

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

TSB-A-02(37)S
Sales Tax
July 25, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S011114A

On November 14, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Crystal Telecom, Corp., 160-38 Willets Point Blvd., White Stone, NY 11357. Petitioner provided additional information pertaining to the Petition on November 29, 2001.

Petitioner has set forth eight questions in the Opinion portion of this Advisory Opinion which concern the sales tax implications of the sale and purchase of prepaid telephone calling cards for the years 1998 - 2000.

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

Company A, a telecommunications provider, is a manufacturer of prepaid telephone calling cards in New York. Company B, located in New York, is a reseller of prepaid telephone calling cards. Company B resells prepaid telephone calling cards to other resellers in New York, as well as in other states. These resellers sell the cards to retail outlets in New York, as well as in other states. The outlets then sell the prepaid telephone calling cards to the end user.

In the years 1998, 1999, and 2000, Company A sold prepaid telephone calling cards to Company B and did not charge Company B sales tax on these sales. Company A did not receive a resale certificate from Company B for these sales. Company A now claims that Company B owes it sales tax on the prepaid calling cards that it sold to Company B for the years 1998, 1999, and 2000. Company B did not receive resale certificates from its customers for its sales of prepaid telephone calling cards during these years.

Applicable Law and Regulations

Section 1101(b)(22) of the Tax Law, as added and amended by Chapters 649 and 651 of the Laws of 1999, effective March 1, 2000, provides:

“Prepaid telephone calling service” means the right to exclusively purchase telecommunication services, that must be paid for in advance and enable the origination of one or more intrastate, interstate or international telephone calls using an access number (such as a toll free network access number) and/or authorization code, whether manually or electronically dialed, for which payment to a vendor must be made in advance, whether or not that right is represented by the transfer by the vendor to the purchaser of an item of tangible personal property. In no event shall a credit card constitute a prepaid telephone calling service. If the sale or recharge of a prepaid telephone calling service does not take place at the vendor’s place of

business, it 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 associated with the purchaser's mobile telephone number.

Section 1105(b) of the Tax Law, as amended by Chapters 649 and 651 of the Laws of 1999, effective March 1, 2000, imposes tax upon:

(1) 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 . . . and (D) a prepaid telephone calling service.

(2) For the purpose of subparagraph (B) of paragraph one of this subdivision, (A) receipts from the sale of telephony or telephone service constituting the actual delivery of telephony or telephone service under a prepaid telephone calling service (for instance, when the receipt is represented by a debit to a prepaid account) shall be excluded from the receipts subject to tax under such subparagraph, and (B) a particular sale of telephony or telephone service to a vendor that resells such telephony or telephone service as a component of a prepaid telephone calling service shall be deemed a sale for resale of telephony or telegraph service.

Section 1110(a) of the Tax Law, as amended by Chapter 651 of the Laws of 1999, effective March 1, 2000, provides, in part:

Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state . . . (G) of any prepaid telephone calling service.

Section 1131(1) of the Tax Law provides, in part:

“Persons required to collect tax” or “person required to collect any tax imposed by this article” shall include: every vendor of tangible personal property or services. . . .

Section 1132 of the Tax Law provides, in part:

(a)(1) Every person required to collect the tax shall collect the tax from the customer when collecting the price . . . to which it applies. . . .

* * *

(c)(1) For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) or (k) of this section, unless (i) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe, signed by the purchaser and setting forth the purchaser's name and address and, except as otherwise provided by regulation of the commissioner, the number of the purchaser's certificate of authority, together with such other information as the commissioner may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, and, where such resale or exemption certificate requires the inclusion of the purchaser's certificate of authority number or other identification number required by regulations of the commissioner, that the purchaser's certificate of authority has not been suspended or revoked and has not expired as provided in section eleven hundred thirty-four . . . the sale shall be deemed a taxable sale at retail. . . Where such a resale or exemption certificate . . . has been furnished to the vendor, the burden of proving that the receipt . . . is not taxable hereunder shall be solely upon the customer. The vendor shall not be required to collect tax from purchasers who furnish a resale or exemption certificate . . . in proper form, unless, in the case of a resale or exemption certificate described in clause (i) of the second sentence of this paragraph whereon the purchaser's certificate of authority number, or other identification number required by regulation of the commissioner, is required to be included, such purchaser's certificate of authority is invalid because it has been suspended or revoked as provided in section eleven hundred thirty-four, and the commissioner has furnished registered vendors with information identifying those persons whose certificates of authority have been suspended or revoked, or unless such purchaser's certificate of authority is invalid because it has expired, and the commissioner has provided registered vendors with a means of determining whether such expiration has occurred. . . .

