

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

TSB-A-05(8)C
Corporation Tax
July 20, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C031202A

On December 2, 2003, a Petition for Advisory Opinion was received from PricewaterhouseCoopers LLP, Attn. Brian Goldstein, 1301 Avenue of the Americas, New York, New York 10019.

The issues raised by Petitioner, PricewaterhouseCoopers LLP, are:

1. Whether the gross receipts of Equipco, as described below, from the sale of mobile telecommunications equipment will be subject to the tax imposed under section 186-e of the Tax Law.
2. Whether a partner or member of Equipco, as described below, includes its share of Equipco's gross receipts in the partner's or member's gross receipts under section 186-e of the Tax Law.

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

A company ("Wireless Co") provides mobile telecommunications services in New York State, directly and through affiliates.

The affiliates of Wireless Co that provide mobile telecommunications service (each, an "Affiliate" and collectively, the "Affiliates") consist of corporations, partnerships and limited liability companies (LLCs).

Another entity ("Equipco") will be either a single member LLC that is owned by Wireless Co or an Affiliate, or a partnership that is owned by Wireless Co and/or one or more Affiliates. Equipco will sell mobile telephone equipment including cell phones and cell phone accessories (collectively, "Equipment") in New York.

Equipco acts as a commissioned salesperson and agent of Wireless Co and the Affiliates for the purpose of finding purchasers of the telecommunications service provided by Wireless Co and the Affiliates. Equipco earns a commission from Wireless Co and the Affiliates for establishing or renewing contracts for the provision of mobile telecommunications service between Wireless Co or the Affiliates and customers. Equipco will, among other regular sales of Equipment, sell Equipment concurrently with the establishment or renewal of a contract for mobile telecommunications service between Wireless Co or an Affiliate and the Equipment purchaser. Establishment or renewal of the service contract will also be made by employees of Wireless Co or an Affiliate at retail outlets maintained by Wireless Co or the Affiliate. In order to encourage the establishment or renewal of these contracts, Equipment will be sold by

Equipco to such customers at a discounted price if the customer establishes or renews a contract for mobile telecommunications service with Wireless Co or an Affiliate when the customer purchases Equipment.

Equipco will use a portion of the commission fee paid by Wireless Co or an Affiliate to “fund” the discount. If the Equipment is damaged or defective, the customer’s recourse and remedy for repair or replacement are through Equipco (which might ultimately process the problem through the distributor or manufacturer of the equipment). If the customer terminates the contract for the provision of mobile telecommunications services early or otherwise defaults on the contract, Wireless Co or its Affiliate may be entitled to damages arising from the early termination or default. However, regardless of whatever damages the customer may owe Wireless Co or an Affiliate occasioned by the early termination or default of the service contract, the customer retains possession and ownership of the Equipment. In the event of a default on the service contract, neither Equipco nor Wireless Co or an Affiliate is contractually entitled to damages or recoupment of the discount in the purchase price for the Equipment even though such price was premised upon the establishment or renewal of the service contract.

Equipment will also be sold by Equipco to existing customers of Wireless Co and its Affiliates and to others. Equipco will not sell the Equipment in such cases at a discounted price.

Applicable law

Section 186-e of the Tax Law provides, in part:

1. Definitions. As used in this section, where not otherwise specifically defined and unless a different meaning is clearly required:

(a)(1) “Gross receipt” means the amount received in or by reason of any sale, conditional or otherwise, of telecommunication services or in or by reason of the furnishing of telecommunication services. Gross receipt from the sale of mobile telecommunications service provided by a home service provider shall include “charges for mobile telecommunications service” as described in paragraph one of subdivision (I) of section eleven hundred eleven of this chapter, regardless of where the mobile telecommunications service originates, terminates or passes through... “Amount received” for the purpose of the definition of gross receipt, as the term gross receipt is used throughout this article, means the amount charged for the provision of a telecommunication service.

(2)(A) Any charge for a service or property billed by or for a mobile telecommunications customer’s home service provider shall be deemed to be provided by such mobile telecommunications customer’s home service provider.

(c) "Person" means persons, corporations, companies, associations, joint-stock companies or associations, partnerships or limited liability companies....

* * *

(e) "Provider of telecommunication services" means 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....

* * *

(g) "Telecommunication services" means telephone 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 ... and also include any equipment and services provided therewith....

(h) For the purpose of applying the provisions of this section to mobile telecommunications service, the following terms when used in relation to mobile telecommunications service shall be defined as such terms are defined in section eleven hundred one of this chapter: "mobile telecommunications service," "mobile telecommunications customer," "home service provider," ...

2. Imposition. (a) There is hereby imposed an excise tax on the sale of telecommunication services by any person which is a provider of telecommunication services, to be paid by such person, at the rate of ... two and one-half percent on and after January first, two thousand of gross receipt from ... (4) mobile telecommunications service provided by a home service provider where the mobile telecommunications customer's place of primary use is within this state.

Section 1101(b) of the Tax Law provides, in part:

(24) "Mobile telecommunications service" shall mean commercial mobile radio service. "Mobile telecommunications service" does not include prepaid telephone calling service or air-ground radio telephone service as defined in section 22.99 of title 47 of the code of federal regulations as in effect on June first, nineteen hundred ninety-nine.

