

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

TSB-A-94 (33)S
Sales Tax
July 29, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z931130B

On November 30, 1993 a Petition for Advisory Opinion was received from Commonwealth Long Distance, Inc., 46 Public Square, Wilkes Barre, Pa. 18703.

The issue raised by Petitioner, Commonwealth Long Distance, Inc., is how New York State and local sales and compensating use taxes will apply to Petitioner's receipts from charges to customers for the various telephone services to be offered by Petitioner and to costs incurred by Petitioner in conjunction with providing the telephone services.

Petitioner is in the business of providing long distance telephone services. Petitioner leases lines from other telephone companies in order to provide long distance service. Petitioner does not own nor rent any real property nor own any telephone switching equipment in New York State. Petitioner intends to initially have employees or agents located in Pennsylvania sell Petitioner's services to New York customers via telephone solicitations. Petitioner intends to enter into contracts with agents located within New York State to sell Petitioner's services to New York customers in the near future.

The following is an enumeration, by category, of Petitioner's services and the costs incurred along with the appropriate application of sales and use taxes to each service and cost.

Switched Services:

1. Intrastate long distance service - a long distance call both originates and terminates within New York. The call is placed from a service address within New York. The customer is billed based on a per minute usage basis for the length of their call depending on the applicable rate plan they choose.

Section 1105(b) of the Tax Law imposes tax on "receipts ... from every sale, other than sales for resale, of telephony ... and telephone ... service of whatever nature except interstate and international telephony ... and telephone ... service". Section 527.2(d)(1) of the New York State Sales and Use Tax Regulations provides that "the provisions of section 1105(b) of the Tax Law with respect to telephony ... and telephone ... service impose a tax on receipts from intrastate communication by means of devices employing the principles of telephony ...". Since the telephone call is intrastate, Petitioner's total charge to the customer for the call is subject to New York State and local sales tax.

2. Intrastate long distance by cellular phone - a call originates and terminates within New York but the service address (to which the call is billed) is a Pennsylvania customer.

Since the telephone call is intrastate within New York, the total charge to the customer is subject to sales tax for the reasons set forth in scenario "1" above. The customer's Pennsylvania billing address does not affect the sales tax application.

3. Interstate long distance - a long distance call originates within New York but terminates in Ohio. The call is placed from a service address (same billing address) within New York.

Since the telephone call, in this instance, is a long distance call which is interstate, Petitioner's charges to the customer for the call will not be subject to New York State or local sales tax for the reasons set forth in scenario "1" above.

4. Interstate long distance by cellular phone - a call originates within New York but terminates in Ohio. The billing (service) address of the customer is Pennsylvania.

Since the telephone call, in this instance, is a long distance call which is interstate, Petitioner's charges to the customer for the call will not be subject to New York State or local sales tax for the reasons set forth in scenario "1" above.

5. Special features - a customer can be billed a fixed monthly fee for special long distance features. The customer is billed based on service address location (New York or otherwise).

Where the customer is billed a fixed monthly fee for each special long distance feature provided to the customer at a New York State location, with the fee remaining constant from month to month, and the fee is not based on the number of long distance telephone transactions during a billing period or some other similar basis, the receipts from such fees will be subject to New York State and local sales tax if any portion of the telephone service offered is intrastate. If the telephone service offered is totally interstate the charges would be exempt.

6. Petitioner pays an independent telephone company or regional Bell operating company a "fee" for "set up" of the originating access. The telephone company can be located in New York or in other states. This enables Petitioner to access the carriers' switching equipment for purposes of transmitting a long distance call for its customer. This "fee" or cost is built into the rates Petitioner charges the subscriber.

Petitioner's purchase of the originating access is considered to be a purchase of a telephone service for the purposes of reselling the service to Petitioner's customer. Accordingly, Petitioner's purchase of the originating access is not subject to New York State or local sales or use taxes.

7. Petitioner pays a local or interexchange carrier for "leased lines". This is the monthly lease cost associated with the use of a dedicated facility to enable Petitioner to provide long distance service to its customers. The lines can be leased from a carrier in Pennsylvania, in New York or in other states. The cost is a fixed monthly fee regardless of usage and is built into the subscriber rates.

Petitioner's purchase of the "leased lines" is considered to be a purchase of a telephone service from the local or interexchange carrier. Since Petitioner resells the telephone service to its customers, such purchase is considered to be for resale purposes and, accordingly, Petitioner's "lease" payments will not be subject to State or local sales or use taxes.

8. Petitioner pays the interexchange carrier (New York or otherwise) for the special feature noted above in item #5. This cost is in turn billed the customer at a profit.

