit V, page 5. Based on this  
17 information, the Department estimated the measure of  
18 taxable commissions based on the number of phones  
19 purchased with an estimate average commission per unit of  
20 \$40 for 1 Stop and a weighted average commission of \$38  
21 for Total PCS.

22 The Department then multiplied Appellants'  
23 purchase records by the commission amounts to compute  
24 unreported taxable commissions of the amounts I stated  
25 earlier. See Exhibits A, page 15, K, page 1, P, page 8

1 through 9, and V, page 1.

2 Pursuant to the Revenue & Taxation Code Sections  
3 6012 and 6051, sales tax is imposed on a retailer's retail  
4 sales of tangible personal property in this state measured  
5 by the retailer's gross receipts. Unless the sale is  
6 specifically exempted or excluded from tax by statute,  
7 gross receipts are the total amount of the sales price  
8 without any deduction for labor, service cost, or other  
9 expense. That's Section 6012 subdivision (a)(2).

10 Per 6012 subdivision (b)(2), gross receipts  
11 include all receipts, cash, credits, and property of any  
12 kind, and there's no limitation that the receipts must be  
13 received from the purchaser directly. A retailer's gross  
14 receipts are presumed to be taxable until proven  
15 otherwise, and the burden is on the retailer to establish  
16 that its retail sales are not subject to tax,  
17 Section 6091.

18 Here, Appellants are retailers of cell phones,  
19 not sellers of service. And the amount received on the  
20 sale of a phone is presumed to be taxable. Based on the  
21 information obtained in the audit, the Department  
22 correctly concluded by a preponderance of the evidence  
23 that these amounts, which included commissions, did in  
24 fact constitute gross receipts. Appellants' primary  
25 contention is that the commissions were not for the sale

1 of the phone but rather a sort of finder's fee for signing  
2 a customer up for service.

3 Appellants have argued that there is no  
4 commission if Appellants does not -- did not sell a  
5 wireless service. However, Appellants have not produced  
6 any evidence to support this contention. And, in fact,  
7 the single relevant document they have provided,  
8 Exhibit 1, indicates that these amounts are, in fact,  
9 gross receipts from the sale of the phone. Exhibit 1, a  
10 more readable copy of which is included in the hearing  
11 binder as Exhibit, consist of two pages from a MetroPCS  
12 agreement which Appellant asserts was applicable to the  
13 period in question.

14 The second page details the amount of  
15 compensation dealers received for certain service  
16 activities, including new activation, reactivation,  
17 handset upgrade and Metro FLASH. For new activation, the  
18 dealer receives, in addition to the margin or profit from  
19 the sale of the phone, the monthly recurring charge or  
20 MRC, plus the charge for any features. The MRC can range  
21 from around \$40 to \$60; see Exhibit 1, page 2, and  
22 Exhibit H, page 5.

23 For a handset upgrade, that is when an existing  
24 customer purchases a new cell phone without any activation  
25 of service, the dealer receives, again, in addition to the

1 margin or profit from the phone, \$40, a \$30 MICRA, plus  
2 \$10. For reactivation, which appears to mean when a  
3 customer who at some point stopped their service, resume  
4 service without purchasing another MetroPCS phone, the  
5 retailer receives \$13. See Exhibit 1, page 3.

6 As I stated, a handset upgrade involves an  
7 existing customer. It does not involve the finding of a  
8 new customer or the activation of service. The \$40  
9 commission a dealer receives for a handset upgrade cannot  
10 be for anything other than the sale of a phone. This fact  
11 alone clearly corroborates the information received from  
12 MetroPCS on which the audit determination is based.

13 Appellants generally received a \$40 commission on  
14 the sale of a cell phone. As a whole, the compensations  
15 for the different service activities provided a -- provide  
16 a framework that is entirely consistent with the  
17 information received from MetroPCS. As I just stated, on  
18 the activation of a sale of a phone to an existing  
19 customer, a handset upgrade, retailers receive \$40. For  
20 reactivation, when no phone is sold, the retailer receives  
21 \$13. And on a new activation, which involves both the  
22 sale of a phone and the activation of service, the dealer  
23 compensation can range from \$40 to \$60 and upward, based  
24 on the value of any features purchased by the customer.

