

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(15)C
Corporation Tax
September 1, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C090529A

Petitioner [REDACTED], requests an Advisory Opinion about the documentation needed to substantiate an exemption from gross receipts for the sale of Internet access service for purposes of the telecommunications excise tax imposed by Tax Law § 186-e. We conclude that there is no specific form provided for this purpose, but that Petitioner should maintain records for a period of three years that demonstrate that a particular sale fulfills the criteria for the exemption. We further conclude that a properly completed ST-121, *New York State and Local Sales Tax Exempt Use Certificate*, will constitute some evidence, but not conclusive proof, that the sale of telecommunication services was exempt from tax.

Facts

Petitioner is a provider of telecommunication services subject to tax under Section 186-e of the Tax Law. Among the services it offers, Petitioner sells telecommunication services to Internet Service Providers (ISPs) that are used to provide Internet access service to the ISPs' customers.

Analysis

The federal Internet Tax Freedom Act (ITFA) generally bars state and local taxes on Internet access service. *See* 47 USC §151 (note § 1101). Before ITFA's enactment, Internet access service was excluded from the telecommunications excise tax imposed by Tax Law § 186-e, but the telecommunications used by an ISP remained subject to tax. *See* Tax Law §179; TSB-M-97(1.1)C&S. In 2003, ITFA's definition of "Internet access service" was expanded to include "telecommunications services . . . purchased, used or sold by a provider of Internet access to provide Internet access." Federal law grandfathered New York's tax on this telecommunications component until November 1, 2005. Consequently, Petitioner's sales of telecommunication services to ISPs that are used to provide Internet access services were not subject to the telecommunications excise tax as of November 1, 2005. *See* TSB-M-08(4.1)C &(2.1)S.

Petitioner asks what it must do to document that its sales of telecommunication services to its ISP customers for use in providing Internet access services are exempt from the telecommunications excise tax. The Tax Department does not provide a specific form to document this exemption. Petitioner should retain documentation of the details of these sales, including the name of the entity to which the telecommunication service was sold and a statement from the purchaser that the telecommunication service will be used to provide Internet access, in its books and records for a period of three years. *See* Tax Law § 186-e.5.

Petitioner asks whether form CT-120, *Resale Certificate for Telecommunications Purchases*, can be used to document sales of telecommunication services to an ISP that will be used to provide Internet access. Form CT-120 cannot be used for this purpose. That form is designed exclusively to document excluded sales for resale, where the telecommunication services sold to the purchaser will be resold *as telecommunication services*. When telecommunication services are sold to an ISP that uses the telecommunications to provide Internet access services to its customer, the sale to the ISP's customer is not a resale of telecommunication services. Rather, it is the sale of a different service, and therefore the resale exclusion does not apply. Thus, the CT-120 is not the appropriate documentation for this exclusion.

Petitioner also asks whether the Tax Department would accept Form ST-121, *New York State and Local Sales Tax Exempt Use Certificate*, to document this exemption. If properly completed, the Tax Department will accept this form as some evidence, but not conclusive proof, that the transaction is exempt from the excise tax as a sale to an ISP of telecommunication services that will be used to provide Internet access. Ordinarily, sales tax exemption forms have no relevance to the telecommunications excise tax. One reason for this is that the legal incidence of the sales tax is on the purchaser, while the incidence of the excise tax is on the provider. However, in this limited situation, the sales tax exemption form documents facts about a particular sale or sales that are relevant to whether the exemption applies for both the sales and excise taxes. Accordingly, if an ISP provides Petitioner with a properly completed ST-121 stating that the telecommunications will be used to provide Internet access to the ISP's customers, the Tax Department will accept this form as some evidence that the particular transaction covered by the form (or group of transactions in the case of a blanket exemption certificate) is exempt from the telecommunications excise tax.

However, we caution that the ST-121 will not be accepted for this purpose unless the certificate is properly completed, including compliance with its instructions on how to identify the exempt use as being for Internet access. Current instructions state that box (U) must be filled in as follows: "telecommunications services used by an ISP to provide Internet access originating with the ISP point of presence (Tax Law section 1105(b)(1))." If that statement is missing or incomplete, then the ST-121 may be of little or no value as evidence of the exemption. This is why we note, as mentioned above, that other documentation will suffice, such as a letter from the purchaser to which the telecommunication service was sold with a statement that the telecommunication service will be used to provide Internet access.

We note that the vendor protection obtained by Petitioner's receipt of a properly completed ST-121 for sales tax purposes does not apply to the use of that form for excise tax purposes. Tax Law § 1132(c)(1) expressly provides that when a person required to collect sales tax obtains a properly completed exemption document in good faith within 90 days after the transaction, the burden of proving that the receipt is not taxable is solely on the purchaser. There is no corresponding provision in Tax Law § 186-e. Therefore, while a timely, properly completed ST-121 obtained in good faith relieves the provider of the burden of proving that the transaction was subject to State and local sales taxes, it will not shift the burden of proof for purposes of the telecommunications excise tax. For excise tax purposes, the burden of proving that the transaction was exempt from tax remains with the provider.

DATED: September 1, 2009

/S/
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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.