Section 1133 of the Tax Law provides, in part:

(a) . . . every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. Any such person shall have the same right in respect to collecting the tax from his customer or in respect to nonpayment of the tax by the customer as if the tax were a part of the purchase price of the property or service . . . and payable at the

same time; provided, however, that the tax commission shall be joined as a party in any action or proceeding brought to collect the tax.

(b) Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the tax commission and it shall be the duty of the customer to file a return with the tax commission and to pay the tax to it within twenty days of the date the tax was required to be paid.

Section 1135 of the Tax Law provides, in part:

(a)(1) Every person required to collect tax shall keep records of every sale . . . and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately.

Section 1147(b) of the Tax Law provides:

The provisions of the civil practice law and rules or any other law relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the state or the tax commission to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this article. However, except in the case of a willfully false or fraudulent return with intent to evade the tax no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return; provided, however, that where no return has been filed as provided by law, the tax may be assessed at any time. Where a purchaser furnishes a vendor with a false or fraudulent certificate of resale or other exemption certificate or other document with intent to evade the tax, the tax may be assessed against such purchaser at any time.
...

Section 525.2(a) of the Sales and Use Tax Regulations provides, in part:

Sales tax.

* * *

(3) Except as specifically provided otherwise, the sales tax is a “destination tax.” The point of delivery or point at which possession is transferred by the vendor

to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate.

(4) The sales tax is generally a "consumer tax." That is, the person required to collect tax must collect the tax from the customer (*i.e.*, the consumer) when collecting the taxable receipt . . . to which the tax applies. The customer cannot shift the liability for payment of the tax to another person nor otherwise be relieved of such liability. The vendor, or other person required to collect the tax, collects the tax as trustee for and on account of the State and is also personally liable for the tax required to be collected.

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

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.

* * *

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate. . . .

Section 532.1 of the Sales and Use Tax Regulations provides, in part:

(a) *Time of collection.* (1) Every person required to collect the tax shall collect the tax from the customer when collecting the price . . . to which it applies.

* * *

(d) *Vendor's remedy for customer's failure to pay tax.* (1) Every person required to collect any tax imposed by article 28 and pursuant to the authority of article 29 of the Tax Law shall have the same right in respect to collecting the tax from his customer or in respect to nonpayment of the tax by the customer as if the tax were a part of the purchase price of the property or service . . . and payable at the same time; provided, however, that the Commissioner of Taxation and Finance shall be joined as a party in any action or proceeding brought to collect the tax.

(2) The joining of the Commissioner of Taxation and Finance as a party in any action or proceeding brought to collect the tax shall be effected by service upon

the Commissioner of Taxation and Finance of a summons and complaint naming the Commissioner of Taxation and Finance as a plaintiff or defendant thereon.

(e) *Payment and returns by customer.* Where any customer has failed to pay sales tax imposed by article 28 and pursuant to the authority of article 29 of the Tax Law to the person required to collect the tax, such tax shall be payable by the customer directly to the Department of Taxation and Finance, and it shall be the duty of the customer to file a return with the Department of Taxation and Finance and to pay the tax within 20 days of the date the tax was required to be paid. . . .

Section 532.4 of the Sales and Use Tax Regulations provides, in part:

Presumption of taxability.

* * *

(b) *Burden of proof.* (1) The burden of proving that any receipt . . . is not taxable shall be upon the person required to collect the tax and the customer.

(2) A vendor who in good faith accepts from a purchaser a properly completed exemption certificate or, as authorized by the Department, other documentation evidencing exemption from tax not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. The timely receipt of the certificate or documentation itself will satisfy the vendor's burden of proving the nontaxability of the transaction and relieve the vendor of responsibility for collecting tax from the customer.

(i) A certificate or other document is "accepted in good faith" when a vendor has no knowledge that the exemption certificate or other document issued by the purchaser is false or is fraudulently presented. If reasonable ordinary due care is exercised, knowledge will not be imputed to the seller required to collect the tax.

* * *

(iii) A certificate or document in substantiation of an exempt sale is considered timely received by the vendor when it is received within 90 days after the delivery of the property or the rendition of the service.

* * *

(3) When a vendor has met the criteria in paragraph (2) of this subdivision, it is protected from liability for failure to have collected tax from the purchaser and the burden of proving the nontaxability of such transaction rests solely on the purchaser.