25 Taken together there's a consistency to the



1 values placed on the various service activities and that  
2 the compensation for the combined transaction is generally  
3 consistent with the compensation received for each  
4 individual transaction.

5 Finally we, note that for new activations and  
6 handset upgrades, the chart indicates that the dealer  
7 receives the handset profit as well as any other  
8 compensation components. In other words, it indicates  
9 that a single person, the dealer who sold the phone,  
10 receives all the compensation. There's no indication  
11 whatsoever in Exhibit 1, and specifically in the chart on  
12 page 3, that separate retailers would receive different  
13 portions of the compensation.

14 And as I have previously stated, Appellants have  
15 not provided any evidence of that being the case from  
16 their own books and records. So to summarize, Appellants  
17 have not produced any records from the audit period  
18 regarding the actual transactions at issue to support  
19 their assertions. There are no records showing that they  
20 did not receive a commission on certain sales, and there's  
21 no evidenced that they received a commission for  
22 activating phones they did not sell.

23 And as I've just explained, the one relevant  
24 document they have provided, the MetroPCS agreement,  
25 Exhibit 1, is consistent with the audit findings and in no

1 way supports their contentions. Total PCS Solutions did  
2 provide documents from two days in 2017, well after the  
3 periods in question, which include an extra report, sales  
4 transaction summary, sales transaction deal, Q-Pay online  
5 reports, including a summary report and transaction  
6 detail, and individual invoices. None these documents  
7 provide evidence in support of Appellants position.

8 The only information provided by the Q-Pay online  
9 reports, for example, is of payments made by customers  
10 into the Q-Pay system; Exhibit 3, pages 6 and 7. There is  
11 no information in these documents related to the  
12 compensation received but the dealer from MetroPCS.  
13 There's also no evidence that Appellants received a  
14 commission for activating phones they did not sell. We  
15 also note that MetroPCS was purchased by T-Mobile in 2013.  
16 Therefore, these records relate to transactions involving  
17 an entirely different company, and Appellants have not  
18 produced any evidence indicating that the terms are  
19 applicable to the sale of a T-Mobile phone in 2017 were  
20 the same as those applicable to the sale of a MetroPCS  
21 phone during the audit period.

22 Exhibits 3 and 4 show deeply discounted phones  
23 being taxed on the full price, which indicate that this is  
24 a bundled transaction, a different type of transaction  
25 from the ones at issue. And, in fact, documents

1 Appellants submitted suggest the commission model after  
2 the T-Mobile merger was different than the transactions at  
3 issue, or at least there was no evidence that they were  
4 the same. See Exhibit 5, page 11, and Exhibit 6, page 3.  
5 For example, Appellants cite Exhibit 6 in their arguments,  
6 which is an audit report for a different taxpayer in a  
7 different audit period with different facts.

8 Firstly, conclusions made in another audit are  
9 not evidence and have no precedential value. The  
10 application of tax is based on the evidence presented in  
11 this appeal. In addition, the audit report says the  
12 dealer received a commission from MetroPCS equivalent to  
13 the first month's service charge on both new activations  
14 and reactivations, Exhibit 6, page 3. Based on  
15 Appellants' Exhibit 1, however, we know that the  
16 commission model and -- we know that is not the commission  
17 model in this case.

18 Although a customer may pay the first month  
19 service charge upon activation or reactivation, Exhibit 1  
20 clearly indicates that the dealer compensation for  
21 activations and reactivations differ and that the dealer  
22 compensation for reactivations was only \$13 or \$11 plus  
23 \$2, Exhibit 1, page 3.

