Blog Post

A “Source” of Consternation? The Taxation of Telecommunications Companies in Florida

April 11, 2025

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Like many states, Florida’s corporate income tax regime has special rules applicable to telecommunications companies. The tricky part about taxing the telecommunications industry is how to source receipts earned from providing interstate telecommunications services. Put differently, when is a state permitted to tax an interstate phone call?

For corporate income tax purposes, the only receipts sourced to Florida are those relating to a “Florida sale.” What comprises a “Florida sale” depends on the nature of the taxpayer’s business. Florida’s unique sourcing provision relating to telecommunication companies is found in Fla. Admin. Code r. 12C-1.1055(2)(g) (the “Telecom Rule”). With respect to interstate communications, the Telecom Rule defines a “Florida sale” to include all receipts where “the communication originates or terminates in Florida <u>and</u> the bill is charged to a Florida telecommunications number or device, Florida telephone number or telephone, or Florida customer.” Although the Telecom Rule raises several constitutional issues, the focus of this post relates to the test for “internal consistency” under the Commerce Clause.

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The U.S. Supreme Court has long made clear that a state tax must be fairly apportioned in order to survive scrutiny under the Commerce Clause. What that means is that a state can only tax its fair share of the receipts earned by a multistate business. If a state's tax law seeks to tax more than its fair share, the applicable tax is not fairly apportioned and will be struck down as violating the Commerce Clause. One test for determining whether a state tax is fairly apportioned is the test for internal consistency.

As recently reiterated by the Court in *Comptroller of Maryland v. Wynne*, a state tax fails the internal consistency test if its application by every taxing jurisdiction would cause a taxpayer engaged in interstate commerce to pay more in taxes than a similarly situated taxpayer conducting business solely intrastate. In other words, does a taxpayer pay more in state tax solely because it conducts business across state lines? The Florida Telecom Rule raises serious questions under the test for internal consistency.

Consider a straightforward example. Maria, is a Florida resident but has cell phone with a Georgia telephone number. Maria places a call to her friend Jim, a Georgia resident. Jim's cell phone has a Georgia area code assigned to it. If every state applied Florida's Telecom Rule, both Florida and Georgia would source 100% of the receipts from the same call. Florida would claim that 100% of the receipts as a "Florida sale" because the call originated in Florida and the bill is charged to a Florida customer. Applying the same law in Georgia, Georgia would claim that 100% of the receipts as a "Georgia sale" because the call terminated in Georgia and the bill is charged to a Georgia telecommunications number. This simple example is hardly unique and outlines just one of the many ways that the Telecom Rule poses challenges under the test for internal consistency.

Those familiar with the holding in *Goldberg v. Sweet* may question the vulnerability of the Telecom Rule to a constitutional challenge. Among other distinctions, however, what saved the Illinois law in *Goldberg* was the inclusion of a credit provision. Specifically, Illinois law permitted the taxpayer a credit against the Illinois tax for tax paid to any other state on the same telephone call. The Telecom Rule contains no such credit mechanism. Consternation indeed.