(4) Audit compliance verification procedures. Verification of the exemption certificates and documents received by a vendor will occur during an audit of its records. The verification shall include a review for proper completion and the timeliness of and receipt in good faith of such exemption certificates and other documents.

* * *

(iv) Exemption certificates or documents not received by the vendor within 90 days after the delivery of the property or the rendition of the service will likewise not, in and of themselves, be considered as satisfying the vendor's burden of proof concerning the taxability of the subject transaction.

(v) The failure of a vendor to have timely received a properly completed exemption certificate or other document . . . does not necessarily mean that the vendor is to be held liable for taxes it failed to collect from the purchaser. Prior to the completion of the audit, the vendor will be given the opportunity to submit additional information and other documentation to prove that the transaction was not subject to tax if this may be done within a reasonable period of time. Such additional information and documentation that may prove that a transaction was not subject to tax might be nothing more in certain circumstances than the purchase contracts and sales invoices . . . Verification may consist of documentation from the purchaser, under the purchaser's letterhead, attesting to why a purchase was exempt or any other documentation which the department determines may substantiate the exemption claimed . . . The department has the right to review and challenge all information and documentation submitted. If the vendor cannot provide adequate documentation, the transaction will be considered taxable.

(5) A vendor is not relieved of the burden of proof when it failed to obtain an exemption certificate or accepted an improper certificate, or had knowledge that the exemption certificate issued by the purchaser was false or fraudulently presented. (Emphasis added)

(6) The fact that a vendor has failed to receive timely or proper documentation of the claimed exempt status of any particular transaction does not change the tax status of the transaction. Thus, a vendor which has timely protested a determination of tax always has the right to prove the nontaxability of any

transaction through the presentation of proper documentation. However, the vendor has lost the opportunity to rely solely upon the receipt of the exemption certificate or document in satisfaction of its burden of proof as to its responsibility to collect tax.

Example 5: A resale certificate is not on file for a sale made to an entity which has since ceased doing business and it is determined from information available that the sale was for resale. The sale will be considered not taxable.

* * *

(d) *Resale certificate.* (1) A resale certificate is used to claim exemption from tax on purchases of tangible personal property or services which will be resold or transferred to a customer when the:

* * *

(iii) service is for resale.

Opinion

The following are the questions presented by Petitioner concerning the activities of Companies A and B and the appropriate answers:

1. Does Company B owe Company A sales tax on the prepaid calling cards for the years 1998, 1999, and 2000?

The “prepaid telephone calling service” provisions of the Tax Law *currently* in effect were enacted by Chapters 649 and 651 of the Laws of 1999 and apply to sales or uses of such services made on or after March 1, 2000. Prior to March 1, 2000, a customer’s initial purchase of a prepaid calling card was not subject to New York State sales or use tax, i.e., the value of the card was not taxed upon purchase; rather, the tax was imposed at the time a taxable (intrastate) telephone call was made by the end user of the card (see Brand Name Sales, Inc., Adv Op Comm T&F, May 19, 1998, TSB-A-98(34)S; Commonwealth Long Distance, Inc., Adv Op Comm T&F, July 29 1994, TSB-A-94(33)S; Technical Services Bureau Memorandum, Application of Sales Tax to Prepaid Calling Services Including Prepaid Telephone Calling Cards, February 1, 2000, TSB-M-00(3)S). Therefore, Company A’s charges to Company B for its prepaid calling cards sold in the years 1998, 1999, and before March 1, 2000, were not subject to sales or compensating use tax. This is so whether Company B was purchasing telephone service from Company A for resale via the cards as either Company A’s telephone service or as its own telephone service.

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Under the 1999 legislation, sales tax is imposed at the time a prepaid telephone calling service (including services represented by prepaid calling cards) is sold, and telephone calls made using a prepaid phone card purchased on or after March 1, 2000, are not subject to sales tax. See Sections 1101(b)(22), 1105(b)(1)(D), and 1105(b)(2)(A) of the Tax Law. In addition, the sale of telephone service to a vendor that resells such service as a component of a prepaid telephone calling service is considered a sale for resale for purposes of the resale exclusion from sales tax. See Section 1105(b)(2)(B) of the Tax Law. Company B should have claimed the resale exclusion from tax on purchases of such telephone services which were to be resold to its customers. Company B should have issued *Resale Certificates* (Form ST-120) to Company A within 90 days of the date of each sale. See Section 1132(c)(1) of the Tax Law and Section 532.4(d) of the Sales and Use Tax Regulations. Having received no documentation from Company B, i.e., resale certificates, to verify that its prepaid calling cards sold to Company B in the year 2000 on or after March 1, 2000 were eligible for the resale exclusion provided in Section 1105(b)(2)(B) of the Tax Law, Company A's charges to Company B for such cards were presumptively subject to the imposition of sales tax under Section 1105(b)(1)(D) of the Tax Law. See TSB-M-00(3)S, supra.