24 So again, while an audit of another taxpayer is  
25 not evidence or precedent in this appeal, we note that it

1 also appears to be based on a conclusion that is clearly  
2 contradicted by the evidence in this case. In sum, the  
3 audit determinations before you are reasonable based on  
4 the available evidence. Appellants are cell phone  
5 retailers, and the evidence shows that the commission  
6 amounts received were additional consideration for  
7 MetroPCS for selling phones.

8 Appellants have made many claims to the contrary  
9 but have not produced any evidence to support their  
10 contentions. And the single relevant document they did  
11 provide, Exhibit 1, indicates that the commissions are, in  
12 fact, gross receipts from the sale of the phone.  
13 Appellants have not met their burden of proving the  
14 commission should be excluded from their respective  
15 taxable measures. For these reasons we request the appeal  
16 be denied.

17 Thank you.

18 JUDGE GEARY: Thank you, Ms. Jacobs.

19 Judge Kwee, do you have any questions?

20 Yes, Judge Aldrich, do you have any questions?

21 JUDGE ALDRICH: Hi. This is Judge Aldrich. I  
22 have a couple of questions for the Department. The  
23 Department made reference to Exhibit W, page 2, under the  
24 \$30 upgrade. Is that interpreted to mean an upgrade for  
25 TPPs? So say, for example, an iPhone 3 to an iPhone 4, or

1 is that an upgrade in service where, for example, you  
2 would want, you know, 10 gig bites of data as opposed to  
3 5?

4 MS. JACOBS: Just a minute. Let us find that  
5 page.

6 JUDGE ALDRICH: Okay. I believe it's page 1575  
7 of the combined PDF.

8 MS. JACOBS: Yeah. We would read that as a phone  
9 upgrade, since it says existing account phone upgrades; so  
10 not like service upgrade but a phone upgrade.

11 JUDGE ALDRICH: Okay. Thank you. And then on  
12 Exhibit A, page 18, the -- it's -- we note that taxability  
13 of the commissions is not based off of Regulation 1671.1.  
14 Does the Department maintain that position?

15 MS. JACOBS: So we don't necessarily agree with  
16 the decision that these transactions aren't covered by  
17 Regulation 1671.1 subdivision (c) (3). 1671.1 does not  
18 exclude or exempt items from gross receipts that would  
19 otherwise be a part of gross receipts, and it's not an  
20 exhaustive list.

21 MR. STRADFORD: Yeah. I think we agree that this  
22 is based on the application of R&TC 6011 and 12, the  
23 definition of gross receipts. Regulation 1671.1 discusses  
24 when there's specific reduction in price on a  
25 transaction-by-transaction basis, and it discusses when

1 that occurs whether it's taxable or not taxable. But it  
2 doesn't exclude situations where there's not a specific  
3 reduction on price on transaction-by-transaction basis.  
4 It's nonexclusive to -- it's not saying that the gross --  
5 the definition of gross receipts are exclusive to that.  
6 It's just when that happens 1671 is telling you when it's  
7 taxable versus when it's simply a reduction in price that  
8 reduces the gross receipts.

9 JUDGE ALDRICH: Thank you. And I do have a  
10 question for Appellant. So you had mentioned that the  
11 Exhibit 1 was sourced from an unrelated appeal?

12 MR. STRADFORD: Correct.

13 JUDGE ALDRICH: I guess my question is how do we  
14 know that the Exhibit 1 sourced from an unrelated appeal  
15 is the actual contract in place for the Appellants at that  
16 time?

17 MR. STRADFORD: It's a MetroPCS agreement.  
18 There's no dispute that Appellants operated MetroPCS  
19 retailers. The agreements were for the relevant time  
20 period. I don't know why it wouldn't be applicable.

