OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **4G TALK N DATA SERVICES, INC., dba Wireless PCS Metro Station**	OTA Case No. 21078173 CDTFA Case ID: 1-670-490

OPINION

Representing the Parties:

For Appellant: Jesse Diaz, President

For Respondent: Amanda Jacobs, Attorney

For Office of Tax Appeals: Steven Kim, Attorney

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, 4G Talk N Data Services, Inc. (appellant), dba Wireless PCS Metro Station, appeals respondent California Department of Tax and Fee Administration's (CDTFA's) decision denying appellant's petition for redetermination of a Notice of Determination (NOD) issued on October 16, 2019. The NOD is for tax of $196,917, plus applicable interest, for the period of October 1, 2015, through March 31, 2018 (liability period). The NOD is based on CDTFA's determination that appellant had an aggregate deficiency measure of $2,443,748. Of that amount, appellant disputed $2,432,593.

Appellant waived the right to an oral hearing, so the Office of Tax Appeals (OTA) decides the matter based on the written record.

ISSUE

Whether the amount of unreported taxable rebates should be reduced.

FACTUAL FINDINGS

1. Appellant, a California corporation and MetroPCS-authorized dealer, sold cell phones, cell phone accessories, and prepaid wireless service plans at seven locations in

California.[1] Appellant held a seller's permit effective from January 1, 2013, through February 15, 2018.[2]

2. For the liability period, appellant claimed no deductions and reported total and taxable sales of $2,803,418.

3. For its audit of appellant, CDTFA acquired, as relevant here, the following books and records from appellant:

   a. A general ledger indicating that appellant had received payments of $2,432,593 from MetroPCS during the liability period.

   b. MetroPCS "price grids" listing cell phone models and their respective pricing information for several periods in 2017 and 2018. The pricing information included MetroPCS-suggested retail prices, standard instant rebates, everyday low prices, and pricing of cell phones after instant rebates from various MetroPCS promotions.

   c. Documents from MetroPCS to its authorized dealers describing the rules and validity periods of various sales, promotions, and instant rebate programs offered during the period of 2016 through 2018, as well as the timing and amount of related authorized dealer reimbursement payments.

4. Appellant also provided to CDTFA an authorized dealer agreement (dealer agreement) between MetroPCS and a California corporation called Wireless PCS Metro Stations, Inc. (WPMS). The dealer agreement identified five of appellant's retail locations as "approved affiliates."[3]

5. Per section 2.1 of the dealer agreement, which established the parameters of the relationship between WPMS and MetroPCS, WPMS agreed to operate "in connection with the promotion and sale of Services and Equipment in a manner consistent with the terms and conditions specified by MetroPCS in its MetroPCS Premier Retailer Guidelines (revised 01/14), or the Exclusive Authorized Retailer Guidelines (revised

[1] "MetroPCS" was the former name of Metro by T-Mobile, a prepaid wireless service provider.

[2] Although the liability period extends through March 31, 2018, the determination only includes liabilities through February 15, 2018. Appellant filed its Certificate of Dissolution with the California Secretary of State on December 28, 2018, and dissolved.

[3] According to the dealer agreement, "[t]o be an approved affiliate, [WPMS] must control the entity and own more than fifty percent (50%) of the entity."

01/14), both [of] which may be amended from time to time by MetroPCS in its sole discretion." The referenced guidelines are not in the evidentiary record before OTA.

6. Per section 3.4 of the dealer agreement, which related to telephone "handsets" (i.e., cell phones), WPMS agreed to sell and honor all customer rebate programs "when available."
7. Per section 5.6 of the dealer agreement, which related to "equipment" (i.e., cell phones, accessories, and wireless communication products), MetroPCS would establish a suggested retail price for equipment from time to time, but WPMS could sell the equipment at any price it chose in its sole discretion, and nothing in the dealer agreement was intended to establish a price that WPMS must adopt.
8. Appellant and WPMS were separate business entities, had separate seller's permits, and operated separately, but they shared a general ledger, made combined purchases for volume discounts, and filed consolidated federal income tax returns. Their respective presidents are related, though the evidentiary record does not contain information specifying the nature of their relationship.
9. Based on information provided by appellant during the audit, CDTFA found that MetroPCS reimbursed appellant for instant rebates that appellant provided to customers who participated in various promotions involving new cell phone purchases. Examples of such promotions include the following: Switcher Rebate program, in which customers received a $60 instant rebate on select newly-purchased cell phones in connection with porting (i.e., moving) their phone number from an eligible carrier to MetroPCS; No Port No Problem program, in which customers received an instant rebate on select newly-purchased cell phones for performing new non-port activations on the same account on the same day; and Add a Line Half Off Device program, in which customers received a discount on select newly-purchased cell phones for activating a new non-port line.
10. CDTFA concluded that, for the liability period, appellant received from MetroPCS taxable rebates of $2,432,593, which appellant should have reported as gross receipts but did not.
11. During a September 19, 2019 discussion of the audit findings with CDTFA, appellant confirmed that it had followed the cell phone prices listed in the MetroPCS price grids and the rules for MetroPCS promotions.
12. On October 16, 2019, CDTFA issued the NOD to appellant.

