

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

TSB-A-09(11)S
Sales Tax
March 2, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S061201A

On December 1, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from WildBlue Communications, Inc., 5970 Greenwood Plaza Boulevard, #300, Greenwood Village, Colorado 80111. Petitioner, WildBlue Communications, Inc, provided additional information pertaining to the Petition on July 5, 2007.

The issue raised by Petitioner is whether certain customer premises equipment furnished at a discounted price to customers of Internet access services may be purchased by Petitioner for resale under section 1105(a) of the Tax Law.

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

Petitioner is a provider of satellite Internet access services with offices located in the state of Colorado. Petitioner will provide Internet access services to business and residential customers in a multi-state region. Customers are generally in rural areas that may not have access to DSL or other Internet service.

Petitioner markets and sells its Internet access service both directly to customers and through third-party agents (“Dealers”). New customers sign up for a one year contract. Use of Petitioner’s Internet access service requires the installation of certain equipment (“Equipment”), consisting primarily of a satellite dish and modem, at the customer’s premises. Dealers sell this Equipment to customers concurrently with the establishment of a contract for Petitioner’s Internet access services. Customers can only obtain Petitioner’s Internet access service via the use of the Equipment. Customers may only purchase the Equipment from Petitioner’s authorized dealers.

Petitioner purchases the separate components of the Equipment from suppliers located outside of New York. Petitioner takes delivery of the components outside New York and the Equipment is assembled by Petitioner outside of New York. Petitioner maintains an inventory of Equipment in warehouses outside of New York. Equipment is shipped directly from these warehouses to Dealers both inside and outside of New York.

In order to encourage customers to subscribe to Petitioner’s Internet access service, Equipment will be sold by the authorized Dealers to customers at a discounted price. The discounted price is typically more than half the wholesale price paid for the Equipment by Petitioner. For example, Petitioner purchases the Equipment components from its suppliers for a total cost of \$600. Petitioner then furnishes the Equipment to an authorized Dealer for \$360. A New York customer signing up for Petitioner’s Internet access service either directly through a Dealer, or via Petitioner’s referral of the new customer to a Dealer is sold the Equipment by the

Dealer for \$360. The Dealer installs Equipment at the customer's location, and bills the customer for Equipment and the Dealer's separately charged installation services. The Dealer will collect and remit applicable New York sales and use taxes on the charge to the customer for the Equipment and the installation services. Petitioner bills the customer for Petitioner's Internet access service over the period of the contract. Dealer is compensated by Petitioner for obtaining the subscription via a commission.

If the customer terminates the contract early or otherwise defaults on the contract for the provision of Internet access service, Petitioner may be entitled to damages arising from the early termination or default of the service contract. However, regardless of whatever damages the customer may owe Petitioner occasioned by the early termination or default of the service contract, the customer retains possession and ownership of the Equipment. Neither Petitioner nor Dealer is contractually entitled in such case to damages or recovery of the discount in the purchase price for the Equipment.

In other instances, a New York customer signs up for Internet access services directly with Petitioner. Petitioner's authorized installer will obtain the Equipment from the nearest Dealer and install the Equipment at the customer's location. Since the Equipment installed at the customer's location by Petitioner's authorized installer was originally furnished by Petitioner to the Dealer, Petitioner recompenses Dealer for the Equipment item by allowing a credit for Dealer purchases from Petitioner. Petitioner proposes that it will bill customers for Equipment and installation services based upon the sales price for the Equipment (e.g., \$360) plus the applicable installation charge, and collect and remit applicable New York State and local sales and use taxes. Petitioner bills the customer for Internet access over the period of the contract.

Petitioner submitted a sample customer agreement that provides, in part, as follows:

This Agreement describes the terms and conditions between you and [Petitioner] applicable to [Petitioner's] Service....

* * *

1.1 **Description.** The Service consists of a satellite-based Internet access service as further described in this Agreement (the "Service"). Service is in available locations in the contiguous U.S. with an unobstructed view of the southern sky and its usage is subject to [Petitioner's] Fair Access and Acceptable Use Policies. In order to receive the Service, you must purchase the equipment designated by [Petitioner] ("WildBlue Equipment") from [Petitioner] or an authorized distributor of [Petitioner]. Only a [Petitioner]-authorized installer may install the WildBlue Equipment in your residence.

* * *

2.3 **Installation of Equipment.** You represent that there are no legal, contractual or similar restrictions on the installation of the WildBlue Equipment in locations(s) you have authorized. . . . You acknowledge and agree that [Petitioner] or our designated service provider will be required to access your premises or system and to install and maintain the Wildblue Equipment, including the antenna and its components, necessary for you to receive the Service inside and outside your home. This will include attaching a satellite modem to your computer, installing software on your computer and configuring your computer for optimized performance of the Service. By signing this Agreement, scheduling a service or installation visit, and permitting us or our service provider to enter your home, you are authorizing [Petitioner] or our service provider to perform all of the above actions....