21 JUDGE ALDRICH: Thank you. No further questions.

22 JUDGE GEARY: Thank you, Judge Aldrich.

23 Judge Kwee, do you have questions?

24 JUDGE KWEE: Yeah. I did have one question for  
25 CDTFA. You had mentioned that there was reimbursement of

1 approximately \$13 paid when there was no phone purchased.  
2 It was just, like, a reactivation. And then if, like, it  
3 was bundled with a purchase then there was a higher MRC.  
4 You know, it could be like \$40 or \$60. I'm wondering, in  
5 the audit, did you make any allocation or take into any  
6 account there was potentially a portion of it was  
7 allocatable to, you know, like if the selling of the one  
8 month of wireless service versus their -- did you have the  
9 entire charge allocatable to the sale of the phone and  
10 picked it up as an entire charge as taxable related to the  
11 sale of the phone?

12 MS. JACOBS: So it's my understanding that when  
13 creating the taxable measure we took the purchase records  
14 and multiplied that by the \$40 or \$38. And so that  
15 wouldn't -- that wouldn't capture reactivation because it  
16 was multiplied based on the phones that the Appellants  
17 purchased.

18 MR. STRADFORD: And I would also point out that I  
19 don't believe that this document was available at the time  
20 of the audit or wasn't produced at the time of the audit.  
21 So it was the -- the \$40 and the \$30 was based on just the  
22 information from MetroPCS as documented in the audit work  
23 papers. It wasn't based on this formula, specifically.

24 MS. JACOBS: But they go to -- I mean --

25 MR. STRADFORD: Yeah, but I mean we think this

1 formula corroborates, essentially, that the information  
2 was correct or at least close to correct.

3 JUDGE KWEE: Okay. And I guess just a quick  
4 follow up. To the extent that, you know, there's a  
5 different charge for if you only purchase one month of  
6 service without getting the phone versus if you get a  
7 phone plus the one month of service. Would the CDTFA have  
8 a position that the charge paid when the commission paid,  
9 the MRC paid, when you have the monthly service plus the  
10 phone that's entirely taxable? Or would the position be  
11 that there would be some allocation for nontaxable service  
12 versus TPP?

13 MR. STRADFORD: Again, it's not based on the --  
14 you know, it was based on the met -- the information from  
15 MetroPCS, which was that the commission on the sale of a  
16 phone is \$40 -- was \$40 on a new activation. This  
17 Exhibit 1 indicates that the actual full compensation is  
18 more than \$40 because it could be \$40 plus -- it could  
19 range the -- the MRC could range from \$40 to \$60, and then  
20 the -- the other features could increase that to more than  
21 60.

22 I think to the extent that these are locked  
23 phones and the -- these are locked phones, and so  
24 essentially purchasing the phones includes the, you know,  
25 like it's not necessarily -- it's not an optional part of



1 the -- the payment that -- to activate the phone. It's  
2 part of gross receipts. I think we accept the estimate  
3 that we received from MetroPCS that it's \$40 and not \$40  
4 to \$60 plus more because then you start getting into truly  
5 optional upgrades that are not required to activate this  
6 locked phone, which is only available to be used on  
7 MetroPCS network.

8 So that -- so, again, this was based on what was  
9 told to us by MetroPCS at the time of the audit, but it is  
10 consistent with this formula because if they were to  
11 choose other features, those would truly be optional  
12 features that were chosen.

13 JUDGE KWEE: Okay. Thank you. I don't have any  
14 other questions.

15 JUDGE GEARY: Thank you, Judge Kwee.

16 Judge Aldrich, does anything else come to mind  
17 before I turn to the Appellants?

18 JUDGE ALDRICH: No further questions.

19 JUDGE GEARY: I wanted to ask the Appellant  
20 before you gave your final closing. Is there any dispute  
21 that these were all locked phones that were sold by --

22 MR. STRADFORD: Yes, there is.

23 JUDGE GEARY: -- your clients?

24 MR. STRADFORD: Yeah, that's not my understanding  
25 at all, actually. Actually, on our reply brief what our

1 client said is that -- this was a briefing dated --

2 JUDGE GEARY: Tell me what you're reading from or  
3 going to read from.

4 MR. STRADFORD: It's a briefing submitted by us  
5 on July 12TH, 2019, in response to a request for  
6 additional briefing from Office of Tax Appeals. The  
7 question that was posed to us was, can a MetroPCS phone be  
8 activated with another service provider. The statement  
9 our client provided was, "Yes, the MetroPCS phones can be  
10 unlocked by a third party or a knowledgeable customer and  
11 used on a different network."