2. Was Company B required to provide a resale certificate to Company A and was Company B required to receive a resale certificate from other resellers?

As described in Question (1), the initial sale of a prepaid telephone calling service, which includes services represented by prepaid calling cards, sold on or after March 1, 2000, is a taxable transaction. When Company A and Company B made sales of taxable services without collecting tax to persons in New York State on or after March 1, 2000, they were required to obtain properly completed resale certificates, within 90 days of the date of each sale, in order to relieve themselves of personal liability for collection of sales tax with respect to such sales. See Section 1132(c)(1) of the Tax Law. Since these exemption documents were not timely tendered in either Company A's or Company B's transactions, neither Company A nor Company B is afforded the protection provided in Section 1132(c)(1) of the Tax Law to sellers who, in good faith, receive properly completed exemption documents within the 90-day period.

Whether resale certificates were or were not tendered to Companies A and B within the statutory 90-day period does not affect the ultimate taxability of the transactions. See Section 532.4(b)(6) of the Sales and Use Tax Regulations. Thus, while Companies A and B have lost the opportunity to rely solely upon the receipt of resale certificates in satisfaction of their burdens of proof as to the taxable status of their sales, they do have the opportunity to prove the nontaxability of their transactions through the presentation, either during an audit or as a timely protest to a determination of tax, of proper documentation which confirms the transactions were exempt. See Sections 532.4(b)(4)(v) and 532.4(b)(6) of the Sales and Use Tax Regulations. Also see Section 532.4(b)(4)(v) of the Sales and Use Tax Regulations for additional guidance as to what is acceptable documentation to confirm an otherwise exempt transaction, when the statutory procedure (receipt of an authorized document within 90 days of the sale) is not followed. The determination of what

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constitutes sufficient documentation necessary for any particular transaction depends on the facts and circumstances of each particular case.

3. Can Company A charge sales tax if it did not have a sales tax resale certificate at the time of sale?

Company A's charges to Company B for its prepaid calling cards sold prior to March 1, 2000, were not subject to sales or use tax. This is so whether Company B was purchasing telephone service from Company A for resale via the cards as either Company A's telephone service or as its own telephone service.

Since Company B did not issue a properly completed resale certificate to Company A with respect to sales of prepaid calling cards occurring in the year 2000 on or after March 1, 2000, such sales were presumptively subject to tax. A seller's statutory duty to collect sales tax does not shield its customer from liability for payment of any tax which the seller fails to collect. Such tax is payable by the customer directly to the Tax Department within twenty days of the date the tax was required to be paid. See Section 1133(b) of the Tax Law. Accordingly, Company B, as the customer in a taxable sale, is liable for the sales tax that was not collected by Company A (see Matter of Mellen Electric Construction Co., Inc. et al, State Tax Commission, June 18, 1987, TSB-H-87(161)S; Matter of Charles Bigelow d/b/a Bigelow Linoleum, State Tax Commission, October 12, 1979, TSB-H-79(84)S). If Company B could prove that its purchases of prepaid telephone calling service were for resale, it would not be required to pay tax on such purchases.

It should be noted that a person required to collect tax has the same right in respect to collecting the tax from a customer as if the tax were a part of the purchase price and payable at the same time. Thus, Company A has a right of action against Company B for any sale tax duly owed by Company B that Company B failed to pay, and may bring suit in accordance with the Tax Law. If Company A brings such a suit, it must join the Commissioner as a party through service upon the Commissioner of Taxation and Finance of a summons and complaint naming the Commissioner of Taxation and Finance as a plaintiff or defendant. See Section 1133(a) of the Tax Law and Section 532.1(d) of the Sales and Use Tax Regulations. However, for any of its purchases from Company A of telephone service on or after March 1, 2000, Company B would have no sales tax liability if Company B can show that it sold the service as a component of its telephone calling card service.

