

**New York State Department of Taxation and Finance**  
**Taxpayer Services Division**  
**Technical Services Bureau**

TSB-A-97(37)S  
Sales Tax  
TSB-A-97(16)C  
Corporation Tax

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z970226A

On February 26, 1997, a Petition for Advisory Opinion was received from Marken Properties, Inc., Relay Communications Center, Inc., and Relay Communications Corporation, 145 Griffing Avenue, Riverhead, New York 11901. Petitioners, Marken Properties, Inc. ("Marken"), Relay Communications Center, Inc. ("Center"), and Relay Communications Corporation ("Corp"), provided additional information pertaining to the Petition on March 20, 1997.

The issues raised by Petitioners are: (1) whether each corporation is subject to franchise tax under Article 9-A or Sections 183 and 184 of Article 9 of the Tax Law; (2) how the receipts of each corporation are treated under Section 186-e of Article 9 of the Tax Law; and (3) how the receipts of each corporation are treated under Article 28 of the Tax Law.

Petitioners submitted the following facts as the basis for this Advisory Opinion.

Philip J. Kenter is the sole shareholder of all three companies, which are federal S corporations. The three corporations operate under one roof.

The assets of the corporations (building, equipment, furnishings, pagers, etc.) are held by Marken. All of Marken's receipts are derived from payments from Center and Corp for rent.

Corp is an FCC licensed radio common carrier of voice paging airtime services and is also a reseller of conventional paging airtime services. All of Corp's receipts are derived from the provision of these paging airtime services.

Center is a provider of telephone answering services. As part of its telephone answering service, Center may provide its customers with pagers, but does not separately bill for paging airtime services. Center also provides voice mail, travel message services, alarm monitoring services, radio sales, rentals, sales of cellular telephones connected to specific cellular carriers, paging equipment, rentals and repairs. All of Center's receipts are from these operations. Center has no receipts from separately stated charges for paging airtime services.

Center conducts all administrative and billing functions for the three corporations. For customer convenience, one monthly bill is sent covering the services provided by the three corporations. The bills separately state the charges associated with each corporation. The charges for the telephone answering services and retail equipment sales are separately stated as charges made by Center. The charges for voice paging airtime services and resold paging airtime services are separately stated as charges made by Corp.

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ISSUE 1

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax on domestic or foreign corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office in New York State. Section 209.4 of the Tax Law, provides that a corporation liable for tax under Sections 183 and 184 of Article 9 of the Tax Law is not subject to tax under Article 9-A of the Tax Law.

Section 183 of Article 9 of the Tax Law imposes a franchise tax on a domestic or foreign corporation formed for or principally engaged in the conduct of a telephone business, for the privilege of exercising its corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office, in New York State.

Section 184.1 of the Tax Law provides that a corporation is subject to the franchise tax under Section 184 for the privilege of exercising its corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office, in New York State, if it is formed for or principally engaged in local telephone business. The term "local telephone business" means the provision or furnishing of telecommunication services for hire wherein the service furnished by the provider thereof consists of carrier access service or the service originates and terminates within the same local access and transport area ("LATA"). The term "telecommunication services" has the same meaning for purposes of Section 184 as for Section 186-e of the Tax Law.

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 ... and also include any equipment and services provided therewith. Provided, the definition of telecommunication services shall not apply to separately stated charges for any service which alters the substantive content of the message received by the recipient from that sent."

To determine the classification and proper taxability of a corporation under either Article 9-A or Sections 183 and 184 of Article 9, an examination of the nature of the corporation's activities is necessary, regardless of the purposes for which the corporation was organized. See Matter of McAllister Bros., Inc. v Bates, 272 AD 511, 517. Ordinarily, a corporation is deemed to be principally engaged in the activity from which more than 50 percent of its receipts are derived. See, e.g., Re Joseph Bucciero Contracting Inc., Adv Op St Tax Commn, July 23, 1981, TSB-A-81(5)C.

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In CCC Telex Service, Inc, Adv Op Comm T & F, July 18, 1989, TSB-A-89 (9)C, it was held that where the petitioner was principally engaged in a telephone answering service business, it would be classified as a general business corporation and would be subject to tax under Article 9-A of the Tax Law.

With respect to Issue 1, Marken and Center are principally engaged in general business activities and are subject to tax under Article 9-A of the Tax Law. It appears that Corp is principally engaged in a telephone business that is taxable under Section 183 of Article 9 of the Tax Law, and, if more than 50 percent of its receipts are derived from local telephone business as defined in Section 184.1 of the Tax Law, Corp is also taxable under Section 184 of the Tax Law.

## ISSUE 2

Section 186-e.2(a) of the Tax Law imposes an excise tax "on the sale of telecommunication services by any person which is a provider of telecommunication services...."

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 provides that 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 as determined in Section 186-e.3 of the Tax Law.

With respect to Issue 2, the voice paging airtime services and the resales of conventional paging airtime services provided by Corp are telecommunication services pursuant to Section 186-e.1(g) of the Tax Law. Therefore, pursuant to Section 186-e.1(e) of the Tax Law, Corp is a provider of telecommunication services and is subject to the excise tax imposed by Section 186-e.2(a) on its receipts derived from the provision of these paging airtime services.