12 During the time of the audit of MetroPCS -- or  
13 during the time of the audit, MetroPCS was a CDMA Code  
14 Division Multiple Access network. So the phones could  
15 have been used on any other CDMA network, for example,  
16 Verizon wireless. Further, currently, T-Mobile is a GSM  
17 global system for Mobile's network. So MetroPCS/T-Mobile  
18 customers could use a phone on an AT&T, also GSM, network  
19 if the phone was unlocked.

20 JUDGE GEARY: Let me ask you this. Is there  
21 anywhere in the evidence that's been admitted an  
22 indication of whether or not your clients offered  
23 activation with other service providers?

24 MR. STRADFORD: They did not.

25 JUDGE GEARY: They did not. Okay. Thank you.

1 Are you ready to proceed with your final closing, your  
2 final argument?

3 MS. JACOBS: Oh, I just wanted to --

4 JUDGE GEARY: Ms. Jacobs, did you have a  
5 question?

6 MS. JACOBS: I just wanted to speak to the phone  
7 locking if you would allow me to do so.

8 JUDGE GEARY: All right. You're going to make  
9 reference to some evidence about that?

10 MS. JACOBS: Yeah.

11 JUDGE GEARY: All right.

12 MS. JACOBS: Yes. Sorry. Just, you know,  
13 contentions made in brief are not evidence. The evidence  
14 in the audit received from MetroPCS is that phones were  
15 locked. And it's our understanding that until 2014 it was  
16 actually illegal for customers to unlock their phone. The  
17 Unlocking Customer Choice in Wireless Competition Act was  
18 signed into law on August 1st, 2014, which repealed making  
19 determined -- rule making determination by the U.S.  
20 copyright office that made it illegal for people to unlock  
21 their cell phones.

22 JUDGE GEARY: And you indicated, Ms. Jacobs, that  
23 in the audit the Department was so advised that these were  
24 locked phones. Can you refer to an exhibit or page  
25 numbers where we can confirm that?

1 MS. JACOBS: I believe it's in -- I don't have a  
2 specific page number for you, but I believe it's in  
3 several of the audit comments. So I would check Exhibits  
4 J, N, V, and Y to find the specific comments.

5 JUDGE GEARY: All right. Thank you.

6 Judges, any questions come to mind for you?

7 Okay. Are you ready, Mr. Stradford, to give your  
8 final closing?

9 MR. STRADFORD: Yes, I am.

10 JUDGE GEARY: You may proceed.

11

12 CLOSING STATEMENT

13 MR. STRADFORD: Okay. So first I would say CDTFA  
14 makes several references to the evidence available in this  
15 case. You know, we have the agreement from the time  
16 period in question. The agreements for like -- the CDTFA  
17 states that the other cases aren't evidence, but the  
18 comments in those cases reflect the exact same type of  
19 transaction that we're dealing with here. So it's  
20 evidence that the nature of the transaction that we're  
21 transcribing is what occurred. They sell wireless  
22 service.

23 They get a commission for the wireless service.  
24 Both the other cases reflect that. I don't even know if  
25 there's a dispute as to that's what's occurring. You

1 know, it's the primary issue, if the sale of wireless  
2 service for which Appellants receive a commission in the  
3 same amount is subject to tax if they also sell a phone.  
4 I -- I don't know what evidence contradicts that in this  
5 case.

6           Regarding the sales records and things of that  
7 nature provided for this case, we're not disputing the  
8 amounts. The amounts are materially accurate. So any  
9 additional records that might, you know, adjust the  
10 amounts upwards or downwards slightly I don't think are  
11 really relevant to whether or not these commissions are  
12 subject to tax in the first place. Regarding whether or  
13 not the phones are locked and whether or not they have to  
14 be active on a MetroPCS network, I don't actually think  
15 that that matters.

