

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-17(1)C
Corporation Tax
TSB-A-17(18)S
Sales Tax
August 3, 2017

**STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE**

ADVISORY OPINION

PETITION NO. Z140827A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner is a mobile

virtual network operator (MVNO) that sells prepaid calling minutes, texting rights, and data (hereafter “prepaid rights”) through a variety of channels. It asks whether the sales and use tax and the telecommunication excise tax apply to those sales and, if so, how to source those sales for purposes of those taxes. We conclude, in general, as follows: (1) with regard to its sales of prepaid rights under its own brand name through third-party retailers, such sales qualify for the resale exclusion for sales tax purposes, but are taxable to Petitioner for purposes of the telecommunication excise tax; (2) with regard to Petitioner’s sales of refills of its prepaid rights, Petitioner must collect sales tax and is liable for the telecommunication excise tax; (3) with regard to Petitioner’s sales of prepaid rights under its own brand name to another MVNO, Petitioner’s sales qualify for the respective resale exclusions in the sales tax and the telecommunication excise tax; and (4) with regard to sourcing, taxable sales should be sourced for sales tax purposes based on the location of the customer at the time of the purchase and for telecommunication excise tax based on the customer’s place of primary use.

Facts

Petitioner is a mobile virtual network operator (“MVNO”). Petitioner is planning on selling packages of prepaid rights, which consist of voice calling and texting rights and Internet access rights to customers worldwide directly on the Internet and indirectly through retail stores. It will buy the telecommunication capacity needed for the prepaid services from another MVNO. Petitioner states that the package of voice calling and texting rights it sells constitute “commercial mobile radio service” as that term is defined in Tax Law § 1101(b)(25), and qualifies as a “prepaid mobile calling service” as defined in Tax Law § 1101(b)(22)(B).

With regard to sales of its prepaid rights through retailers, Petitioner will enclose a cellphone in a clamshell casing bearing its trade name and trade dress, along with a PIN needed to activate service (“clamshell package”). It will sell that package to a distributor that will resell the package to third-party brick and mortar retailers. To activate service, a customer can call 611# on the phone and provide the phone’s serial number, along with the PIN number. Alternatively, the customer can access Petitioner’s website and input the same information. Under either way of activating service on the phone, the customer will have to agree to Petitioner’s terms of service, in order to complete the activation process. Currently, when

TSB-A-17(1)C
Corporation Tax
TSB-A-17(18)S
Sales Tax
August 3, 2017

- 2 -

activating service, Petitioner does not intend to ask for the customer's address and claims that it would not be able to verify the customer's address in any case.

With regard to refills of the prepaid rights, when the customer activates the phone, Petitioner gives the customer the choice of agreeing to an automatic payment process by which the company's automated system will charge the customer's credit card and refill the customer's account each month. Alternatively, the customer can refill the prepaid services at a third-party retail location.

Finally, Petitioner also will sell its prepaid rights to smaller MVNOs under its own brand name. In its contract with the other MVNO, Petitioner will make itself responsible for the availability of the prepaid rights that the smaller MVNO will sell. The smaller MVNO will resell those prepaid rights under its own brand name to third-party retailers, who will sell the same to consumers under the smaller MVNO's brand name. Petitioner will buy the commercial mobile radio capacity that it resells from another MVNO, which will have bought the capacity directly or indirectly from one of the national mobile carriers.

Analysis

The two telecommunication taxes that may apply to the sales of the prepaid rights at issue herein are the sales taxes imposed under Tax Law § 1105(b) and the telecommunication excise tax imposed by Tax Law § 186-e. Below we consider how these two taxes apply to Petitioner's three types of sales.

