

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

TSB-A-02(17)C
Corporation Tax
November 6, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C020222A

On February 22, 2002, a Petition for Advisory Opinion was received from Primus Telecommunications, Inc., 1700 Old Meadow Road, McLean, Virginia 22102-4302.

The issue raised by Petitioner, Primus Telecommunications, Inc., is whether sales by Teleco P, as described below, to a foreign-based reseller of long distance services through prepaid calling cards, qualify as sales for resale that are exempt from the gross receipts tax imposed under section 186-e of the Tax Law.

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

Foreign prepaid calling card seller, FORCO, is incorporated under the laws of a foreign country and operates exclusively outside of the United States. FORCO sells prepaid calling cards which permit the user to make prepaid long distance calls to an 800 number which routes the call to the billing platform in the host country, and subsequently worldwide. FORCO is not subject to regulation by New York State. FORCO is not defined as a carrier in its home country.

Teleco P is incorporated in Delaware and holds a Certificate of Public Convenience and Necessity issued by the New York State Public Service Commission (PSC). Teleco P sells telecommunications services to FORCO, i.e., minutes of international traffic. FORCO card user calls are switched from their billing platform to Teleco P's switch in New York for termination worldwide.

For example, FORCO's customer calls an access number located in the customer's home country. When prompted, the customer enters the account number and personal identification number. After the billing platform determines the validity of the calling card, the customer is prompted for the call destination data. The call is then routed to other switches depending on the billing platform contracts that have been negotiated by FORCO, which includes the Teleco P switch. When FORCO's customer in Toronto places a call to London, the call is routed from the billing platform through Teleco P's switch in New York to its termination in London. The call origination point is unknown to Teleco P, and the call terminates in London.

The sale of telecommunication services by Teleco P to FORCO includes the charges for the trunk from the billing platform, switching services and sub-sea cable access through the point of presence (POP) in New York.

Applicable Law

Section 186-e.1(g) of the Tax Law defines “telecommunication services” as “telephony or telegraphy, or telephone or telegraph service, including, but not limited to, any transmission of voice, image, data, information and paging, through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar media or any combination thereof and shall include services that are ancillary to the provision of telephone service ... and also include any equipment and services provided therewith. Provided, the definition of telecommunication services shall not apply to separately stated charges for any service which alters the substantive content of the message received by the recipient from that sent.”

Section 186-e.1(e) of the Tax Law defines “provider of telecommunication services” as “any person who furnishes or sells telecommunications services regardless of whether such activities are the main business of such person or are only incidental thereto....”

Section 186-e.2(a) of the Tax Law imposes “an excise tax on the sale of telecommunication services by any person which is a provider of telecommunication services....”

Section 186-e.2(a) of the Tax Law provides that the tax is imposed on “gross receipt from: (1) any intrastate telecommunication services, except any telecommunication services the gross receipt from which is subject to tax under subparagraph four of this paragraph; (2) any interstate and international telecommunication services (other than interstate and international private telecommunication services and any telecommunication services the gross receipt from which is subject to tax under subparagraph four of this paragraph) which originate or terminate in this state and which telecommunication services are charged to a service address in this state, regardless of where the amounts charged for such services are billed or ultimately paid; (3) interstate and international private telecommunication services, the gross receipt to which the tax shall apply shall be determined as prescribed in subdivision three of this section, except any telecommunication services the gross receipt from which is subject to tax under subparagraph four of this paragraph; and (4) mobile telecommunications service provided by a home service provider where the mobile telecommunications customer’s place of primary use is within this state.”

Section 186-e.2(b)(1) of the Tax Law provides that “There shall be excluded from the tax imposed by this section the sale of telecommunication services to a provider of telecommunication services which is an interexchange carrier or a local carrier where such services are purchased by such provider for resale as telecommunication services to its purchasers....” Pursuant to Technical Services Memorandum TSB-M-95(3)C, December 13, 1995, a provider may accept a *Certificate of Public Convenience and Necessity* issued by the PSC as evidence that a carrier is eligible for the resale exclusion.

Section 186-e.1(b)(1) of the Tax Law provides that “interexchange carrier” means “any provider of telecommunication services between two or more exchanges that qualifies as a common

carrier. Common carrier means any person engaged as a common carrier for hire in intrastate, interstate or foreign telecommunication services.”

Section 186-e.1(b)(2) of the Tax Law provides that “local carrier” means “any provider of telecommunication services for hire to the public, which is subject to the supervision of the public service commission and is engaged in providing carrier access service to a switched network. For the sole purpose of the application of the sale for resale exclusion under paragraph (b) of subdivision two of this section, a reference to an “interexchange carrier” or “local carrier” shall include a cellular common carrier which is a facilities-based cellular common carrier without regard to a determination of whether such carrier is providing local or interexchange service as such.”

Opinion

Petitioner states that FORCO operates exclusively in its home country and is engaged in the business of providing prepaid long distance calls to its customers. The customer dials an 800 number which routes the call to the billing platform in the host country. The call is then switched to Teleco P’s switch in New York for termination worldwide. Petitioner states that Teleco P does not know where the call originated. Teleco P sells telecommunication services to FORCO, including charges for the trunk from the billing platform, switching services and sub-sea cable access through its POP in New York.

Pursuant to section 186-e.1(e) of the Tax Law, Teleco P is a provider of telecommunication services in New York State, and pursuant to section 186-e.2(a) of the Tax Law Teleco P is subject to tax on its gross receipts from any intrastate telecommunication services and mobile telecommunications services.

Section 186-e.2(b)(1) of the Tax Law provides that certain sales for resale of telecommunication services are excluded from the tax imposed by section 186-e.2(a). In order to qualify for the exclusion, FORCO must be an interexchange carrier or a local carrier, and it must purchase telecommunication services that are resold as telecommunication services to its customers. In this case, Petitioner states that FORCO is not defined as a carrier in its home country. Therefore, Teleco P’s gross receipts for telecommunication services provided for FORCO with respect to the prepaid international calls may not qualify for the sale for resale exclusion provided in section 186-e.2(b)(1) of the Tax Law.

However, if FORCO can demonstrate that its activities in the country in which it operates, if conducted in New York State, would constitute the activities of an interexchange carrier as defined in section 186-e.1(b)(1) of the Tax Law or a local carrier as defined in section 186-e.1(b)(2) of the Tax Law, FORCO would be treated as an interexchange carrier or a local carrier for purposes of section 186-e of the Tax Law. (See Arthur Andersen LLP, Adv Op Comm T&F, April 17,2001, TSB-A-01(16)C.) In that case, Teleco P’s sales of telecommunication services to FORCO would

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qualify for the sale for resale exclusion under section 186-e.2(b)(1) where FORCO resells the telecommunication services, as such, to its customers.

DATED: November 6, 2002

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