13. On November 12, 2019, appellant filed a petition for redetermination with CDTFA.
14. On May 24, 2021, CDTFA issued its decision denying the petition for redetermination.
15. This timely appeal followed.

DISCUSSION

California imposes upon a retailer a sales tax measured by the retailer's gross receipts from the retail sales of tangible personal property sold in this state, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, it is presumed that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.) It is the retailer's responsibility to maintain complete and accurate records to support reported amounts and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).)

If CDTFA is not satisfied with the amount of tax reported by any person, or if any person fails to make a return, CDTFA may compute and determine the amount required to be paid on the basis of any information within its possession or that may come into its possession. (R&TC, §§ 6481, 6511.)

In the case of an appeal, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Amaya*, 2021-OTA-328P.) If CDTFA carries its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA's determination is warranted. (*Ibid*.) The applicable burden of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) That is, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Appeal of AMG Care Collective*, 2020-OTA-173P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.)

Tax applies to the gross receipts from the retail sale of a wireless telecommunication device (e.g., a cell phone), and the retailer of the wireless telecommunication device is required to report and pay the tax. (Cal. Code Regs., tit. 18, § 1585(a)(1) & (b)(1).)

Manufacturers, vendors, and other third parties often engage in various programs that result in credits or payments made to retailers with respect to a retailer's taxable sale of products to an end-use customer. (Cal. Code Regs., tit. 18, § 1671.1(a).) These payments and credits include, but are not limited to, purchase and cash discounts, voluntary price reductions and other

incentives, and rebates. (*Ibid*.) Under certain conditions, payments received by the retailer in the form of rebates or other types of payments or credits for products sold at retail are included in the retailer's gross receipts or sales price from the sale of the product. (*Ibid*.)

Retailers engage in rebate and incentive programs with manufacturers or other third parties that result in additional revenue for the retailer when certain conditions are satisfied. (Cal. Code Regs., tit. 18, § 1671.1(c)(3).) These are transactions involving discounts,[4] rebates, and other price reductions. (*Ibid*.) These rebate and incentive programs may be known as "Voluntary Price Reductions," "Promotions," "Instant Rebates," or by a similar name. (*Ibid*.) Operative October 1, 2007, when a retailer enters into an oral or written contract with a manufacturer or other third party that requires, on a transaction-by-transaction basis, a specific reduction in the retailer's selling price of specified products in exchange for a certain payment of a like amount from the contracting party (e.g., a payment that is not contingent upon selling a particular amount of the specified products), such payments received by the retailer are part of the taxable gross receipts or sales price of the sales. (Cal. Code Regs., tit. 18, § 1671.1(c)(3)(A).) In the context of rebate and incentive programs, it is rebuttably presumed that any consideration received by retailers from third parties related to promotions for sales of specified products is subject to tax until the contrary is established. (*Ibid*.)

The types of documentation that will generally rebut this presumption include, but are not limited to, a copy of an agreement or contract between the retailer and a third party that: (1) requires the retailer to give specified products preferential shelf space or to display the products in specific areas of the retailer's establishment in exchange for the payment received; (2) provides the retailer with an advertising allowance, equal to or in excess of the payment received, when the retailer advertises the third-party's products; or (3) provides that the retailer will only receive the payment if the retailer sells a certain quantity of the products within a specified price range during a particular period, or if the retailer purchases a certain quantity of the products during a particular period. (Cal. Code Regs., tit. 18, § 1671.1(c)(3)(A)1-3.) In the absence of a written agreement or contract, the retailer may use any verifiable method of establishing that the consideration received from the third party was not subject to tax, such as a signed and dated letter or other type of documentation provided by the third party, subsequent to

[4] "Discount" means a reduction in the amount of consideration the customer is required to provide in order to purchase the tangible personal property from a retailer as a result of third-party consideration promised to or received by the retailer. (Cal. Code Regs., tit. 18, § 1671.1(c)(1)(A).)

the contract or agreement, verifying that the payment received was not paid pursuant to a contract requiring a reduction in the selling price of specified products on a transaction-by-transaction basis. (Cal. Code Regs., tit. 18, § 1671.1(c)(3)(A)4.)