* * *

5.2 **Restrictions On Use Of The Service.** [Petitioner] reserves the right to terminate immediately the Service and this Agreement if you knowingly or otherwise engage in any prohibited activity or if you use the WildBlue Equipment or Service in a way which is contrary to any [Petitioner] policy or any policy of a [Petitioner] supplier. You must strictly adhere to any policy set forth by another service provider accessed through the Service. You agree to comply with [Petitioner's] Acceptable Use and Fair Access Policies . . . both of which are incorporated into and made a part of this Agreement....

* * *

5.5 **No Unauthorized Use of WildBlue Equipment or Software.** You are strictly prohibited from servicing, altering, modifying, or tampering with the WildBlue Equipment, Software or Service or permit any other person to do the same who is not authorized by [Petitioner]. You may not copy, distribute, sublicense, decompile or reverse engineer any of the Software.

* * *

6. **WildBlue Equipment.** The terms of sale applicable to the WildBlue Equipment are governed by your purchase agreement or other documents evidencing such sale and, if applicable, [Petitioner's] limited warranty . . . and service plan, if any. In addition, WildBlue Equipment contains software and/or other intellectual property subject to a license agreement(s) ("License Agreement") provided with the WildBlue Equipment. Any breach of the License Agreement constitutes a breach of this Agreement.

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. . .

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . 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.

* * *

(7) Use. The exercise of any right or power over tangible personal property or over any of the services which are subject to tax under section eleven hundred ten of this article or pursuant to the authority of article twenty-nine of this chapter, by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine. Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials, or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine.

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.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(x) such services rendered with respect to property described in paragraph twelve-a of subdivision (a) of section eleven hundred fifteen of this article.

Section 1110 of the Tax Law provides, in part:

(a) 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 on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail, (B) of any tangible personal property (other than computer software used by the author or other creator) manufactured, processed or assembled by the user, (i) if items of the same kind of tangible personal property are offered for sale by him in the regular course of business or (ii) if items are used as such or incorporated into a structure, building or real property by a contractor, subcontractor or repairman 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, if items of the same kind are not offered for sale as such by such contractor, subcontractor or repairman or other user in the regular course of business,...

(b) For purposes of clause (A) of subdivision (a) of this section, the tax shall be at the rate of four percent of the consideration given or contracted to be given for such property, or for the use of such property, including any charges for shipping or delivery as described in paragraph three of subdivision (b) of section eleven hundred one, but excluding any credit for tangible personal property accepted in part payment and intended for resale.

(c) For purposes of subclause (i) of clause (B) of subdivision (a) of this section, the tax shall be at the rate of four percent of the price at which items of the same kind of

tangible personal property are offered for sale by the user, and the mere storage, keeping, retention or withdrawal from storage of tangible personal property by the person who manufactured, processed or assembled such property shall not be deemed a taxable use by him; ...

(d) For purposes of subclause (ii) of clause (B) of subdivision (a) of this section, the tax shall be at the rate of four percent of the consideration given or contracted to be given for the tangible personal property manufactured, processed or assembled into the tangible personal property the use of which is subject to tax, including any charges for shipping or delivery as described in paragraph three of subdivision (b) of section eleven hundred one.

Section 1115(a)(12-a) of the Tax Law provides:

Tangible personal property for use or consumption directly and predominantly in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale or internet access services for sale or any combination thereof. Such tangible personal property exempt under this subdivision shall include, but not be limited to, tangible personal property used or consumed to upgrade systems to allow for the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale or internet access services for sale or any combination thereof. As used in this paragraph, the term "telecommunications services" shall have the same meaning as defined in paragraph (g) of subdivision one of section one hundred eighty-six-e of this chapter.

Section 1115(v) of the Tax Law provides:

Receipts from the sale of Internet access service, including start-up charges, and the use of such service, shall be exempt from the taxes imposed under this article. For purposes of this subdivision, the term "Internet access service" shall mean the service of providing connection to the Internet, but only where such service entails the routing of Internet traffic by means of accepted Internet protocols. The provision of communication or navigation software, an e-mail address, e-mail software, news headlines, space for a website and website services, or other such services, in conjunction with the provision of such connection to the Internet, where such services are merely incidental to the provision of such connection, shall be considered to be part of the provision of Internet access service.

Section 1118 of the Tax Law provides, in part:

The following uses of property and services shall not be subject to the compensating use tax imposed under this article:

* * *

(7) (a) In respect to the use of property or services to the extent that a retail sales or use tax was legally due and paid thereon, without any right to a refund or credit thereof, to any other state or jurisdiction within any other state but only when it is shown that such other state or jurisdiction allows a corresponding exemption with respect to the sale or use of tangible personal property or services upon which such a sales tax or compensating use tax was paid to this state. To the extent that the tax imposed by this article is at a higher rate than the rate of tax in the first taxing jurisdiction, this exemption shall be inapplicable and the tax imposed by section eleven hundred ten of this chapter shall apply to the extent of the difference in such rates, except as provided in paragraph (b) of this subdivision.