Petitioner's purchases of special long distance features from the interexchange carrier are considered to be purchases of a telephone service. Since Petitioner will resell the special feature to its customers, such purchases are considered to be for resale purposes and Petitioner's payments to the interexchange carrier will not be subject to State or local sales or use taxes.

Dedicated Private Line Services

9. Installation of Dedicated (Private Line) Services - installation of a private line for a specific customer can be charged to the customer at cost or with a profit margin. The customer may have a New York service address.

The installation of a private line at a location within New York State is considered to be the providing of a telephone service. Accordingly, receipts from charges to the customer for the installation of a private line at a location within New York State will be subject to the tax imposed under Section 1105(b) of the Tax Law, regardless of the customer's service address.

10. Monthly lease of dedicated (Private line) - a flat fee is billed to the customer for the use of such a line. The customer may have a New York service address.

The monthly lease of a private line at a location within New York State is considered to be the providing of a telephone service. Accordingly, receipts from charges to the customer for the monthly lease of a private line at a location within New York State will be subject to the tax imposed under Section 1105(b) of the Tax Law, regardless of the customer's service address if any portion of the private line connects intrastate locations. If the private line totally connects interstate locations, the charges would be exempt.

11. The customer will be billed on a rate/minute for each minute of usage based on conversation time.

When the conversation time is in conjunction with an intrastate telephone call, the rate/minute charge to the customer will be subject to the tax imposed under Section 1105(b) of the Tax Law. When the rate/minute charge results from an interstate telephone call, the charge to the customer will not be subject to the tax imposed under Section 1105(b) of the Tax Law.

12. Installation cost of a dedicated line (DSI) is ordered from a local telephone exchange company (in New York). Petitioner claims a "sale for resale exemption" since this cost is billed to the customer directly (either at cost or with a profit margin) and sales tax is applied.

Petitioner's purchase of the installation of a dedicated line for a customer is considered to be the purchase of a telephone service. Since Petitioner purchased the installation for the purpose of reselling it to the customer, Petitioner's payment for the installation of the dedicated line will not be subject to New York State or local sales or use taxes.

13. Petitioner is also billed a monthly flat lease amount from the local telephone company (in New York) for the dedicated line which Petitioner in turn bills the customer at cost or with a profit margin.

Petitioner's monthly lease payment to the local telephone company is considered to be payment for a telephone service which is purchased for resale purposes. Accordingly, Petitioner's payments are not subject to New York State or local sales or use taxes.

1-800 Services:

14. Petitioner charges the customer a fee for the initial installation of a 1-800 service line. The customer has a service address in New York State.

Since the installation of a 1-800 service line is a telephone service, the charge to the customer for such installation is subject to the tax imposed under Section 1105(b) of the Tax Law.

15. Petitioner charges the customer a monthly fee for use of the 1-800 service. The customer has a service address in New York State.

Since the 1-800 service provided to the customer is a telephone service, the charge to the customer for this service is subject to the tax imposed under Section 1105(b) of the Tax Law if the 1-800 service is available to both intrastate and interstate callers. If the 1-800 service is only available to interstate callers, the charges would be exempt.

16. Petitioner charges the customer for minutes of use of the 1-800 service (based on a stated rate/minute). The customer has a service address in New York State.

Since the 1-800 service is considered to be a telephone service, the charge to the customer for minutes of use will be subject to the tax imposed under Section 1105(b) of the Tax Law.

17. Petitioner purchases the 1-800 service from a telephone company (this can be RCI in New York or any interexchange carrier in any state). Petitioner has to pay a flat fee for each 1-800 number ordered. This cost is in turn passed onto the customer in the rate/minute billed to the customer based on usage.

Since Petitioner purchases the 1-800 service for the purpose of reselling the service to customers, Petitioner is considered to be purchasing a telephone service for resale purposes and Petitioner's payments for the 1-800 service are not subject to the tax imposed under Section 1105(b) of the Tax Law.

18. Petitioner has to pay the interexchange carrier (New York or otherwise) a monthly fee for utilization of a 1-800 number and a stated rate for usage/minute which again is passed onto the customer.

Since the monthly fee for utilization of a 1-800 number and the stated rate for usage/minute are considered to be components of a telephone service being purchased by Petitioner for the purpose of reselling such service to customers, Petitioner's payments for the monthly fee for utilization of a 1-800 number and the stated rate for usage/minute are not subject to the tax imposed under Section 1105(b) of the Tax Law.

Calling Card Services

19. A customer is billed based on minutes of usage. The customer may be a Pennsylvania based customer (with a Pennsylvania service address) who makes the call while in New York State by using a calling card. The call may originate and terminate within New York State or originate within New York State and terminate outside the state.

A customer may also be a New York based customer (service address in New York State) who, while in Pennsylvania, makes a call with the calling card to a location outside of New York State or makes a call which terminates in New York State.