Application of the Sales Tax

The Tax Law imposes sales tax on the sale of specified services, except for resale of those services. *See* Tax Law § 1105(b), (c). Included in the taxable services are a number of telecommunication services, including "prepaid telephone calling services." Tax Law § 1105(b)(1)(D). Prepaid telephone calling service includes, for sales tax purposes, prepaid mobile calling services. Tax Law § 1101(b)(22)(A). Prepaid mobile calling service is defined as "the right to use a commercial mobile radio service, whether or not sold with other property or services, that must be paid for in advance and is sold for use over a specified period of time or in predetermined units or dollars that decline with use in a known amount, whether or not that right is represented by or included the transfer to the purchaser of an item of tangible personal property." Tax Law § 1101(b)(22)(B).

When sales of prepaid mobile calling services take place at a brick and mortar store, the sales are taxable at the State and local rate in effect at that location. *See* Tax Law §§ 1101(b)(22)(A); 1213; TSB-M-00(3)S. If the sale does not take place there, the Tax Law provides:

[the sale] shall be conclusively determined to take place at the purchaser's shipping address or, if there is no item shipped, at the purchaser's billing address or the location

TSB-A-17(1)C
Corporation Tax
TSB-A-17(18)S
Sales Tax
August 3, 2017

- 3 -

associated with the purchaser's mobile telephone number, or, if the vendor does not have the address or the location associated with the customer's mobile telephone number, at such address, as approved by the commissioner, that reasonably reflects the customer's location at the time of the sale or recharge.

Tax Law § 1101(b)(22)(A).

Applying these rules first to the sales of Petitioner's clamshell packages, when a customer buys one of Petitioner's packages at a retail store, the customer is buying the right to receive a prepaid mobile calling service to be provided by Petitioner, along with a cellphone on which to receive the service. To get the service, the customer will have to activate the phone, which involves agreeing to Petitioner's terms of service. The retailer's sale of the right to receive a mobile telecommunications service from Petitioner qualifies as a sale of a prepaid mobile calling service and the retailer must collect sales tax at the point of sale. *See* Tax Law §§ 1101(b)(22); 1105(b)(1)(D).

A charge that is expressly for Internet access ("data") is not subject to tax under Federal or State law. *See* 47 USCA § 151 n. ("Internet Tax Freedom Act"); Tax Law §§ 179; 1115(v). If taxable telecommunication services and data are sold together for one price, the entire charge is subject to sales tax. *See* 47 USCA § 151 n., at § 1106; Tax Law § 1111(l)(2). However, if the seller can reasonably identify the portion of its single charge that is attributable to the data rights provided, using a reasonable, objective, and verifiable standard, from books and records that it keeps in the regular course of its business, it can exclude that portion of its charge from sales tax. If the provider separately sells data, then that standard requires the use of the price at which the provider makes such sales; if the provider does not separately sell data, then it must use the prevailing retail price of data sold separately by other providers. *See Id.* Thus, if Petitioner can reasonably identify the portion of the charge for the clamshell package that is attributable to the data rights provided, using the § 1111(l)(2) standard, it can exclude that portion of its charge from sales tax. *See* 47 USCA § 151 n., at § 1106; Tax Law § 1111(l)(2).

The sales tax resale exclusion applies to both Petitioner's sale of the clamshell package to the distributor and the distributor's sale of the package to the retailer, if those parties timely receive in good faith properly completed resale certificates (Form ST-120) from their respective customers, in which case they are not liable for sales tax on those sales. *See* Tax Law § 1105(b)(1)(D).

Petitioner's sale of a refill of its prepaid rights also amounts to a sale of a prepaid mobile calling service and is taxable to the extent that the sale takes place in New York. As discussed above, the sale is deemed to take place at the address associated with the mobile phone account or, if the vendor lacks that address, at such other address that reasonably represents the customer's location when purchasing the refill. *See* Tax Law § 1101(b)(22)(A). Under this standard, Petitioner may rely on the address on the credit card or other instrument used to pay for the service to determine the customer's location at the time of sale. If it does not have that address either, and has not received permission from the Commissioner to use a different

