

Proposed Text of
California Code of Regulations, Title 18, Section 2461,
Exemptions, Deductions, Credits, and Specific Applications of Tax
(A new regulation to be added to the California Code of Regulations)

2461. Exemptions, Deductions, Credits, and Specific Applications of Tax.

(a) In General. This regulation explains the specific applications of the prepaid MTS surcharge and local charges to, and applicable exemptions, deductions, and credits for the following types of transactions:

- (1) Sales for resale.
- (2) Bad debts.
- (3) Bundled transactions.
- (4) Lifeline transactions.
- (5) Transactions in which a surcharge or local charge was paid to another state.

(b) Sales for Resale.

The burden of proving that a sale of prepaid MTS is not at retail is upon the seller unless the seller timely takes in good faith a certificate from the purchaser that the prepaid MTS are purchased for resale. If timely taken in proper form as set forth in subdivision (b)(1)(A) and in good faith from a person who is engaged in the business of selling prepaid MTS and who holds a Prepaid MTS Account as required by Regulation 2460, *Administration*, the certificate relieves the seller from the duty of collecting the prepaid MTS surcharge and local charges. A certificate will be considered timely if it is taken at any time before the seller bills the purchaser for the prepaid MTS, or any time within the seller's normal billing and payment cycle, or any time at or prior to delivery of the prepaid MTS to the purchaser. A resale certificate remains in effect until revoked in writing.

(1) Form of Certificate.

(A) Any document, such as a letter or purchase order, timely provided by the purchaser to the seller will be regarded as a resale certificate with respect to the sale of the prepaid MTS described in the document if it contains all of the following essential elements:

1. The signature of the purchaser, purchaser's employee or authorized representative of the purchaser.
2. The name and address of the purchaser.
3. The number of the Prepaid MTS Account held by the purchaser. If the purchaser is not required to hold a Prepaid MTS Account because the purchaser makes no sales

of prepaid MTS in this state, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a Prepaid MTS Account in lieu of a Prepaid MTS Account number.

4. A statement that the prepaid MTS described in the document is purchased for resale. The document must contain the phrase “for resale.” The use of phrases such as “nontaxable,” “not subject to surcharge,” “exempt,” or similar terminology is not acceptable.

5. Date of execution of document. (An otherwise valid resale certificate will not be considered invalid solely on the grounds that it is undated.)

(B) A document containing the essential elements described in subdivision (b)(1)(A) is the minimum form which will be regarded as a resale certificate. However, in order to preclude potential controversy, the seller should timely obtain from the purchaser a certificate substantially in the form shown in Appendix A of this regulation.

(C) Blanket Resale Certificate. If a purchaser issues a general (blanket) resale certificate which provides a general description of the items to be purchased, and subsequently issues a purchase order which indicates that the transaction covered by the purchase order is subject to the prepaid MTS surcharge or local charges, the resale certificate does not apply with respect to that transaction. However, the purchaser will bear the burden of establishing either that the purchase order was sent to and received by the seller within the seller’s billing cycle or prior to delivery of the prepaid MTS to the purchaser (whichever is the later), or that the prepaid MTS surcharge or local charges were paid to the seller. The purchaser may avoid this burden by using the procedures described in subdivision (b)(1)(D) below.

(D) Qualified Resale Certificate. If a purchaser wishes to designate on each purchase order whether the prepaid MTS being purchased are for resale, the seller should obtain a qualified resale certificate, i.e., one that states “see purchase order” in the space provided for a description of the property to be purchased. Each purchase order must then specify whether or not the prepaid MTS covered by the order is purchased for resale. The use of the phrases “for resale,” “resale = yes,” “not subject to surcharge,” “surcharge = no,” or similar terminology on a purchase order, indicating that the prepaid MTS surcharge or local charges should not be added to the sales invoice will be regarded as designating that the prepaid MTS described is purchased for resale provided the combination of the purchase order and the qualified resale certificate contains all the essential elements provided in subdivision (b)(1)(A). However, a purchase order where the applicable amount of the prepaid MTS surcharge or local charges is shown as \$0 or is left blank will not be accepted as designating that the prepaid MTS is purchased for resale, unless the purchase order also includes the phrase “for resale” or other terminology described above to specify that the prepaid MTS is purchased for resale. If each purchase order does not so specify, or is not issued timely within the meaning of subdivision (b), it will be presumed that the prepaid MTS covered by that purchase order was not purchased for resale and that sale or purchase is subject to the prepaid mobile telephony services

