

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

TSB-A-89 (38)S
Sales Tax
October 11, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S890605B

On June 5, 1989, a Petition for Advisory Opinion was received from Cellular Telephone Company, 87 West Passaic Street, Rochelle Park, New Jersey 07662.

The issues raised are whether Petitioner, Cellular Telephone Company's, service of providing two-way mobile telecommunication is subject to the tax imposed under Section 1105(b) of the Tax Law and, if taxable, what is the appropriate local sales tax rate to be applied.

Petitioner, trading under the name of Metro One, is a provider of cellular telephone service in portions of the State of New York, New Jersey and Connecticut. The company is one of two Federal Communications Commission licensed carriers operating in the New York Standard Metropolitan Statistical Area - encompassing Long Island, New York City, Westchester, portions of Rockland and Putnam counties and northern New Jersey (this area is known as the Cellular Geographic Service Area "CGSA").

The service is a form of two-way mobile telecommunications which allows for communication between a mobile telephone and either a traditional landline telephone or another mobile unit. Cellular service has been offered by the Petitioner since 1985 and differs in several important respects from traditional landline service, most notably from the fact that the subscriber is mobile and may initiate or receive a call anywhere within the CGSA. Additionally, the Petitioner is unaware of the exact location of a subscriber's unit at any particular time.

Petitioner segments its billing into the following four components:

- 1) Activation Fee - This is a one-time charge associated with the initial application for service. It includes the cost of a credit check, the assignment of a telephone number for the subscriber and related administrative expenses.
- 2) Monthly Access Fee - This is a flat monthly charge which permits the customer access to the Company's cellular system. The access fee permits the customer to receive service within the Cellular Geographic Service Area "CSGA".
- 3) Usage Charges (based upon number of minutes of use) - These are charges imposed by the Company for the "air time" utilized by a subscriber, whether from a call made to (outgoing) or received by (incoming) such subscriber's cellular unit. They are based upon the amount of time used by the subscriber "on the air."
- 4) Toll Call Charges - These are charges imposed by the Company upon outgoing calls to areas outside the CGSA.

Section 1105(b) of the Tax Law imposes a tax upon,

"The receipts from every sale, other than sales for resale, of gas, electricity, refrigeration and steam and gas, electric, refrigeration and steam service of whatever nature, and from every sale, other than sales for resale, of telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service."

Section 527.2(d)(2) of the Sales Tax Regulations defines the terms telephony and telephony to include "... use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signal."

Section 1101(b)(3) of the Tax Law defines receipt as, "The amount of the sale price of any property and the charge for any service taxable under this article ... without any deduction for expenses"

Petitioner, Cellular Telephone Company, is selling telephone service as defined in section 527.2(d)(2) of the sales tax regulations.

Usage charges are subject to tax pursuant to section 527.2(d)(5) of the Sales Tax Regulations since the tax on utility services applies to every charge for any telephone and telegraph service.

The effect of Section 1101(b)(3) of the Tax Law is to treat as a single sale any sale in which any of the components cannot be singly purchased. Thus, even though the components of a particular sale can be separately stated, calculated or estimated, if they cannot be separately purchased, the combination of the items listed must be considered as one. Penfold v. State Tax Commission, 114 AD 2d 696 (1985). Because Petitioner's subscribers simply cannot purchase cellular telephone service without paying the activation fee, the monthly access fees, the usage charges and the toll call charges, it must be concluded that these charges are nothing more than an adjunct or component of the charges for cellular telephone service. These services are part and parcel of basic telephone service supplied by Petitioner to its customers. Rochester Telephone Corporation Advisory Op, Comm of T & F, December 9, 1987 TSB-A-87(1)S.

The issue then is what is the appropriate local sales tax rate to be applied to Petitioner's sale of cellular phone services.

Section 527.2(d)(6) of the Sales Tax Regulations provides: "Where a customer has telephones at a single location connected to exchanges in different localities, and a tie-line to a locality in which he is not located, the tax rate applicable for each service is the tax rate in effect in the locality to which the exchange is assigned.

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Example: A business located in Nassau County has two telephone numbers, one with a Nassau exchange and one with a Queens exchange. This enables his Queens customers to phone him toll free. Service on the Queens exchange is considered to be purchased in Queens County even though the telephone is physically located in Nassau County".

Petitioner indicates that it is assigned telephone numbers for its customers with several different area codes and exchanges. Therefore the local tax to be charged on the activation fee, the monthly access fee and the usage charges is the highest rate of local tax imposed within the area of the exchange in which the telephone number being charged is assigned.

Since section 1105(b) of the Tax Law does not impose sales tax on those telephone calls which are interstate and international, only those toll calls that are intra-state toll calls are subject to local tax at the highest rate of tax imposed within the area of the exchange in which the telephone number being charged is assigned.

DATED: October 11, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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