* * *

(27)(i) "Mobile telecommunications customer" shall mean either (A) a person or entity that contracts with a home service provider for mobile telecommunications services; or (B) if the end user of mobile telecommunications services is not the

contracting party, the end user of the mobile telecommunications service, but this clause (B) applies only for the purpose of determining the place of primary use....

(ii) "Home service provider" shall mean a facilities-based carrier or reseller as defined in subparagraph (iv) of this paragraph, with which the mobile telecommunications customer contracts for the provision of mobile telecommunications service.

Section 1111(I)(1) of the Tax Law defines "charges for mobile telecommunications services" and provides, in part:

Such term shall mean any charge by a home service provider to its mobile telecommunications customer for (A) commercial mobile radio service, and shall include property and services that are ancillary to the provision of commercial mobile radio service (such as dial tone, voice service, directory information, call forwarding, caller-identification and call-waiting), and (B) any service and property provided therewith.

Opinion

With respect to Issue 1, Equipco will be either a single member LLC owned by Wireless Co or an Affiliate, or a partnership owned by Wireless Co and/or one or more Affiliates. As either an LLC or a partnership, Equipco is a person under section 186-e.1(c) of the Tax Law and will be subject to the excise tax imposed under section 186-e of the Tax Law if it is a provider of telecommunication services that sells telecommunication services.

Telecommunication services under section 186-e.1(g) of the Tax Law include mobile telecommunications service which is defined under section 1101(b)(24) of the Tax Law. Under section 186-e.1(g), mobile telecommunications service includes any transmission of voice, image, data, information and paging, through microwave, radio wave or satellite, and services that are ancillary to the provision of telephone service and any equipment and services provided therewith. The sale of mobile telecommunications service includes any equipment and services provided therewith. The tax is imposed on a person's gross receipt from the sale of such mobile telecommunications service and includes charges for mobile telecommunications service as defined in section 1111(I) of the Tax Law. Charges for mobile telecommunications service include any charge by a home service provider to customers for (a) commercial mobile radio service, and include property and services that are ancillary to the provision of such commercial mobile radio service such as dial tone, voice service, directory information, call forwarding, caller-identification and call-waiting, and (b) any service and property provided therewith.

In this case, Petitioner states that Equipco is the seller of mobile telecommunications equipment, but that Equipco does not sell the mobile telecommunications service. Wireless Co and the Affiliates are providing the mobile telecommunications service, and Equipco's Equipment that is used to provide such mobile telecommunications service is sold to customers

of Wireless Co and the Affiliates concurrently with the establishment or renewal of a contractual relationship for such mobile telecommunications service with the customers. When the Equipment is sold in conjunction with the service contract, the customer's price for the Equipment is discounted. A portion of the amount of the commission fee paid by Wireless Co or the Affiliate that has the contractual relationship with the customer for the telecommunications service "reimburses" Equipco for the discount on the Equipment. Equipco also sells Equipment to existing customers of Wireless Co and its Affiliates and others through retail sales.

Based on the facts presented, Equipco is selling mobile telecommunications equipment, but it is not selling mobile telecommunications service. See *Marken Properties, Inc., Relay Communications Center, Inc., and Relay Communications Corporation*, Adv Op Comm T&F, June 26, 1997, TSB-A-97(16)C and (37)S. Therefore, Equipco's sales of the Equipment are not subject to the tax imposed under section 186-e of the Tax Law.

With respect to Issue 2, Equipco is a person under section 186-e of the Tax Law and is a taxpayer if it has taxable gross receipts as defined in section 186-e of the Tax Law. Therefore, if Equipco is a single member LLC or a partnership, its gross receipts are not treated as passed-through to its member or partners and are not included in the gross receipts of the member or partners for purposes of section 186-e of the Tax Law. Accordingly, if Equipco is a single member LLC, its member will not include Equipco's gross receipts from Equipco's sale of the Equipment when computing the member's gross receipts under section 186-e of the Tax Law. If Equipco is a partnership, none of the partners will include the partner's distributive share of Equipco's gross receipts from Equipco's sale of the Equipment when computing the partner's gross receipts under section 186-e of the Tax Law.

However, it should be noted that there are circumstances in which the gross receipt for the sale of the mobile telecommunications service by Wireless Co and its Affiliates would include the amount received for the Equipment used by the customer in connection with the provision of the telecommunication services. For instance, if the telecommunication services sold by Wireless Co or its Affiliates and the Equipment are marketed in package form, Equipco may be considered in some cases to be selling the Equipment on behalf of Wireless Co or its Affiliates. Such a determination would depend on the specific nature of any agreements between Wireless Co or its Affiliates with Equipco, and the specific nature of the contractual service agreements between Wireless Co or its Affiliates with the mobile telecommunications customer. The sale of such a package in that case would be considered the sale of the mobile telecommunications service, and the total package price, including the amount paid for the Equipment, would be considered to be the gross receipt of Wireless Co or its Affiliates from the sale of mobile telecommunications service.

Furthermore, if Wireless Co bills for the Equipment, under section 186-e.1(a)(2)(A) of the Tax Law it is considered to be providing the Equipment along with the telecommunication services, and Wireless Co's gross receipt for purposes of section 186-e.1(a)(1) of the Tax Law

will include both the charge for the telecommunication services and the charge for the Equipment.

DATED: July 20, 2005

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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