surcharge or local charges. If the purchase order includes both prepaid MTS to be resold and prepaid MTS to be used, the purchase order must specify which prepaid MTS are purchased for resale and which prepaid MTS are purchased for use.

The seller shall retain copies of the purchase orders along with the qualified resale certificates in order to support the sales for resale.

(E) If the seller does not timely obtain a resale certificate, the fact that the purchaser deletes the prepaid MTS surcharge or local charges from the seller's billing, provides a Prepaid MTS Account number to the seller, or informs the seller that the transaction is "not subject to the surcharge" does not relieve the seller from the liability for the prepaid MTS surcharge or local charges nor from the burden of proving the sale was for resale.

(2) Good Faith.

In absence of evidence to the contrary, a seller will be presumed to have taken a resale certificate in good faith if the resale certificate contains the essential elements as described in subdivision (b)(1)(A) and otherwise appears to be valid on its face. If the purchaser insists that the purchaser is buying for resale prepaid MTS of a kind not normally resold in the purchaser's business, the seller should require a resale certificate containing a statement that the specific prepaid MTS is being purchased for resale in the regular course of business.

(3) Improper Use of Certificate.

Any person, including any officer or employee of a corporation, who gives a resale certificate for prepaid MTS which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable for the amount of prepaid MTS surcharge or local charges that would be due if he or she had not given such resale certificate.

(4) Other Evidence to Rebut Presumption of Imposition of the Prepaid MTS Surcharge or Local Charges.

A sale for resale is not subject to the prepaid MTS surcharge or local charges. A person who purchases prepaid MTS for resale and who subsequently uses the prepaid MTS owes the prepaid MTS surcharge or local charges on that use. A resale certificate which is not timely taken is not retroactive and will not relieve the seller of the liability for the prepaid MTS surcharge or local charges. Consequently, if the seller does not timely obtain a resale certificate containing the essential elements as described in subdivision (b)(1)(A), the seller will be relieved of liability for the prepaid MTS surcharge or local charges only where the seller shows that the prepaid MTS:

(A) Were in fact resold by the purchaser and was not used by the purchaser for any purpose other than retention, demonstration, or display while holding them for sale in the regular course of business, or

(B) Are being held for resale by the purchaser and has not been used by the purchaser for any purpose other than retention, demonstration, or display while holding them for sale in the regular course of business, or

(C) Were consumed by the purchaser and the prepaid MTS surcharge or local charges were reported directly to the Board by the purchaser on the purchaser's return, or

(D) Were consumed by the purchaser and the prepaid MTS surcharge or local charges were paid to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis.

(5) Use of XYZ Letters.

A seller who does not timely obtain a resale certificate may use any verifiable method of establishing that it should be relieved of liability for the prepaid MTS surcharge or local charges under subdivision (b)(4). One method that the Board authorizes to assist a seller in satisfying its burden that the sale was for resale or that the prepaid MTS surcharge was paid, is the use of "XYZ letters." XYZ letters are letters in a form approved by the Board which are sent to some or all of the seller's purchasers inquiring as to the purchaser's disposition of the prepaid MTS purchased from the seller. An XYZ letter will include certain information and request responses to certain questions, set forth below. The XYZ letter may also be further customized by agreement between the Board's staff and the seller to reflect the seller's particular circumstances.

