



Application of the Sales Tax Resale Exclusion to Purchases of Equipment by Cable and Satellite Television Service Providers

The purpose of this memorandum is to explain how the Court of Appeals decision in *Matter of EchoStar Satellite Corp. v. Tax Appeals Tribunal* affects the application of the sales and use tax resale exclusion to certain purchases made by satellite and cable television service providers.

In *Matter of EchoStar Satellite Corp. v. Tax Appeals Tribunal* (20 NY3d 286), the Court of Appeals held that the purchase of certain equipment by EchoStar Satellite Corporation, a satellite television service provider, qualified for the resale exclusion from sales and use taxes (sales tax).

Summary of the EchoStar decision

As described in the *EchoStar* decision, EchoStar was a company that provided satellite television service to its customers. In order to deliver the programming, EchoStar supplied its customers with a satellite dish and other equipment. Prior to the year 2000, EchoStar required its customers to purchase the necessary equipment at the commencement of the service contract. In 2000, EchoStar began renting the equipment to its customers under a lease agreement, while continuing to offer its customers the option to purchase the equipment. Although EchoStar did not issue separate bills for the equipment rentals, its invoices separately listed a \$5.00 monthly fee for each receiver. The lease agreement also indicated that the total amount of annual rent for each additional receiver was \$60, or an additional \$5.00 per month.

In confirming a Tax Appeals Tribunal decision upholding an assessment against EchoStar, the Appellate Division held that EchoStar could not claim the sales tax resale exclusion on its purchases of the equipment. In the Court's view, EchoStar's primary purpose was to provide satellite television service and EchoStar used the equipment to supply that service to its customers; the additional charge on its monthly bills was merely an 'add-on' for the use of the equipment, not a true rental.

The Court of Appeals reversed the Appellate Division's judgment and held that EchoStar's purchases of the equipment qualified for the resale exclusion since the transfer of the equipment constituted a lease and not merely an element of the service. The Court based this conclusion on the following facts:

- The customer agreements for the provision of the equipment were structured as leases, distinguishing the service component from the provision of the equipment.

- The equipment rental fees were directly proportional to the number of receivers provided.
- The equipment charges were separately stated on monthly invoices.
- The transfer of the equipment was a significant part of the transaction, not merely a trivial element of a contract for services.

Tax Department's policy on the application of the resale exclusion based the *EchoStar* decision

Sales tax is imposed on retail sales of taxable tangible personal property and sales, other than for resale, of certain specified services. A retail sale of tangible personal property does not include a sale for resale. For sales tax purposes the term *sale* includes any transfer of title or possession of the property or both, and the exchange or barter, rental, lease, or license to use or consume property, for consideration.

Prior to the *EchoStar* decision, it was the Department's position that the resale exclusion was generally not allowed for the purchase of equipment provided to customers in order to deliver the cable or satellite programming. The equipment was considered to be used by the business to provide the service and not resold to the customer.

As a result of the *EchoStar* decision, the resale exclusion applies to the purchase of equipment provided in connection with cable or satellite television service where:

- the equipment is purchased by the business to be sold outright to its customers; or
- the equipment is purchased to be rented or leased to its customers, provided that all of these conditions are met:
 - the agreement for the provision of the equipment is structured as a lease;
 - the rental fee or lease payment is based on and directly proportional to the value of equipment provided;
 - the rental fee or lease payment is separately stated on the invoice given to the customer; and
 - the rental or leasing of the equipment is a significant part of the transaction, and not merely a trivial element of the contract for the purchase of cable or satellite television service. The Department will not consider the rental or leasing to be a significant part of the transaction if the rental or leasing charge for the equipment is a minimal charge that is not reflective of the cost of the equipment.

Where the equipment is considered to be resold by the cable or satellite television service provider, the service provider must collect sales tax on its sales or rental charges for the equipment.

In order that cable and satellite television service providers may structure their transactions with more certainty concerning the sales tax impact in these situations, the Department will consider equipment that is not sold outright by the service provider to its customer to be used by the service provider to provide the service and not resold where:

- there is no separate lease agreement and the customer service agreement does not contain a separate section stating that the equipment is leased to the customer;
- the customer service agreement does not have an explicit lease term but merely provides that the equipment may be used by the customer while the service is provided in order to receive service; and
- the cable or satellite television service provider paid sales or use tax on its purchase or use of the equipment and does not seek a refund or credit for the tax paid.

Transitional rules

The Department will apply the following transitional rules to purchases of equipment by cable or satellite television service providers that qualify for the resale exclusion as a result of the *EchoStar* decision.

A cable or satellite television service provider that paid sales tax on purchases of equipment that qualified for the resale exclusion as a result of the *EchoStar* decision may be eligible to claim a refund or a credit. However, if the service provider has not collected tax on its sales or rental charges for the equipment, the refund or credit will be limited to the excess of the tax the service provider paid on its purchases over the amount of tax that it should have collected on its sales or rental charges for the equipment. The burden of proof is on the service provider to establish that the tax the service provider paid on its purchase of the equipment exceeds the amount that it should have collected on the sale, rental or lease of the equipment.

The Department will not assess sales tax on a service provider's sales and rentals of equipment to customers for periods prior to December 1, 2013, where the service provider paid tax on its purchase of the equipment and is not seeking a refund or credit for tax that it paid based on the *EchoStar* decision.

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