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

TSB-A-15(3)C
Corporation Tax
TSB-A-15(4)I
Income Tax
March 12, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M140509A

The Department of Taxation and Finance received a Petition for Advisory Opinion from "Petitioner" [redacted]. Petitioner is a telecommunication carrier and it asks whether it would be protected from liability for the excise tax imposed by Tax Law § 186-e by its acceptance of a resale certificate from a foreign carrier that lacks the purchaser's vendor identification number. We conclude that, without the customer's Certificate of Authority number, the resale certificate is not complete and will not rebut the presumption that the sale is subject to §186-e tax.

Facts

Petitioner is a Delaware corporation and a licensed common carrier by the New York Public Service Commission ("PSC") and sells telecommunication services that are subject to the 186-e telecommunication excise tax. Certain of Petitioner's customers are other telecommunication carriers that purchase Petitioner's services for resale. These resale carrier customers include foreign carriers that use Petitioner's services for resale to their ultimate end users in foreign countries. Petitioner's domestic carrier customers can provide Petitioner with a completed § 186-e tax resale certificate form (Form CT-120). According to Petitioner, however, the foreign carriers cannot provide a completed Form CT-120, because this form requires the reseller to provide the number of the reseller's Certificate of Authority ("COA"), which this Department issues to persons required to collect sales tax pursuant to Tax Law § 1134.

These carriers often do not have U.S. operations or even a presence in the U.S. They do not serve customers in New York. Rather, they offer services in their home countries and use Petitioner's services to facilitate the provision of these telecommunication services abroad. As a result, these foreign customers have no need for a COA and in many cases do not have a COA.

Analysis

As relevant here, Tax Law § 186-e imposes an excise tax on a telecommunication service provider's gross receipts from sales of the following: (1) intrastate telecommunication service; (2) interstate and international telecommunication service if the service originates or terminates in New York and is charged to a service address in New York; and (3) private telecommunication services attributable to New York, or any combination thereof.

Tax Law § 186-e.2(b)(1)(i) further provides that "[a]ll gross receipts are deemed taxable to the provider of telecommunication services under this section, unless the provider, within ninety days after the provision of telecommunication services, has taken from the purchaser a certificate of resale in the form the commissioner has prescribed, to document that the

telecommunication services were purchased for resale as telecommunication services." Under Tax Law § 186-e.2(b)(1)(ii), however, "[a] certificate of resale is not properly completed if it does not include the purchaser's certificate of authority number issued pursuant to [Tax Law § 1134]." Consistent with this provision, the § 186-e tax resale certificate form created by the Department, the CT-120, requires the purchaser's COA number.

Thus, § 186-e.2(b)(1) presumes that the gross receipts from the sale of telecommunication services are taxable unless the purchaser timely supplies the seller with a properly completed resale certificate that the seller accepts in good faith. To be properly completed, the resale certificate must include the purchaser's COA number issued in accordance with Tax Law § 1134. Therefore, when Petitioner accepts a resale certificate that lacks the purchaser's COA number, the resale certificate is not properly completed and, thus, cannot rebut the presumption of taxability in § 186-e.2(b)(1)(ii).

Absent a properly completed resale certificate, the sale of telecommunications services is presumed to be taxable, and failure to pay these taxes may subject Petitioner to interest and penalty liabilities. Petitioner may attempt to prove, through a refund claim or on audit, that the sale to the carrier was for resale, but the burden of proof remains on it. To avoid possible liability for penalties and interest, Petitioner should collect the § 186-e tax from any purchaser that does not have a COA, since the purchaser is entitled to seek a credit pursuant to § 186-e.2(b)(1)(v) to the extent that it can show that the purchase was for resale. Alternatively, a foreign carrier may voluntarily register as a vendor in the State of New York and obtain a COA. However, once a foreign carrier voluntarily registers, it would be required to file zero remittance tax returns in order to be in good standing and retain its COA.

Finally, according to Petitioner, its foreign carrier customers have repeatedly insisted that TSB-A-01(16)C continues to allow Petitioner to treat the sales to these carriers as exempt sales for resale, even though the resale customers do not have a COA and, thus, cannot complete Form CT-120. That 2001 Advisory Opinion has been superseded by a change in the Tax Law, namely Chapter 297 of the Laws of 2008, which amended the § 186-e resale provision, effective January 1, 2009, to allow for the use of resale certificates to substantiate that a purchase of telecommunication services was for resale. *See* TSB-M-09(2)C. Included in that legislation was the resale provision in Tax Law § 186-e.2(b)(1)(ii) that requires a COA number, as discussed above. Therefore, TSB-A-01(16)C has no relevance to sales to telecommunication services occurring on or after January 1, 2009.

DATED: March 12, 2015

/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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.