sourcing method, Petitioner must ask the customer for its address at the time of the refill. Petitioner may rely on that address in determining the applicable State and local sales tax rate even though it cannot verify its accuracy. To the extent that Petitioner can reasonably identify the portion of the charge for the refill that is attributable to the data rights provided, using the standard in § 1111(l)(2) described above, it can exclude that portion of its charge from the sales tax. *See 47 USCA § 151 n., at § 1; Tax Law § 1111(l)(2).* Petitioner's purchases of the commercial mobile radio service from a MVNO that it resells in these transactions qualify for the sales tax resale exclusion if Petitioner provides the MVNO with a properly completed resale certificate. *See Tax Law § 1105(b)(1).*

With regard to Petitioner's third type of sale, whereby Petitioner buys mobile capacity from a MVNO and sells it to another MVNO that will use it to sell its own branded prepaid mobile calling services, Petitioner's sale qualifies for the sales tax resale exclusion. As a result, Petitioner need not collect tax on such sales if it timely accepts in good faith a properly completed ST-120 from its MVNO customer. *See Tax Law §§ 1105(b)(1); 1132(c)(1).*

Application of § 186-e Excise Tax

Tax Law § 186-e(2)(a)(2) imposes an excise tax on the sale of mobile telecommunication services provided by a home service provider where the mobile telecommunications customer's place of primary use is within the State. A "mobile telecommunications service" is defined as a "commercial mobile radio service" and it excludes a "prepaid telephone calling service." *See Tax Law §§ 186-e(1)(h); 1101(b)(24).*

The gross receipts from the sales of a mobile telecommunications service are taxable to the extent that the customer's place of primary use (PPU) is in New York. *See Tax Law § 186-e(2)(a)(2).* A customer's PPU, in general, is the street address representative of where the customer's use of the mobile telecommunications service primarily occurs. Tax Law § 1101(b)(26).

To be liable for the § 186-e tax on gross receipts from telecommunication services, a person must be a "provider of telecommunication services." That term is defined in Tax Law § 186-e(1)(e) 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."

Turning first to Petitioner's sales of the clamshell packages, when a customer buys one of the packages from a retailer, the customer is buying, among other things, the right to obtain texting and voice minutes from Petitioner. The voice minutes and texting rights rely on a commercial mobile radio service, but do not constitute a prepaid telephone calling service because they do not necessitate the use of an authorization code or access number to make a call or send a text. *See TSB-A-16(2)C.* Therefore, when a customer uses the voice minutes and texting rights, the customer is receiving a mobile telecommunications service. *See Tax Law §§ 186-e(1)(h); 1101(b)(24).* The cellphone included in the clamshell package is part of the mobile telecommunications service because it is ancillary to that service. *See Tax Law § 186-e(2)(b)(4); Tax Law § 1111(l)(1)(A).* Importantly, however, in selling a contract right to receive a mobile

TSB-A-17(1)C
Corporation Tax
TSB-A-17(18)S
Sales Tax
August 3, 2017

- 5 -

telecommunications service from a third-party (Petitioner), the retailer is not “furnishing or selling” a mobile telecommunications service, but rather is selling an intangible, that is, a future contract right. Thus, the retailer is not a telecommunication service provider liable for the mobile telecommunications services promised by the clamshell package, and does not owe telecommunication excise tax. *See Tax Law § 186-e(2)(a)(2); TSB-A-16(2)C (kiosk owner that enables recharges of third-party mobile telecommunications services is not a telecommunication service provider); see also TSB-A-02(37)S (retailer that sells a third-party’s prepaid telephone cards is not making a taxable sale of telephone services for sales tax purposes with regard to periods prior to the effective date of Tax Law amendment requiring such retailers to collect tax).*¹