(A) An XYZ letter may include the following information: seller's name and Prepaid MTS Account number, date of invoice(s), invoice number(s), purchase order number(s), amount of purchase(s), and a description of the prepaid MTS purchased or other identifying information. A copy of the actual invoice(s) may be attached to the XYZ letter. The XYZ letter will request the purchaser to complete the statement and include the purchaser's name, seller's Prepaid MTS Account number and nature of the purchaser's business. The statement shall be signed by the purchaser, purchaser's employee or authorized representative, and include the printed name of person signing the certificate, title, date, telephone number and city.

(B) An XYZ letter will request that the purchaser, purchaser's employee or authorized representative check one of the boxes provided inquiring as to whether the prepaid MTS in question were:

1. Purchased for resale and resold, without any use other than retention, demonstration, or display while being held for sale in the regular course of business;
2. Purchased for resale and presently in resale inventory, without having been used for any purpose other than retention, demonstration, or display while being held for sale in the regular course of business;
3. Purchased for resale but consumed or used; or

4. Purchased for use.

5. When the purchaser answers either (3) or (4) affirmatively (box checked), the XYZ letter will inquire further whether:

A. The prepaid MTS surcharge or local charges were paid directly to the Board on the purchaser's return, and if so, in what amount;

B. The prepaid MTS surcharge or local charges were added to the billing of the seller and remitted to the seller, and if so, in what amount;

C. The prepaid MTS surcharge or local charges were paid directly to the Board by the purchaser pursuant to an assessment against or audit of the purchaser developed either on an actual basis or test basis.

D. The purchaser confirms that the purchase is subject to the prepaid MTS surcharge or local charges.

(C) A response to an XYZ letter is not equivalent to a timely and valid resale certificate. A purchaser responding affirmatively to questions reflected in subparagraphs 1, 2, or 3 of subdivision (b)(5)(B) will be regarded as confirming the seller's belief that a sale was for resale for purposes of subdivision (b)(6). However, the Board is not required to relieve a seller from liability for the collection of the prepaid MTS surcharge or local charges based on a response to an XYZ letter. The Board may, in its discretion, verify the information provided in the response to the XYZ letter, including making additional contact with the purchaser or other persons to determine whether the purchase was for resale or for use or whether the prepaid MTS surcharge or local charges were paid by the purchaser. When the Board accepts the purchaser's response to an XYZ letter as a valid response, the Board shall relieve the seller of liability for collection of the prepaid MTS surcharge or local charges.

(D) When there is no response to an XYZ letter, the Board staff should consider whether it is appropriate to use an alternative method to ascertain whether the seller should be relieved of the prepaid MTS surcharge or local charges under subdivision (b)(4) with respect to the questioned or unsupported transaction(s).

(6) Purchaser's Liability for the Prepaid MTS Surcharge or Local Charges.

A purchaser who issues a resale certificate containing the essential elements as described in subdivision (b)(1)(A) and that otherwise appears valid on its face, or who otherwise purchases prepaid MTS that is accepted by the Board as purchased for resale pursuant to subdivision (b)(5) and who thereafter makes any storage or use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business is liable for the prepaid MTS surcharge or local charges on the purchase price of the prepaid MTS. The prepaid MTS surcharge or local charges are due at the time the prepaid MTS is

first stored or used and must be reported and paid by the purchaser with the purchaser's return for the period in which the prepaid MTS is first so stored or used.

(c) Bad Debts.

A seller of prepaid MTS is relieved from liability to collect the prepaid MTS surcharge insofar as the measure of the surcharge is represented by accounts found worthless and charged off for income tax purposes (which include circumstances where the seller's income is reported on a related person's income tax return and the bad debt is charged off on that return) or, if the seller is not required to file income tax returns and the seller's income is not reported on another person's return, charged off in accordance with generally accepted accounting principles. A seller may claim a bad debt deduction provided that the prepaid MTS surcharge was actually paid to the state.

This deduction should be taken on the return filed for the period in which the amount was found worthless and charged off for income tax purposes or, if the seller is not required to file income tax returns, charged off in accordance with generally accepted accounting principles.