4. Can Company A charge sales tax to Company B if Company B was merely a reseller?

See Question (3). Since Company B did not issue a properly completed resale certificate to Company A with respect to sales of prepaid calling cards occurring in the year 2000 on or after March 1, 2000, such sales were presumptively taxable. Although Company A is personally liable for the tax it was responsible for collecting, liability for payment of the sales tax is also placed upon Company B, the consumer. Matter of Mellen Electric Construction Co., Inc. et al, *supra*; Matter of Charles Bigelow d/b/a Bigelow Linoleum, *supra*. Company A's only means of collecting the tax

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is an action or proceeding in a court of law as provided in Section 532.1 of the Sales and Use Tax Regulations. Superior Restaurant Equipment Co., Inc., Adv Op State Tax Commission, June 9, 1986, TSB-A-86(23)S.

Again it is noted that if there is sufficient information to prove the exempt status of the transactions, no tax is required to be paid on such sales.

5. For what periods may Company A retroactively seek to collect sales tax from Company B?

Under the New York State Tax Law, the statute of limitations for the New York State Department of Taxation and Finance to assess Company A New York State sales and use tax is three years from the date a return is filed. The three-year limitation does not apply if a return is not filed, and the tax may be assessed any time. See Section 1147(b) of the Tax Law.

Company A, as a person required to collect tax, and not in possession of a timely and properly completed resale certificate from Company B, is personally liable for the tax that was required to be collected from Company B. Company A has the same right in respect to collecting the tax from Company B as if the tax were part of the purchase price of the prepaid calling service and payable at the same time. A discussion of the provisions of the Civil Practice Law and Rules or any other laws relative to limitations of time for the enforcement of a civil remedy is beyond the scope of this Advisory Opinion.

6. Should the sales tax have been collected at the retail level in each state where the prepaid card was sold and submitted to that state's sales tax office?

The sales tax is a destination tax. The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate. See Section 525.2(a)(3) of the Sales and Use Tax Regulations. If a purchaser is located outside New York State and a seller is located in New York State, when the seller delivers the prepaid telephone calling service to the purchaser outside New York State (i.e., when Company B sells prepaid calling cards to resellers located outside New York State) and when a New York retail outlet sells and delivers prepaid calling cards to end-users located outside New York State, no New York State sales tax is applicable and the other state's tax laws would prevail. Petitioner's question regarding the responsibilities of Companies A and B or any other party under the sales tax laws of other states cannot be addressed in this Advisory Opinion.

With regard to the duty of New York vendors to collect sales tax for sales occurring in New York, see Question (1). In addition, any out-of-state vendor which was required to be registered and collect New York sales tax was responsible for collecting and remitting the tax on such sales to end-users within New York. Also, a New York State resident that, on or after March 1, 2000, purchased telephone card services from an out-of-state vendor which was not required to be registered and collect New York sales tax was still liable for compensating use tax

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on the purchase of that service, unless the purchase was for resale. See Section 1110(a)(G) of the Tax Law. It is noted that the vendors selling the telephone card service on or after March 1, 2000, are personally liable for the sales tax due on sales of prepaid phone cards, whether or not the sales tax was collected from the customer, to the extent that the sales were not for resale.

7. If so, what documentation is required of Company B to prove that the cards were not sold by Company B at the retail level?

See Question (2). Section 532.4 of the Sales and Use Tax Regulations provides guidance as to what documentation might be required since Company B failed to obtain resale certificates from its customers which would have relieved it of its liability for collection and remittance of tax. What is required is sufficient information so that a reasonable determination as to the exempt status of the transactions may be made. It cannot be determined, within the scope of an Advisory Opinion, what would or would not be considered sufficient after-the-fact documentation to verify that Company B's sales were for resale. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to a specified set of facts. See Tax Law Section 171, subd. twenty-fourth; 20 NYCRR 2376.1(a). Inasmuch as issues pertaining to additional documentation ordinarily arise within the context of an audit, the necessary factual determinations must be made within such context.

8. Who is ultimately responsible for collecting and remitting sales tax?

Since no resale certificates have been issued in the situation described by Petitioner, all of the sales of prepaid telephone calling services by the New York State vendors described in this Advisory Opinion to purchasers located in New York are presumptively subject to tax. The vendors are responsible for collecting and remitting tax on their taxable sales. A purchaser is also liable for any tax due that the seller has failed to collect. In the case of an out-of-state seller who is not required to be registered with New York State, purchasers located in New York are liable for compensating use tax on their purchases of prepaid telephone calling services, other than purchases for resale. See Section 1110(a)(G) of the Tax Law.

DATED: July 25, 2002

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