Petitioner is the party liable for the mobile telecommunications services promised to the purchaser of the clamshell package. The purchaser must create an account with Petitioner to receive the mobile telecommunications services and Petitioner has the right to debit the account upon use by the customer or the expiration of the service period. Therefore, Petitioner is the telecommunication service provider that owes excise tax on the gross receipt from those services to the extent the customer’s PPU is in New York State. To determine the customer’s PPU, Petitioner must ask the customer to provide his or her residential street address or primary business street address when the customer activates the cellphone and Petitioner may rely on that address in determining the customer’s PPU. The consideration Petitioner receives from the distributor for the clamshell package constitutes its gross receipts subject to tax. *See Tax Law §§ 186-e(1)(a)(1); 186-e(2)(a)(2).* To the extent that Petitioner can reasonably identify the portion of the charge for the clamshell package that is attributable to the data rights provided, using the standard in § 1111(l)(2) described above, it can exclude that portion of its charge from the excise tax. *See 47 USCA § 151 n., at § 1106; Tax Law § 186-e(2)(b)(4).*

Petitioner has a contract with the MVNO under which Petitioner purchased the prepaid rights included in its clamshell package; that MVNO is referred to in this Advisory Opinion as the “supplier MVNO.” The supplier MVNO’s liability under that contract for those prepaid rights will be reduced as Petitioner’s customer uses the underlying voice, text, and data services. The supplier MVNO, therefore, is making a sale of those rights to Petitioner. However, the supplier MVNO will not owe § 186-e tax with regard to the amounts Petitioner paid it for those prepaid rights if Petitioner timely provides the supplier MVNO with a properly completed Form CT-120, *Resale Certificate for Telecommunication Purchases.* *See Tax Law § 186-e(2)(b)(1).*

Petitioner, in turn, sells those clamshell packages to distributors. The distributor is not a telecommunication service provider for the same reason that the retailer who sells the clamshell package to the ultimate customer is not a telecommunication service provider: as discussed above, both the distributor and retailer are selling an intangible in the form of a contract claim right to receive a mobile telecommunications service from Petitioner and neither the distributor

¹ The retailer’s receipts from the sale of the clamshell package is not subject to the excise tax imposed by § 186-e, but is subject to sales tax, because in 2015 the Legislature amended the Tax Law to specifically make the retailer’s sale of the prepaid mobile service taxable for sales tax purposes. However, that legislation does not apply to the § 186-e excise tax. *See Part P of Chapter 59 of the Laws of 2015.*

TSB-A-17(1)C
Corporation Tax
TSB-A-17(18)S
Sales Tax
August 3, 2017

- 6 -

nor the retailer is liable for the mobile telecommunications service promised by the clamshell package. Because the distributor is not a telecommunication service provider, the distributor may not present a resale certificate to Petitioner and Petitioner may not, in good faith, accept a resale certificate from the distributor. *See Tax Law § 186-e(2)(b)(1).* Therefore, the sales of the clamshell packages from Petitioner to the distributor do not qualify for the excise tax resale exclusion.

With regard to Petitioner's gross receipts from the sale of refills of the prepaid rights, such gross receipts are taxable under § 186-e because the refills also constitute mobile telecommunications services to the extent that the customers' PPUs are in New York. *See Tax Law § 186-e(2)(a)(2).* To the extent that Petitioner can reasonably identify the portion of the charge for the prepaid rights that is attributable to the data rights provided, using the standard in § 1111(l)(2) described above, it can exclude that portion of its charge from the telecommunication services excise tax. *See 47 USCA § 151 n., at § 1106; Tax Law § 186-e(2)(b)(4).*

Finally, with regard to Petitioner's sale of prepaid rights to a second MVNO, which that MVNO will resell to consumers through retailers, Petitioner is making a sale for resale of those prepaid rights to the second MVNO, because the second MVNO will be reselling that telecommunications service as its own service. Therefore, the sale qualifies for the resale exclusion and Petitioner will not owe any telecommunications excise tax if it timely accepts a properly completed CT-120 from the second MVNO. *See Tax Law § 186-e(2)(b)(1).*

DATED: August 3, 2017

/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.