

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

TSB-A-01(19)S
Sales Tax
May 24, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000825A

On August 25, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from S.T.A.T. Communications, Inc., 121 Franklin Street, Watertown, NY 13601. Petitioner, S.T.A.T. Communications, Inc., provided additional information pertaining to the Petition on September 11, 2000.

The issue raised by Petitioner is whether sales tax is applicable to the charges for certain telephone expenses it incurs as part of the service described below which Petitioner provides to its customers.

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

Petitioner characterizes itself as a telephone answering service. Petitioner operates a call center where live operators, available 24 hours a day, take orders over the telephone on behalf of customers, such as mail order catalog companies, and take telephone messages on behalf of individuals and businesses.

For customer convenience, Petitioner provides each customer with a specifically assigned telephone line to which the customer can program its phone to forward its calls to Petitioner. These telephone lines are direct inward dial (“DID”) lines which can be used to accept inbound telephone calls only. Petitioner purchases the DID lines in blocks of one hundred from the telephone company, and remits New York State sales tax imposed on the charges. The telephone company charges are then passed through directly to Petitioner’s customers without mark-up. Petitioner asserts that the separate imposition of sales tax on these rebilled expenses results in multiple taxation on the same charges.

Applicable Law and Regulations

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

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article . . . valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery . . . regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery . . . is provided by such vendor or a third party. . . .

* * *

(13) Telephone answering service. A service that consists of taking messages by telephone and transmitting such messages to the purchaser of the service or at the purchaser's direction. . . .

* * *

(18) Fulfillment services. Any of the following services performed by an entity on its premises on behalf of a purchaser:

- (i) the acceptance of orders electronically or by mail, telephone, telefax or internet;
- (ii) responses to consumer correspondence and inquiries electronically or by mail, telephone, telefax or internet;
- (iii) billing and collection activities; or
- (iv) the shipment of orders from an inventory of products offered for sale by the purchaser.

Section 1105(b)(1) of the Tax Law imposes sales tax, in part, on:

The receipts from every sale, other than sales for resale, of . . . (B) telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service; (C) a telephone answering service. . . .

Section 526.5(e) of the Sales and Use Tax Regulations provides, in part:

TSB-A-01(19)S
Sales Tax
May 24, 2001

Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts. (Emphasis added)

Example 1: A photographer contracts with a customer to furnish photographs at \$50 each in addition to expenses.

The customer is billed as follows:

| | |
|----------------|----------|
| Photographs(2) | \$100 |
| Model fees | 60 |
| Meals | 10 |
| Travel | 25 |
| Props(Flowers) | <u>5</u> |
| Total due | \$200 |

Receipt subject to tax is \$200

Section 526.6(c) of the Sales and Use Tax Regulations provides, in part:

(c) *Resale exclusion.* (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

Opinion

Petitioner operates a call center where live operators take merchandise orders and messages over the telephone on behalf of its customers. For the customers' convenience, Petitioner purchases from the telephone company the direct inward dial ("DID") phone lines required to forward the customers' calls from their own lines to Petitioner's call center. The purchase of a phone line, which is intrastate in nature, from the telephone company is subject to the imposition of sales tax under Section 1105(b)(1)(B) of the Tax Law. The purchase of such telephone service cannot be made without payment of the sales tax unless the service is purchased for resale. See Section 527.2(e) of the Sales and Use Tax Regulations.

In this case, Petitioner is providing telephone answering services as defined in Section 1101(b)(13) of the Tax Law, and may be providing fulfillment services to some customers, as defined in Section 1101(b)(18) of the Tax Law. Petitioner is not providing its customers with telephone or telegraph services. Accordingly, Petitioner is not reselling telephone service to its

TSB-A-01(19)S
Sales Tax
May 24, 2001

customers, but is merely incurring telephone expenses in conducting its business (see Matter of Phone Programs, Inc., Dec Tx App Trib, April 6, 2000, TSB-D-00(6)S; Total Recall Message Center, Adv Op Comm T&F, February 28, 1996, TSB-A-96(14)S). Therefore, the DID phone lines purchased by Petitioner are not purchased for resale and are subject to sales tax at the time of purchase.

Contrary to Petitioner's assertion, the inapplicability of the resale exclusion to Petitioner's purchases of the DID telephone lines does not result in unlawful multiple sales taxation of the rebilled cost of the same phone lines, because the cost of the phone lines is an element of Petitioner's service to its customer. See Matter of Helmsley Enterprises, Inc., v. Tax Appeals Tribunal, 187 AD2d 64 app den 81 NY2d 710. Petitioner is deemed to have consumed the taxable service as an expense of providing its own service. All expenses, including telephone expenses, incurred by Petitioner and included in its charges to its customers are included in the definition of "receipt" provided in Section 1101(b)(3) of the Tax Law. Therefore, the charge to a customer for the telephone expense (including the tax paid by Petitioner on its purchase of such service) is subject to sales tax as part of Petitioner's receipts from the sale of telephone answering services. If Petitioner makes a nontaxable sale, the amount charged to its customers (including expense charges) is not subject to tax. Whether or not the charges to Petitioner's customer are taxable, the charge to Petitioner for intrastate telephone services it consumes is subject to tax.

DATED: May 24, 2001

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

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