16           The fact that the wireless service is optional is  
17 evidenced by the documentation that we provided, I think  
18 makes it extremely clear that it's not gross receipts.  
19 But even if they were required to operate on a MetroPCS  
20 network, which we don't agree that they were, you know,  
21 there's precedent in this regard. Specifically, you know,  
22 the Dell case, wherein, they were examining sales of  
23 computers with optional maintenance contracts.

24           And in that case what the court found is that  
25 sales tax could not be assessed on the service contracts

1 component of the sales because the service contracts were  
2 not tangible personal property. In this case, I don't  
3 think there's any dispute that wireless service is not  
4 tangible.

5 And two, the value of the service contracts were  
6 readily ascertainable and, therefore, deductible from the  
7 taxable portion of the sales. Similarly, here the  
8 wireless portion of the sale is readily ascertainable  
9 because it's separately stated, in this case even, and  
10 it's an ongoing charge that they pay every month to  
11 maintain their service. So even in the instance that they  
12 are required to, you know, activate with MetroPCS, then  
13 it's still a -- it's still not tangible, and the  
14 availability is readily ascertainable, and it's -- it's  
15 not subject to tax.

16 It's really that simple. And I would just say  
17 that it's so simple that on other taxpayers operating the  
18 same things, the issue is regulated to some comments and  
19 that's it. There's no assessment. And so that's coming  
20 from the CDTFAs on other cases that we had no involvement  
21 with. Well, I guess the first one we did have involvement  
22 with, but the second one we didn't. So there's no way  
23 that we could, you know, potentially argue that for them  
24 to influence the outcome on this case.

25 We all have cell phones. We all have wireless

1 service. None of us pay tax on wireless service. It  
2 doesn't even make sense that the retailer would charge.  
3 In theory, if the Department were right, which you know,  
4 we obviously dispute, the retailer would charge tax  
5 reimbursement on the sale of wireless service when they  
6 sold the phone. And then on the next month the wireless  
7 service would not be subject to tax and not -- then there  
8 would be no reimbursement charge from MetroPCS?

9 I think that it's just clear that wireless  
10 service is intangible and not subject to tax. And I think  
11 that's well evidenced -- not that wireless service is  
12 intangible, but the commission specifically that they  
13 receive are for the sale of wireless service is well  
14 evidenced in the documentation that we provided. And then  
15 that's corroborated by, you know, CDTFA audits of the same  
16 exact franchisee for the same periods in one instance and  
17 later periods in another where the commission model is the  
18 same. So from our perspective it's quite straightforward.

19 Thank you.

20 JUDGE GEARY: Thank you, Mr. Stradford.

21 Judges, anything further?

22 JUDGE ALDRICH: Nothing further.

23 JUDGE GEARY: Thank you everybody for appearing  
24 here today. Do the parties --

25 Mr. Stradford, that do you submit the matter?

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MR. STRADFORD: Excuse me?

JUDGE GEARY: Do you submit this matter --

MR. STRADFORD: Yes.

JUDGE GEARY: -- for decision?

Ms. Jacobs?

MS. JACOBS: Yes. I did want to give you a citation that you asked for, Exhibit W, page 2. Was the --

JUDGE GEARY: All right. Thank you.

MS. JACOBS: -- but otherwise, yes.

JUDGE GEARY: All right. Thank you.

The record is now closed in this hearing.

I'll thank you again everybody for participating. In the coming weeks the panel will meet to discuss the matter, and we will send you a written opinion within 100 days. This is the conclusion of this hearing.

(Proceedings adjourned at 10:23)



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HEARING REPORTER'S CERTIFICATE

I, Ernalyne M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the testimony and proceedings were reported stenographically by me and later transcribed by computer-aided transcription under my direction and supervision, that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am in no way interested in the outcome of said action.

I have hereunto subscribed my name this 16th day of May, 2022.

\_\_\_\_\_  
ERNALYN M. ALONZO  
HEARING REPORTER