

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-01(16)C
Corporation Tax
April 17, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C000927C

On September 27, 2000, a Petition for Advisory Opinion was received from Arthur Andersen LLP, Attn: Ronald J. Rabkin, 1345 Avenue of the Americas, New York, New York, 10105.

The issue raised by Petitioner, Arthur Andersen LLP, is whether sales to a foreign interexchange carrier or local carrier qualify as sales for resale that are exempt from the gross receipts tax imposed under section 186-e of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Foreign Telco X is incorporated under the laws of a foreign country and operates exclusively outside of the United States. Telco X is a provider of international and domestic telecommunication services in its home country. Telco X is not subject to regulation by the New York State Public Service Commission (PSC), and therefore, does not hold a Certificate of Public Convenience and Necessity. Telco X does not hold a license from the Federal Communications Commission (FCC).

Domestic Telco Y is a wholly owned subsidiary of Telco X. Telco Y is incorporated under the laws of Delaware, and operates exclusively within the United States. Telco Y holds a license from the FCC, and is authorized to provide interstate and international telecommunication services in the United States.

Telco Y sells international telecommunication services to Telco X for resale to its customers in the country of Telco X. For example, Telco X is the interexchange carrier or local carrier for its customers. When Telco X's customer calls from London to New York City, the call originates and is charged to London. Pursuant to section 186-e.2(a) of the Tax Law, the call is not taxed in New York State. The sale of the telecommunication services by Telco Y to Telco X includes the charges for access for the transmission of the call, that is, the sub-sea cable and the landing station in New York City and the carrier access services in New York City.

Petitioner provided additional information stating that the foreign country in which Telco X was organized and operates, does not formally refer to service providers as an "interexchange carrier" or "common carrier", but that Telco X is a common carrier in such country providing telecommunication services within and without the country.

Discussion

Section 186-e.1(g) of the Tax Law defines “telecommunication services” as “telephony or telegraphy, or telephone or telegraph service, including, but not limited to, any transmission of voice, image, data, information and paging, through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar media or any combination thereof and shall include services that are ancillary to the provision of telephone service....”

Section 186-e.1(e) of the Tax Law defines “provider of telecommunication services” as “any person who furnishes or sells telecommunications services regardless of whether such activities are the main business of such person or are only incidental thereto....”

Section 186-e.2(a) of the Tax Law imposes an excise tax on the “the sale of telecommunication services by any person which is a provider of telecommunication services....” The tax is imposed on gross receipts from: (1) any intrastate telecommunication services; (2) any interstate and international telecommunication services (other than interstate and international private telecommunication services) which originate or terminate in New York State and which telecommunication services are charged to a service address in New York State, regardless of where the amounts charged for such services are billed or ultimately paid; and (3) interstate and international private telecommunication services, the gross receipts of which are apportioned as prescribed in section 186-e.3 of the Tax Law.

Section 186-e.2(b)(1) of the Tax Law provides that certain sales for resale of telecommunication services are excluded from tax. In order to qualify for this exclusion, the purchaser must sell the purchased telecommunication services as telecommunication services. Moreover, the purchaser must be an interexchange carrier or local carrier. Pursuant to Technical Services Memorandum TSB-M-95(3)C, December 13, 1995, a provider may accept a *Certificate of Public Convenience and Necessity* issued by the PSC as evidence that a carrier is eligible for the resale exclusion.

Section 186-e.1(b)(1) of the Tax Law provides that “interexchange carrier means any provider of telecommunication services between two or more exchanges that qualifies as a common carrier. Common carrier means any person engaged as a common carrier for hire in intrastate, interstate or foreign telecommunication services.”

Section 186-e.1(b)(2) of the Tax Law provides that “local carrier” means any provider of telecommunication services for hire to the public, which is subject to the supervision of the PSC and is engaged in providing carrier access service to a switched network. For the sole purpose of the application of the sale for resale exclusion under section 186-e.2(b) of the Tax Law, a reference to an “interexchange carrier” or “local carrier” shall include a cellular common carrier which is a

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facilities-based cellular common carrier without regard to a determination of whether such carrier is providing local or interexchange service as such.

In this case, Petitioner states that the foreign country in which Telco X operates does not formally refer to service providers as an “interexchange carrier” or “local carrier”, but that Telco X is a common carrier in such country. If Telco X can demonstrate that its activities in the country in which it operates, if conducted in New York State, would constitute the activities of an interexchange carrier as defined in section 186-e.1(b)(1) of the Tax Law or a local carrier as defined in section 186-e.1(b)(2) of the Tax Law, Telco X would be treated as an interexchange carrier or a local carrier for purposes of section 186-e of the Tax Law.

Pursuant to section 186-e.2(b)(1) of the Tax Law certain sales for resale of telecommunication services are excluded from the tax. Telco Y’s sales of telecommunication services to Telco X will qualify for the exclusion under such section 186-e.2(b)(1), if Telco X is considered to be an interexchange carrier or a local carrier, and Telco X resells the telecommunication services, as such, to its customers.

DATED: April 17, 2001

/s/
Jonathan Pessen
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.