Center is the provider of telephone answering services. As part of these services, it may provide its customers with pagers. However, Center does not separately bill for paging airtime services, it is included in the charges for the telephone answering services. Since the paging airtime services provided by Center are not resold as separately billed paging services, Center is not considered the provider of telecommunication services under Section 186-e.1(e) of the Tax Law. Accordingly, Center is not subject to the tax imposed under Section 186-e of the Tax Law.

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Marken is not a provider of telecommunication services and is not subject to the tax imposed under Section 186-e of the Tax Law.

ISSUE 3

Section 1105(a) of Article 28 of the Tax Law imposes New York State sales tax upon receipts from every retail sale of tangible personal property, except as otherwise provided in such article. A "sale" includes any transfer of title or possession (or both) of tangible personal property and any rental, lease or license to use or consume such property in any manner or by any means for a consideration (see, Tax Law, §1101(b)(5)). "Tangible personal property" means corporeal personal property of any nature and does not include real property (see, Tax Law, §1101(b)(6)).

Section 1105(b) of the Tax Law imposes sales tax upon receipts from every sale, other than a sale for resale, of telephony and telegraphy and telephone and telegraph services of whatever nature, except interstate and international telephony and telegraphy and telephone and telegraph services, and from every sale, other than a sale for resale, of telephone answering services. Section 1105(b) was amended by Chapter 166 of the Laws of 1991 to specifically add telephone answering services to the enumerated services in this section in order to assure consistent application of the tax on all answering services no matter who performs such services or by what means. A "telephone answering service" is any service that consists of taking messages by telephone and transmitting such messages to the purchaser of the service (or his or her designee), but not including such a service if it is merely an incidental element of a different service purchased by the customer (see, Tax Law, §1101(b)(13)).

Section 527.2(d) of the Sales and Compensating Use Tax Regulations provides, in pertinent part:

(2) The term *telephony and telegraphy* includes use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals.

\* \* \*

Example 2: Paging service which is a one-way transmission of communication by signal or voice or both signal and voice from a base unit to a mobile unit is considered telephony.

\* \* \*

(4) A service is not considered telegraphy or telephony if either of these services is merely an incidental element of a different or other service purchased by the customer.

Example 6: A company offers its customers a protective service using a central station alarm system, which transmits signals telegraphically. The customer is purchasing a protective service.

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(5) The tax on utility services applies to every charge for any telephone and telegraph service. Among these charges are monthly message rate and intrastate toll charges and charges for special services, such as installation, change of location, conference connections, tie-lines, WATS lines and the furnishing of equipment.

See, also, Telephone Answering Services Subject to Sales Tax Effective September 1, 1991, Technical Services Bureau Memorandum, October 11, 1991, TSB-M-91(13)S.

Section 1105(c)(3) of the Tax Law imposes State sales tax upon the receipts from every sale, except for resale, of the services of installing, maintaining, servicing or repairing tangible personal property that is not held for sale in the regular course of business. Section 1105(c)(8) imposes tax upon the receipts from every sale, except for resale, of protective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, such as protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons. However, Section 1115(r) of the Tax Law provides for an exemption from tax on receipts from the sale of alarm call services designed specifically to respond to medical emergencies.

(State and local sales taxes similar to those imposed by Sections 1105(a), (b) and (c) as previously described are also imposed, where applicable, under Sections 1107, 1108 and 1109 of Article 28 and pursuant to the authority of Article 29 of the Tax Law.)

With respect to Issue 3, Marken's receipts from its rentals of tangible personal property in New York State to Center and Corp are subject to State and local sales taxes under Section 1105(a) of the Tax Law, unless the tangible personal property is rented by Center or Corp solely for the purpose of renting the property to their customers (i.e., resale). Marken's receipts from its rentals of real property are not subject to sales tax. Receipts attributable to the rental of tangible personal property must reasonably reflect the fair rental value of such property and must be stated separately from receipts from the rental of real property (see, Northway Properties, State Tax Comm, July 31, 1984, TSB-H-84(107)S).

Center's receipts from its sales and rentals of tangible personal property in New York State are also subject to State and local sales taxes under Section 1105(a) of the Tax Law, provided such sales and rentals are not for purposes of resale. Receipts from the sales of its repair services to tangible personal property that is not held by its customers for resale in the regular course of business are subject to tax under Section 1105(c)(3). Receipts from the sales of its alarm monitoring services are taxable under Section 1105(c)(8) provided these services are not designed specifically to respond to medical emergencies.

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Receipts from the sales of Center's telephone answering services, voice mail and travel message services, and receipts from the sales of Corp's voice and conventional paging airtime services are subject to tax under Section 1105(b) of the Tax Law. However, any separately stated receipts from the sale of paging services of an interstate or international nature are not subject to tax. Corp's purchases of conventional paging airtime services for purposes of resale may be made without payment of the sales tax (see, 20 NYCRR 527.2(e)).

DATED: June 26, 1997

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Bureau

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