

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

TSB-A-05(32)S
Sales Tax
August 18, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040609A

On June 9, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from AboveNet Communications, Inc., 360 Hamilton Avenue, 7th Floor, White Plains, NY 10601.

The issue raised by Petitioner, Above Net Communications, Inc., is whether its monthly charges to customers for the use of its fiber optic cable are subject to sales tax.

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

Petitioner, formerly known as Metromedia Fiber Network Services, Inc., is a Delaware corporation doing business in New York. Its primary activity is leasing its fiber optic network to commercial customers, such as banks and telecommunication service providers.

Petitioner's fiber optic cable was installed by third party contractors and remains the property of Petitioner. Customers have exclusive use rights, but not necessarily indefeasible rights, and by agreement the customer may not sublease, swap, assign, license, sell or share the use of Petitioner's fiber optic cables. In addition, customers may not perform any repairs or maintenance on the cables without the express written consent of Petitioner. Both a customer's origination and termination points may or may not be within New York, and the fiber cables leased may or may not be within New York.

In the case of "dark" fiber optic cable, Petitioner physically provides cables which connect to customers' locations. However, Petitioner does not provide the equipment that is necessary to "light" or activate the fiber optic cable for the transmission of communications. Each end of the cable enters or exits the ground directly from or into a limited access, secured (i.e., locked) box located in a building. Customers interconnect with the cable at those locations. Customers may not gain access to the cable at any location other than the secured box even though it might be accessible by Petitioner from a manhole or a handhole. Even if a customer could gain access to the conduit housing the cable, the customer would be unable to identify its cable because it would be grouped in with the many other cable strands that are allocated to other customers. Thus, the fiber optic cable leased to a particular customer is part of a bundle of optic cables. The cables are contained in conduit that is typically buried anywhere from 3 to 6 feet underground.

Petitioner also offers Wavelength Division Multiplexing (WDM) services ("Lit Services") and Metro Ethernet services. These services provide increased bandwidth capacity and private optical telecommunications networks to customers. For these services Petitioner uses its own equipment to "light" the fiber optic cable strand for a customer, so that the cable

may transmit communications. Petitioner lists this service on monthly invoices as “lit” Fiber, Wavechannel, WDM Services, and/or Metro Ethernet, separate from its charges for “dark” fiber sales.

Petitioner’s charges for “lit” and “dark” fiber are billed on a monthly, flat fee basis. Petitioner does not distinguish in its billing between intrastate or interstate connections.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, 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:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed . . .

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, *rental, lease or license to use or consume* (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor. (Emphasis added)

Section 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

(b) (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*. . . . (Emphasis added)

Section 1132(c)(1) of the Tax Law provides, in part:

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. . . .

Section 526.8 of the Sales and Use Tax Regulations provides, in part:

(a) Definition. The term *tangible personal property* means corporeal personal property of any nature having a material existence and perceptibility to the human senses. . . .

* * *

(c) Tangible personal property does not include:

- (1) real property;
- (2) intangible personal property.

Section 527.2 of the Sales and Use Tax Regulations provides, in part:

Sale of utility and similar services.

(a) Imposition. (1) Section 1105(b) of the Tax Law imposes a tax on the receipts from every sale, except a sale for resale or a sale specifically exempt under section 1115(b)(i) and (ii), (c) or (e) of the Tax Law, of

- (i) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature; and

(ii) telephony and telegraphy and telephone and telegraph service of whatever nature, except interstate and international telephony and telegraphy and telephone and telegraph service.

(2) Although this tax is generally known as the "consumer's utility tax," the intention of the statute is to tax the enumerated sales and services whether or not rendered by a company subject to regulation as a utility company. *The words "of whatever nature" indicate that a broad construction is to be given the terms describing the items taxed.* The inclusion of the word "service" indicates an intent to tax, under this provision, items that are furnished as a continuous supply while the vendor-vendee relationship exists. (Emphasis added)

(3) A charge for installing equipment, such as transmission equipment, which a gas, electric, or telephone or telegraph company makes, according to a tariff, to a real property developer is deemed to be a charge for gas, electric, telephone or telegraph service. The charge may be for reimbursement of the company's cost of doing the work itself, or for the cost the company incurred in having a contractor perform the work.

* * *

(d) Telephony and telegraphy; telephone and telegraph service. (1) The provisions of section 1105(b) of the Tax Law with respect to telephony and telegraphy and telephone and telegraph service impose a tax on receipts from intrastate communication by means of devices employing the principles of telephony and telegraphy.

(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 3: Message switching services, transmitted to a computer over lines leased from a communication carrier are telegraph services subject to the tax imposed under section 1105(b) of the Tax Law.

* * *

(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.

Example 7: A telephone company installs station apparatus, owned by it, on the premises of a customer. The installation is a service taxable under section 1105(b) of the Tax Law.

* * *

(e) Sales for resale. Purchases of utility services by a utility for resale as such may be made without payment of the sales tax. The purchaser must furnish the supplier of the utility to be resold with a resale certificate (Form ST-120). When the utility services are resold by the purchaser he must collect the sales tax on the receipts from his sales as imposed under section 1105(b) of the Tax Law. A purchase of a utility service which is not resold is subject to tax as a purchase at retail.

Opinion

Petitioner is a Delaware corporation doing business in New York. Its primary activity is leasing the use of fiber optic cable to commercial customers such as banks and telecommunication service providers.