When a customer makes a telephone call within New York State by using a calling card, any charges to that customer for an intrastate telephone call will be subject to the tax imposed under Section 1105(b) of the Tax Law, regardless of whether the customer has a New York or Pennsylvania service address.

Where the telephone call originates within New York State but terminates outside New York State, the call is interstate in nature and any charges to the customer for the call will fall within the exclusion from tax provided under Section 1105(b) of the Tax Law.

When the customer makes a call, by using a calling card, which originates outside New York State and terminates inside New York State the call is considered to be interstate in nature and any charges to the customer for the call will fall within the exclusion from tax provided under Section 1105(b) of the Tax Law.

When the customer makes a call, by using a calling card, which originates and terminates outside New York State, any charges to the customer for the call will not be subject to New York State or local sales and use taxes.

20. Petitioner purchases the calling card services from an interexchange carrier (New York or otherwise). The interexchange carrier charges a fee for making the plastic cards for the customers.

Since the plastic calling cards do not constitute a telephone service, but instead are considered to be tangible personal property, Petitioner will be liable for the New York State Sales or Compensating Use Tax imposed under Sections 1105 or 1110, respectively, of the Tax Law on the amount Petitioner pays for each calling card which is distributed to customers located within New York State.

21. Petitioner is required to pay a cost per minute of usage to the interexchange carrier (New York or otherwise) for use of their switching equipment to transmit the calls. The calls are carried totally by these interexchange carriers. Presently, the calls do not get transmitted over any leased lines referred to in scenarios "7" or "10". However, they may in the future. Petitioner, in turn, passes this cost on to the customer along with a profit margin.

Since the cost per minute of usage charge to Petitioner represents a charge for a telephone service which Petitioner resells to customers, Petitioner's payments to the interexchange carrier will not be subject to New York State or local sales or use taxes.

22. The interexchange carrier (New York or otherwise) also charges Petitioner a fee "per work second" for a manual operator to process calls made with a calling card. Petitioner in turn bills the customer this fee.

Since the "per work second" fee charged to Petitioner is considered to be a component of the telephone service purchased by Petitioner for the purpose of being resold to customers, Petitioner's payment of the fee will not be subject to New York State or local sales or use taxes.

Debit Card Services

This service involves a sale to the customer of a "card" which is priced in advance (ie: \$10, \$25). It basically represents a "prepayment" of their long distance service. As the customer utilizes the card, the prepaid amount is "drawn down" and terminates when used up.

Petitioner will be entering into "agency contracts" with companies to act as major distributors of this type card. The company may be a New York company, Pennsylvania company, etc.

23. Petitioner will receive from the customer an amount equivalent to the purchased debit card (the "face amount" of \$10 or \$25 for example). The customer can have a New York service address or an address outside of New York.

The customer's initial purchase of the debit card will not be subject to New York State sales or use tax. However, whenever the customer makes an intrastate call within New York State the total charge for the call will be subject to the tax imposed under Section 1105(b) of the Tax Law.

24. Petitioner's cost of services for the debit cards will be as noted in the previous section on calling card services. Petitioner's cost is passed on to the customer as part of the face amount of the debit card offered for sale.

Petitioner's purchase of the debit cards is considered to be a purchase of tangible personal property. Petitioner's cost of the debit cards which are delivered to customers within New York State will be subject to the tax imposed under Section 1105(a) of the Tax Law.

Billing and Collection Services

25. Petitioner will be entering into agreements with certain small telephone service providers within New York State to provide a billing and collection service to them at an agreed upon fee. The service to be provided is billing and collection for this telephone company's customers who are located within New York State.

Petitioner is located in Pennsylvania and the function will be performed here even though the bills will be forwarded to the New York customers for payment. All billing reports to be generated from the system will be forwarded to the New York provider for review. Payment is made to a remittance address outside of New York.

Since billing and collection services are not included within the services enumerated under Section 1105(c) of the Tax Law, the charges to Petitioner for billing and collection services are not subject to New York State or local sales or use taxes.

26. Along with the billing and collection services to be performed for these telephone service providers in New York, Petitioner will be the long distance provider for their customers. The services provided are the same as those noted in the above sections.

Any telephone service performed by Petitioner for customers located within New York State, other than interstate long distance telephone calls, will, generally, be subject to the tax imposed under Section 1105(b) of the Tax Law.

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It is noted that whenever Petitioner makes a purchase for resale purposes, Petitioner should provide the supplier or vendor a properly completed form ST-120, Resale Certificate. Petitioner must be registered with the Department of Taxation and Finance as a sales tax vendor in order to issue a properly completed Resale Certificate.

DATED: July 29, 1994

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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