Failure to take the deduction on the proper return will not in itself prevent the allowance of a refund measured by an amount for which a seller could have taken a timely deduction provided a claim for refund is filed with the Board within the limitation periods specified in sections 55222, 55222.1, and 55222.2 of the Revenue and Taxation Code.

(1) Amount Subject to Deduction.

(A) Receipts Subject to the Prepaid MTS Surcharge. If the amount of an account found to be worthless and charged off is comprised in part of receipts not subject to the prepaid MTS surcharge such as sales for resale or sales subject to a Lifeline exemption and in part of receipts subject to the prepaid MTS surcharge, a bad debt deduction may be claimed only with respect to the unpaid amount upon which the prepaid MTS surcharge has been paid. The allowable amount of deduction shall be adjusted for amounts claimed as retailer reimbursement. It shall be presumed that retailer reimbursement was claimed on all previously reported amounts subject to the prepaid MTS surcharge. In determining that amount, all payments and credits to the account may be applied: (1) ratably against the various elements comprising the amount the purchaser contracted to pay (pro rata method); (2) may be applied as provided in the contract of sale (contract method); or (3) may be applied by another method which reasonably determines the amount subject to the prepaid MTS surcharge (alternative method). When claiming a bad debt deduction or refund using an alternative method, the seller must include a clear explanation of that method. After having applied payments and credits using one method and claiming a deduction or refund based on such method, a seller shall not thereafter reapply the payments or credits using another method with respect to such losses previously claimed.

(B) Expenses of Collection. No deduction is allowable for expenses incurred by the seller in attempting to enforce collection of any account receivable, or for that portion of

a debt recovered that is retained by or paid to a third party as compensation for services rendered in collecting the account.

(2) **Worthless Account Subsequently Collected.** If any account found worthless and charged off is thereafter collected by the seller, in whole or in part, the amount subject to the prepaid MTS surcharge so collected shall be included in the first return filed after such collection and tax shall be paid on such amount with the return. The same percentage of the account which the seller claimed as an allowable bad debt deduction or refund shall be used to determine the percentage of the recovery subject to the prepaid MTS surcharge. The percentage subject to the prepaid MTS surcharge of any amounts received from a third party for the sale of an account after the seller has found them to be worthless and has claimed a bad debt deduction or refund are regarded as amounts subsequently collected for purposes of this provision, and the seller must include such amounts in the first return filed after receipt of such amounts and pay the prepaid MTS surcharge thereon.

(3) **Records.** In support of deductions or claims for refund for bad debts, sellers must maintain adequate and complete records showing:

(A) Date of original sale.

(B) Name and address of purchaser.

(C) Amount purchaser contracted to pay.

(D) Amount on which seller paid the prepaid MTS surcharge.

(E) The jurisdiction(s) where the local charges, when applicable, were allocated.

(F) All payments or other credits applied to the account of the purchaser.

(G) Evidence that the uncollectible portion of gross receipts on which the prepaid MTS surcharge was paid actually has been legally charged off as a bad debt for income tax purposes (whether or not the income tax return has yet been filed) or, if the seller is not required to file income tax returns and the seller's income is not reported on another person's return, charged off in accordance with generally accepted accounting principles.

(H) The percentage subject to the prepaid MTS surcharge of the amount charged off as a bad debt properly allocable to the amount on which the seller reported and paid the prepaid MTS surcharge.

(d) **Bundled Transactions.**

(1) The prepaid MTS surcharge and local charges apply to the entire selling price when there is a sale of prepaid MTS in combination with mobile data services or any other services or products for a single price.

(2) The prepaid MTS surcharge and local charges apply to the entire selling price when there is a sale of prepaid MTS in combination with a mobile telephone communication device for a single nonitemized price, except as provided in subparagraphs (A) or (B).