Here, according to its general ledger, appellant received payments of $2,432,593 from MetroPCS during the liability period, which appellant did not report on its sales and use tax returns. During the audit, appellant provided CDTFA with price grids that listed the MetroPCS-suggested retail prices, standard instant rebates, everyday low prices, and pricing of cell phones after instant rebates from various MetroPCS promotions, as well as MetroPCS dealer documentation regarding the rules, validity periods, and dealer reimbursement payments for various sales, promotions, and instant rebate offers. Appellant acknowledged that it had followed the reduced cell phone prices listed in the MetroPCS price grids and the rules for MetroPCS promotions, which indicates that appellant engaged in rebate and incentive programs with MetroPCS. One example of such programs is MetroPCS's Switcher Rebate program, in which dealers offered customers up to a $60 instant rebate on select newly-purchased cell phones in connection with porting their phone number from eligible carriers to MetroPCS. MetroPCS reimbursed dealers like appellant for the rebates they provided in connection with these cell phone sales. Based on all these facts, OTA finds that it was reasonable for CDTFA to conclude that MetroPCS payments of $2,432,593 to appellant during the liability period relate to MetroPCS promotions involving sales of cell phones. Accordingly, it is rebuttably presumed that these payments are subject to tax unless appellant establishes that a different result is warranted.

On appeal, appellant contends that the reimbursement payments are not taxable because they fall outside of the purview of California Code of Regulations, title 18, (Regulation) section 1671.1(c)(3)(A), which requires a "specific reduction" to the selling price. Appellant maintains that MetroPCS did not require appellant to reduce the sales price of any cell phone by a specific amount to receive a rebate. Appellant asserts that the dealer agreement allowed MetroPCS to establish a suggested retail price, but that appellant was not required to adopt it; rather, appellant was allowed to sell any equipment (including cell phones) at any price in its sole discretion.

As an initial matter, it is unclear if the dealer agreement, which was between WPMS and MetroPCS, applies to appellant. On the one hand, WPMS and appellant filed consolidated

federal income tax returns, which, under Internal Revenue Code section 1504, requires that WPMS and appellant be "affiliated" (i.e., one owns 80 percent of the total voting power and total stock value of the other). In addition, as noted above, the agreement between WPMS and MetroPCS identified five of appellant's retail locations as "approved affiliates." But on the other hand, WPMS and appellant are separate legal entities, and the exact nature of their affiliation (i.e., who owns/controls whom) is not clear from the evidentiary record. A corporation is generally not liable for contracts entered into by another affiliated corporation unless it is shown that the affiliated corporations may be deemed a single business enterprise under the "single business enterprise" equitable doctrine. (See *Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1107.) Again, WPMS and appellant's affiliation is not clear from the evidentiary record before OTA.

But even if the dealer agreement governed appellant's relationship with MetroPCS, it would not rebut the presumption that the payments at issue are subject to tax. Although section 5.6 of the dealer agreement states that a dealer may sell equipment (including cell phones) at any price, section 3.4 requires a dealer to sell and honor all customer rebate programs when available. In its argument, appellant points to section 5.6 but ignores section 3.4.

The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. (Civ. Code, § 1641.) Each provision in an agreement should be construed consistently with the entire document such that no provision is rendered nugatory (i.e., of no value or importance). (*Tapley v. Locals 302 and 612 of Intern. Union of Operating Engineers-Employers Const. Industry Retirement Plan* (9th Cir. 2013) 728 F.3d 1134, 1140.) Repugnancy (i.e., an inconsistency or a contradiction) in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract. (Civ. Code, § 1652)

To give effect to sections 5.6 and 3.4 of the dealer agreement, OTA construes them together in the following manner: generally, a dealer may sell equipment from MetroPCS at any price in its sole discretion (per section 5.6); but when a rebate program is available, a dealer must sell and honor such program (per section 3.4), which is what appellant confirms that it did here. In other words, OTA finds that section 5.6 gives way to section 3.4 when it comes to the rebate-type programs at issue here. Further, there is no documentary evidence in the record to suggest

that a different interpretation is warranted; rather, OTA's construction of the dealer agreement is bolstered by the price grids and MetroPCS dealer documentation for various MetroPCS sales, promotions, and instant rebates related to the sales of select cell phones. Accordingly, OTA concludes that appellant's argument that section 5.6 of the dealer agreement removes the payments at issue from the purview of Regulation section 1671.1(c)(3)(A) misconstrues section 5.6, ignores section 3.4, and ultimately lacks merit.

HOLDING

Appellant has not established that the amount of unreported taxable rebates should be reduced.

DISPOSITION

CDTFA's action is sustained.

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Andrew Wong
Administrative Law Judge

We concur:

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Andrew J. Kwee
Administrative Law Judge

DocuSigned by:
Ovsep Akopchikyan
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Ovsep Akopchikyan
Administrative Law Judge

Date Issued: 10/27/2023