The fiber was installed for Petitioner by third party contractors and remains the property of Petitioner. Both a customer's origination and termination points may or may not be within New York, and the cable, or portions thereof, linking to a customer's locations may or may not be within New York. Each end of the cable enters or exits the ground directly from or into a limited access, secured (i.e., locked) box located in a building. Customers interconnect with the cable at those locations.

With "dark" fiber, Petitioner merely provides the physical cable used to connect to customers' locations. Petitioner does not provide the equipment that is necessary to "light" or activate the fiber optic cable for the transmission of communications.

Petitioner also offers WDM services ("Lit Services") and Metro Ethernet services. These services differ from the provision of "dark" cable in that Petitioner uses its own equipment to activate the fiber optic cable strand for a customer. Petitioner lists these services on its monthly invoices as "lit" Fiber, Wavechannel, WDM Services, and/or Metro Ethernet, separate from its charges for "dark" cable.

The sales tax on telephony and telephone service is imposed upon all telephone service of whatever nature, except interstate service and sales for resale. The term *telephony and telegraphy* encompasses the use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals. Section 1105(b)(1) of the Tax Law, and section 527.2(d) of the Sales and Use Regulations.

Since Petitioner does not provide the equipment or energy source necessary to light the fiber optic cable for the transmission of communications when selling the use of its “dark” cable, Petitioner’s monthly charges to customers for their use of “dark” cable are not receipts from the sale of telephone or telegraph services. Leases of telephone wires, where the telephone company did not provide active telephone service over the leased wires, have been determined to be in the nature of a lease of real property (See *Matter of Central Office Alarm Co., Inc.*, Dec St Tx Comm, August 12, 1976, STH 76-25, aff’d *Central Office Alarm Co., Inc. v STC* 58 AD2d 162 [3rd Dept 1977]). The purchase or lease of realty is not subject to the sales tax. (*Sales Tax Solutions*, Adv Op Comm T&F, June 24, 1999, TSB-A-99(32)S). Therefore, Petitioner’s monthly charges to customers for the use of “dark” cable are not charges for the provision of telephone or telegraph services subject to sales tax imposed pursuant to section 1105(b)(1) of the Tax Law.

The intention of section 1105(b)(1)(B) of the Tax Law is to tax telephone and telegraph service of whatever nature, whether or not rendered by a company subject to regulation as a utility company. See section 527.2(a)(2) of the Sales and Use Tax Regulations. The statutory words "of whatever nature" indicate that a broad construction is to be given the terms describing the items taxed. The charge by Petitioner to its customers for telephone and telegraph services through the use of Petitioner’s “lit” fiber optic network is considered to be the sale of telephone or telegraph service subject to tax imposed pursuant to section 1105(b)(1)(B). See *Deloitte & Touche LLP*, Adv Op Comm T&F, February 27, 1998, TSB-A-98(12)S. The entire charge to the customer for the use of Petitioner’s fiber optic network, including Petitioner’s expenses in providing services across the network (i.e., equipment and energy costs necessary to “light” the cable) is a charge for telephone services subject to sales tax, regardless of whether Petitioner separately states charges for such components.

A telecommunications service both originating and terminating in New York is considered to be intrastate telephone and telegraph service subject to the tax imposed under section 1105(b)(1)(B) of the Tax Law regardless of whether the communications may be routed through another state. (See *Western Union Telegraph Company*, Dec St Tx Comm, February 4, 1983, TSB-H-83(57)S.) Thus, charges to Petitioner’s customer for telephone and telegraph services (Wavechannel, WDM, Metro Ethernet, etc.) connecting points within New York State are subject to sales tax, regardless of the customer’s billing address. Separate charges for interstate and international telephone service may be excluded from sales tax. To the extent Petitioner fails to distinguish between intrastate, interstate and international telephone service, the entire charge for the telephone service is subject to sales tax.

If Petitioner provides telephone service (i.e., use of its “lit” fiber optic network) to other telecommunication service providers and Petitioner’s network becomes an integral component of that provider’s overall telecommunication facilities, the provider’s purchase of such service is not unlike the purchase of “leased lines” shared among telephone companies. See *Commonwealth Long Distance, Inc.*, Adv Op Comm T&F, July 29, 1994, TSB-A-94(33)S; *Deloitte & Touche LLP, supra*. Purchases by telecommunication service providers of telephone

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service from Petitioner could be purchases for resale that are not subject to sales tax. Such purchasers should, as applicable, provide Petitioner with a properly completed *Resale Certificate*, Form ST-120. See section 1132(c) of the Tax Law and section 527.2(e) of the Sales and Use Tax Regulations.

It should be noted that *Metromedia Fiber Network, Inc.*, Adv Op Comm T&F, April 21, 2000, TSB-A-00(10)C, contains language indicating that receipts from the rental of “dark” fiber optic cable constitute receipts from the rental of tangible personal property for purposes of the receipts factor of the business allocation percentage under section 210.3(a)(2) of Article 9-A of the Tax Law. However, for purposes of the issues addressed in *Metromedia Fiber Network, supra*, it was immaterial whether the “dark” optic cable was tangible personal property or real property. The present Opinion has no effect on the legal conclusions reached in *Metromedia Fiber Network*.

DATED: August 18, 2005

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