(A) The purchase price of the mobile telephone communication device in the bundled transaction is disclosed to the customer on a receipt, invoice, or other documentation provided to the customer. In such an instance, the prepaid MTS surcharge and local charges shall only apply to the remaining charge after excluding the selling price of the mobile telephone communication device; or

(B) The amount of the prepaid MTS sold with the mobile telephone communication device is a minimal amount. In such an instance, the prepaid MTS surcharge and local charges do not apply to the entire selling price.

For the purposes of this subdivision, the amount of prepaid MTS will be deemed as minimal if the service allotment is for 10 minutes or less or is five dollars or less.

(e) Lifeline Transactions.

A lifeline transaction is a transaction in which a person purchases prepaid MTS from a seller authorized to provide lifeline service under the state or federal lifeline programs. The state lifeline program means the program furnishing lifeline voice communication service pursuant to the Moore Universal Telephone Service Act. The purchase in a retail transaction in this state of prepaid MTS, either alone or in combination with mobile data or other services, by a consumer is exempt from the prepaid MTS surcharge if all of the following apply:

- (1) The prepaid consumer is certified as eligible for the state or federal lifeline programs. The seller must retain sufficient documentation supporting amounts claimed as subject to the lifeline program.
- (2) The seller is authorized to provide lifeline service under the state or federal lifeline programs. If the seller is not an authorized provider of lifeline service, the exemption does not apply.
- (3) The exemption is applied only to the amount paid for the portion of the prepaid MTS that the lifeline program specifies is exempt from the prepaid MTS surcharge.

(f) Transactions in Which a Surcharge or Local Charge was Paid to Another State.

A credit shall be allowed against, but shall not exceed, the prepaid MTS surcharge and local charges imposed on any prepaid consumer of prepaid MTS to the extent that the prepaid consumer has paid emergency telephone users charges, state utility regulatory commission fees, state universal service charges, or local charges on the purchase to any other state, political subdivision thereof, or the District of Columbia. The credit shall be apportioned to the charges against which it is allowed in proportion to the amounts of those charges.

Note: Authority cited: Sections 42020 and 42103, Revenue and Taxation Code. Reference: Sections 42010, 42012, 42018 and 42020, Revenue and Taxation Code.

APPENDIX A

California Resale Certificate - Prepaid Mobile Telephony Services

The burden of proving that a sale of prepaid MTS is not a retail transaction is upon the seller unless the seller timely takes in good faith a certificate from the purchaser that the prepaid MTS are purchased for resale. If timely taken in proper form and in good faith from a person who is engaged in the business of selling prepaid MTS and who holds a Prepaid MTS Account as required by Regulation 2460, *Administration*, this certificate relieves the seller from the duty of collecting the prepaid MTS surcharge and local charges. If the purchaser is not required to hold a Prepaid MTS Account because the purchaser makes no sales of prepaid MTS in this State, the purchaser must include on the certificate a sufficient explanation as to the reason the purchaser is not required to hold a Prepaid MTS Account in lieu of a Prepaid MTS Account number.

I HEREBY CERTIFY:

1. I hold a valid California Prepaid MTS Account number: _____.
2. This certificate is for the purchase from _____ of the property described below.
[Vendor's name]
3. I will resell the item(s) described in paragraph 4, which I am purchasing for resale in the regular course of my business operations, and I will do so prior to making any storage, use, or other consumption of the item(s) other than retention, demonstration, and display while holding the item(s) for sale in the regular course of my business. I understand that if I use the item(s) purchased under this certificate in any manner other than as just described, ***I will owe the prepaid MTS surcharge and local charges***, based on the sales price of the prepaid MTS, or as otherwise provided by law.

I further understand that if any tangible personal property is involved, the transaction might also be subject to sales or use tax in this state, and this certificate does not relieve me of any obligations imposed pursuant to California's Sales and Use Tax Law.

4. Description of property to be purchased:

Name of Purchaser	
Signature of Purchaser, Purchaser's Employee or Authorized Representative	
Printed Name of Person Signing	Title
Address of Purchaser	
Telephone Number	Date