(b) To the extent that the compensating use tax imposed by this article and a compensating use tax imposed pursuant to article twenty-nine are at a higher aggregate rate than the rate of tax imposed in the first taxing jurisdiction, the exemption provided in paragraph (a) of this subdivision shall be inapplicable and the taxes imposed by this article and pursuant to article twenty-nine shall apply to the extent of the difference between such aggregate rate and the rate paid in the first taxing jurisdiction. In such event, the amount payable shall be allocated between the tax imposed by this article and the tax imposed pursuant to article twenty-nine in proportion to the respective rates of such taxes.

Opinion

Petitioner sells Internet access delivered via satellite technology. Internet access services are exempt from sales and use tax. See section 1115(v) of the Tax Law.

Petitioner does not provide and customers cannot effectively utilize Petitioner's satellite Internet service other than through the requisite Equipment being installed at the customer's premises that is needed to initiate and/or receive such communications. Petitioner's contract with its customers provides that its Internet access service is provided to customers only via Petitioner's approved Equipment, which Equipment is only to be provided and installed by Petitioner's approved contractor/installers. Customers may not service, alter, modify, or tamper with the Equipment or Petitioner's software installed on the customer's computers.

Petitioner purchases the separate components of the Equipment from suppliers located outside of New York. Petitioner takes delivery of the components outside New York and the Equipment is assembled by Petitioner outside of New York. Equipment is shipped directly from these warehouses to Dealers both inside and outside of New York.

Petitioner's purchases of the components of the Equipment outside New York are not subject to sales tax. However, the use of the Equipment in New York may be subject to

compensating use tax under section 1110 of the Tax Law, unless the Equipment is being sold by Petitioner to persons in New York. See sections 1101(b)(7) and 1110 of the Tax Law. If the Equipment is not sold to persons in New York but, rather, is used in providing Petitioner's Internet access service to customers, then Petitioner's use of the Equipment in New York is subject to use tax under section 1110(a) of the Tax Law, unless the Equipment is otherwise exempt from tax.

If tangible personal property is manufactured, processed or assembled by the user, then the use tax is based on either (i) the consideration paid for the property manufactured, processed or assembled into the tangible personal property the use of which is subject to tax, or (ii) if items of the same kind of tangible personal property are offered for sale by the user in the regular course of business, the price at which such items are offered for sale by the user. See sections 1110(c), (d) of the Tax Law.

The facts provided by Petitioner in this Opinion and the sample customer agreement submitted by Petitioner suggest that Petitioner's Internet access service may only be used by customers in conjunction with the Equipment. The use of the Equipment appears to be interrelated with Petitioner's service so that it appears unlikely that the Equipment would ever be sold to persons who do not subscribe to Petitioner's service or that the Equipment would be used in conjunction with any other service. The facts in this Opinion present a unique set of circumstances. It appears from these facts that the Equipment is not sold separately to customers but rather is furnished by Petitioner or its authorized Dealers in their capacity as third-party agents of Petitioner as an integral component of Petitioner's Internet access service. See *Matter of Baker Protective Service, Inc.*, Det Tx App Trib, November 1, 2001, DTA No. 816899; *Mutual Central Alarm Services, Inc.*, Adv Op Comm T & F, December 14, 2006, TSB-A-06(31)S. Therefore, Petitioner is subject to use tax when it uses the Equipment in New York, unless some exemption applies to the Equipment. Petitioner is not required to collect sales tax on its shipments of Equipment to Dealers in New York.

It appears that the Equipment is used directly in providing Petitioner's Internet access service for sale, for purposes of the exemption from sales and use tax under section 1115(a)(12-a) of the Tax Law. Accordingly, Petitioner's use of the Equipment in New York will be exempt from tax if the Equipment is used predominantly (over 50% of its use) in providing Internet access service for sale. See section 528.13(c)(4) of the Sales and Use Tax Regulations. If the Equipment is used for purposes other than providing Internet access service, or telecommunications services, for sale; e.g., providing satellite television services for sale, then it might not qualify for exemption under section 1115(a)(12-a).

The services of installing, maintaining, servicing or repairing tangible personal property are subject to sales tax under section 1105(c)(3) of the Tax Law. However, installing, maintaining, servicing or repairing tangible personal property that qualifies for exemption under section 1115(a)(12-a) is exempt from sales and use tax. See section 1105(c)(3)(x) of the Tax

TSB-A-09(11)S
Sales Tax
March 2, 2009

Law. Thus, if Petitioner's Equipment qualifies for exemption under section 1115(a)(12-a), the charges to install the Equipment would be exempt from tax.

It should be noted that if Petitioner has already paid a sales or use tax to another state on the Equipment components without any right to a refund or credit, and Petitioner owes use tax on that Equipment in this State, under section 1118(7) of the Tax Law, Petitioner may take a credit against any use tax Petitioner is required to pay to New York for the tax paid to the other state on those components, provided the other state would allow a similar reciprocal credit. See *A Guide to New York State Reciprocal Credits for Sales Taxes Paid to Other States*, Publication 39 (8/04), for information about computing the applicable amount of the credit and a listing of the reciprocal credits allowed for taxes paid to other states. If the total tax paid to the other state exceeds the total use tax due in New York, the excess amount will not be refunded. See *Bell Signs, Inc.*, Adv Op Comm T & F, April 30, 2008, TSB-A-08(21)S.

DATED: March 2, 2009

/s/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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.