

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

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Corporation Tax
TSB-A-10(24)S
Sales Tax
May 4, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z091116B

Petitioner [REDACTED], requests an Advisory Opinion about whether roaming mobile telecommunications services provided to customers of foreign mobile telecommunications carriers and billed to the customer by the foreign carrier are subject to New York State and local sales taxes or the telecommunications excise tax.

We conclude that the services described by Petitioner are not subject to State and local sales taxes and the telecommunications excise tax because they are provided to mobile telecommunications customers with places of primary use outside New York State.

Facts

Petitioner is a facilities-based provider of mobile telecommunication services. It provides mobile telecommunication services directly to its end-user subscribers, as well as to subscribers of other domestic and foreign carriers who are “roaming” in Petitioner’s service areas. Petitioner has entered into agreements with foreign mobile telecommunications carriers under which it supplies roaming services to the foreign carriers’ customers while in the United States. These customers’ residential or business street addresses are located outside New York State. Under these agreements, the foreign carriers pay Petitioner for the roaming services. The foreign carriers, in turn, bill their customers for the roaming services supplied by Petitioner.

Petitioner asks the following questions:

1. Are the roaming services excluded from New York State and local sales taxes and the telecommunications excise tax under the federal Mobile Telecommunications Sourcing Act on the ground that they are provided to a customer with a place of primary use outside New York State?
2. Alternatively, are the roaming services provided by Petitioner to customers of foreign mobile telecommunications carriers excluded from New York State and local sales taxes and the telecommunications excise tax as sales for resale?

Analysis

Petitioner’s sales of roaming services are not subject to State and local sales taxes or the telecommunications excise tax because they are provided to mobile telecommunications customers with places of primary use outside New York State. Tax Law section 1111(l), which incorporates the provisions of the federal Mobile Telecommunications Sourcing Act (4 USC § 116, *et seq.*) for purposes of New York State and local sales taxes, provides:

(3)(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.

(B) Charges for mobile telecommunications service that are provided or deemed to be provided by a mobile telecommunications customer's home service provider shall be sourced to the taxing jurisdiction where the mobile telecommunications customer's place of primary use is located, regardless of where the mobile telecommunications service originates, terminates or passes through.

Tax Law section 186-e.1(a) contains identical provisions covering the telecommunications excise tax.

A "home service provider" is a facilities-based carrier or reseller, with which the mobile telecommunications customer contracts for the provision of mobile telecommunications service. *See* Tax Law § 1101(b)(27)(ii). A "serving carrier" is "a facilities-based carrier providing mobile telecommunications service to a mobile telecommunications customer outside the home service provider's or reseller's licensed service area." *See* Tax Law § 1101(b)(27)(v).

"Mobile telecommunications customer" means 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. "Mobile telecommunications customer" does not include either (a) a reseller of mobile telecommunications service; or (b) a serving carrier under an arrangement to serve a mobile telecommunications customer outside the home service provider's licensed service area.

See Tax Law § 1101(b)(27)(i). "Place of primary use" means:

[T]he street address representative of where a mobile telecommunications customer's use of the mobile telecommunication service primarily occurs, and must be

(i) the residential street address or the primary business street address of the mobile telecommunications customer and

(ii) within the licensed service area of the home service provider.

Tax Law § 1101(b)(26). All of the above definitions also apply to the telecommunications excise tax. *See* Tax Law § 186-e.1(h).

The foreign carriers' customers are "mobile telecommunications customers" as defined by Tax Law section 1101(b)(27)(i), because they are the end users of the service provided by Petitioner. The foreign carriers, not Petitioner, are the mobile telecommunications customers' home service providers. Petitioner, as a serving carrier, provides service to the mobile telecommunications customers under an agreement with the home service provider, for which the customers are billed by their home service provider. Because Petitioner's roaming services are billed to the customer by the home service provider,

they are deemed to be provided by the home service provider. *See* Tax Law § 1111(l)(3)(A). Accordingly, these services must be sourced to the taxing jurisdiction in which the mobile telecommunications customers' places of primary use are located. *See* Tax Law § 1111(l)(3)(B). Because the customers' places of primary use (i.e., their residential or business street addresses) are not located in New York State, the service is not sourced within the State and is not subject to State or local sales taxes or the telecommunications excise tax.

Petitioner also asks whether its sales of roaming services described above are exempt from the sales and telecommunications excise taxes as sales for resale. Under the definition of "mobile telecommunications customer" in Tax Law section 1101(b)(27)(i), the end user is deemed to be the customer for purposes of determining the place of primary use. Under the facts presented, the end users are the foreign carrier's customers, whose residential or business street addresses are all outside of New York State. Thus, because the sales by Petitioner to the foreign carrier would all be sourced outside the state, and therefore not subject to New York sales and excise taxes, it is not necessary to address whether these sales are exempt sales for resale.

DATED: May 4, 2010

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.