

Internet Access Charges Not Subject to Sales Tax and Telecommunications Excise Tax

On October 8, 1998, Governor George E. Pataki signed into law new legislation to codify existing state policy with regard to taxation of Internet access, as previously announced in Technical Services Bureau Memoranda TSB-M-97(1)S and TSB-M-97(1)C, which are obsolete and are replaced by this memorandum. This new legislation added sections 12, 179, and 1115(v) to the Tax Law, and is applicable, for sales and compensating use tax purposes, to sales or uses made on or after February 1, 1997. For telecommunications excise tax purposes, the legislation is applicable to taxable periods ending on or after February 1, 1997.

Internet Access Service - Not Taxable

Effective February 1, 1997, the sale of Internet access service, including start-up charges, is exempt from sales and use taxes under Articles 28 and 29 of the Tax Law. In addition, for taxable periods ending on or after February 1, 1997, Internet access service is not subject to the telecommunications excise tax imposed under section 186-e of the Tax Law. Moreover, the provision of Internet access service does not constitute the carrying on of a telephone, local telephone, telegraph, or transmission business for purposes of the taxes imposed under Article 9 of the Tax Law. (Tax Law, sections 179 and 1115(v).)

Internet access is the connection provided to the Internet, usually by means of a dial-up service (a temporary connection, over a telephone line, to the computer of an Internet Service Provider (ISP)), or a dedicated line (a direct telephone line). To qualify for this exemption, the Internet access service must entail routing Internet traffic by means of accepted Internet protocols such as:

- Transmission Control Protocol/Internet Protocol (TCP/IP), a language by which Internet computers communicate with each other;
- Point to Point Protocol (PPP), a protocol that handles the sending of data packets over dial-up and leased-line connections to an Internet service provider;
- Serial Line Internet Protocol (SLIP), a standard for connecting a computer to the Internet using a regular telephone line; and
- Simple Mail Transfer Protocol (SMTP), a protocol for sending and receiving e-mail between servers on the Internet.

Thus, the purchase of telephone service from telecommunications providers (such as local exchange companies or long-distance companies) to access the Internet does not fall within the scope of this exemption. For example, the charge for the telephone call to an ISP to initiate access to the Internet is still subject to both sales tax and the telecommunications excise tax, as is the charge to an ISP for leasing telephone lines from a telecommunications provider. However, any charges for interstate telephony or telegraphy remain exempt from sales tax.

Start-up charges are charges by the provider of Internet access service for the installation of

equipment necessary to provide Internet access. These charges are not subject to sales or use tax, or the telecommunications excise tax.

Internet access charges may also include items such as: communications software, navigation software, an e-mail address, e-mail software, news headlines, space for a website, and other website services. If these services are incidental to providing Internet access, the services will be considered a part of the Internet access service and will not be subject to sales or use tax, or the telecommunications excise tax.

Nexus

Taxability under Article 9, Corporation Tax; Article 9-A, Franchise Tax on Business Corporations; Article 32, Franchise Tax on Banking Corporations; Article 33, Franchise Taxes on Insurance Corporations. A person will not be subject to tax under sections 183, 184, or 186 of Article 9, or under Articles 9-A, 32 or 33 of the Tax Law merely because the person stores advertising on a server or other computer equipment located in New York State, or has advertising disseminated or displayed on the Internet. This exemption does not apply where the server or other computer equipment located in New York State is owned or leased by such person. For these purposes, the term *person* includes a corporation, joint stock company or association, insurance corporation or banking corporation, as these terms are defined in sections 183, 184, or 186 of Article 9, or under Articles 9-A, 32 or 33 of the Tax Law. (Tax Law, section 12.)

Sales tax vendor status. A person will not be considered a vendor under section 1101(b)(8) of the Tax Law merely because the person stores advertising on a server or other computer equipment located in New York State, or has advertising disseminated or displayed on the Internet. This exemption does not apply where the server or other computer equipment located in New York State is owned or leased by such person. In addition, a person who provides telecommunication services or Internet access service will not be considered a vendor solely by virtue of the fact that its customers advertise and sell products and services through the provider's server or other computer equipment. However, these new provisions do not affect the status of any person who is a vendor of certain entertainment or information services under the provisions contained in section 1101(b)(8)(ii)(B) of the Tax Law.

For purposes of the sales tax vendor status provisions above, the term *person* means and includes individuals, persons, corporations, companies, associations, joint-stock companies or associations, partnerships or limited liability companies, societies, estates, assignee of rents, referees, any person acting in a fiduciary or representative capacity, or any other entity, and persons, their assignees, lessees, trustees or receivers, appointed by any court whatsoever, or by any other means, and any combination of the foregoing. For these purposes the state, municipalities, political and civil subdivisions of the state or municipality, and public districts will be treated as persons. (Tax Law, section 12.)