

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division**

TSB-A-09(9)C
Corporation Tax
TSB-A-09(24)S
Sales Tax
June 17, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z071207A

On December 7, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from NovaTel, Ltd., 11550 IH-10 West, Suite 110, San Antonio, TX 78230.

The issue raised by Petitioner, NovaTel, Ltd, is whether the telecommunications services sold by Petitioner to its customers, as described below, were subject to State and local sales tax and the excise tax imposed by section 186-e of the Tax Law, during the period from August 1, 2004 to September 30, 2006, or are subject to tax under current law.

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

Petitioner is a telecommunications reseller located solely in San Antonio, Texas. Petitioner has no physical presence in the state of New York and does not have any customers within the state of New York. Petitioner utilizes certain traditional landline services and facilities supplied by Verizon Business to transmit calls placed by Petitioner's customers, which are offshore Call Centers within foreign countries, to residents within the state of New York and nationwide. Petitioner also transmits calls that originate in New York and terminate at the offshore Call Centers within foreign countries, by reselling toll free services and facilities purchased from Verizon Business.

In both cases, Petitioner's customer is the offshore Call Center and not the resident within the state of New York. The New York resident is never billed by Petitioner for any portion of the call. Petitioner is billed in Texas by Verizon for Petitioner's use of Verizon's facilities in the provision of service to its offshore customers. Verizon also bills Petitioner for certain New York taxes and surcharges. The following is a description of the services that Petitioner provides to its customers.

Offshore callers

Petitioner's customer, an offshore Call Center, dials a U.S. number using its private branch exchange (PBX). The call goes through the Call Center's Customer Premises Equipment ("CPE") to an International Private Line circuit ("IPLC") which is provided by a licensed offshore telecommunications provider contracted by the Call Center. The call passes through the IPLC to the Call Center's CPE in a collocation facility located in New York and contracted by the Call Center. The call is cross-connected from the collocated Call Center's CPE to a circuit contracted from Verizon Business by Petitioner at the same collocation facility. The call is transported across the circuit contracted from Verizon Business by Petitioner to a Verizon

Business Public Switched Telephone Network (PSTN) switch. Verizon Business receives the call at its PSTN switch and through a contractual arrangement with Petitioner transports the call across Verizon Business long distance network to a Local Exchange Carrier (“LEC”) or a cell phone provider. The LEC or cell phone provider completes the call which is answered by a U.S. end user.

U.S. Callers

Callers in the United States dial a toll free number which passes to the LEC. The call is cross-connected from the LEC’s switch to Verizon Business’s long distance point of presence (POP). Verizon Business receives the call and through a contractual arrangement with Petitioner transmits the call over its network to Verizon Business’s PSTN switch. The call is cross-connected from Verizon Business’s PSTN switch to a circuit contracted from Verizon Business by Petitioner for outbound 800 service and then the call is transported to the Call Center’s CPE in a U.S. collocation facility contracted by the Call Center. The call is cross-connected from the Call Center’s CPE to an IPLC contracted by the Call Center. The call goes across the IPLC to the Call Center’s offshore CPE. The call passes from the CPE to the Call Center’s PBX and is answered by the offshore Call Center agent.

In all of the processes described above, the call is not touched or handled by any network, operator, Voice Response Unit (“VRU”), Automated Call Distribution equipment (“ACD”), or other equipment or process of Petitioner. Petitioner bills its customers for the services that are purchased by Petitioner from Verizon Business and resold.

Applicable law and regulations

Section 186-e of the Tax Law provides, in part:

1. Definitions. As used in this section, where not otherwise specifically defined and unless a different meaning is clearly required:

(a)(1) “Gross receipt” means the amount received in or by reason of any sale, conditional or otherwise, of telecommunication services or in or by reason of the furnishing of telecommunication services....Gross receipt is expressed in money, whether paid in cash, credit or property of any kind or nature, and shall be determined without any deduction therefrom on account of the cost of the service sold or the cost of materials, labor or services used or other costs, interest or discount paid, or any other expenses whatsoever except that there shall, however, be allowed a deduction for bad debts with respect to charges previously subjected

to the tax hereunder when the debt has become worthless in accordance with generally accepted accounting principles consistently applied by the taxpayer. "Amount received" for the purpose of the definition of gross receipt, as the term gross receipt is used throughout this article, means the amount charged for the provision of a telecommunication service.

* * *

(b)(1) "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.

(2) "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.

* * *

(e) "Provider of telecommunication services" means 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. Where a reference is made to a "utility" in this chapter in regard to the tax imposed by this section or by this section and section one hundred eighty-six-a of this article, such reference to "utility" shall be deemed to include a reference to a provider of telecommunication services.

(f) "Service address" means the location of the telecommunication equipment from which the telecommunication is originated or at which the telecommunication is received from the provider of telecommunication services. The foregoing rule is amplified, but not limited, by the following special provisions, which are listed in order of priority of application so that only the first applicable special provision will apply, if more than one potentially applies: (i) if the telecommunication originates or terminates in this state and the service is charged to telecommunication equipment which is not associated with the origination or termination of the telecommunication (for example, by

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the use of a calling card or third party billing) and the location of such equipment is in this state, the service address of the telecommunication will be deemed to be in this state; (ii) if the service is obtained through the use of a credit or payment mechanism such as a bank, travel, credit or debit card or if the service is obtained by charging telecommunication equipment which is not associated with the origination or termination of the telecommunication (for example, by the use of a calling card or third party billing) and the equipment is not located in the state of origination or termination, then the service address is deemed to be the location of the origination of the telecommunication; and (iii) if the service address is not a defined location, as in the case of mobile telephones, paging systems, maritime systems, air-to-ground systems and the like, service address shall mean the location of the subscriber's primary use of the telecommunication equipment as defined by telephone number, authorization code, or location in this state where bills are sent, provided, however, the location of the mobile telephone switching office or similar facility in this state that receives and transmits the signals of the telecommunication will be deemed the service address where the mobile telephone switching office or similar facility is outside the subscriber's assigned service area.

(g) "Telecommunication services" means 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 (such as, but not limited to, dial tone, basic service, directory information, call forwarding, caller-identification, call-waiting and the like) 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.

* * *

2. Imposition. (a) There is hereby imposed an excise tax on the sale of services by any person which is a provider of telecommunication services, to be paid by such person, at the rate of two and one-half percent on and after January first, two thousand of 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 1105(b)(1) of the Tax Law imposes a tax upon:

The receipts from every sale, other than sales for resale, of the following: (A) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature; (B) telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service . . . (C) a telephone answering service; and (D) a prepaid telephone calling service.

Section 527.2 of the Sales and Use Tax Regulations provides, in part:

Sale of utility and similar services. (Tax Law, Section 1105(b))

(a) *Imposition.* (1) Section 1105(b) of the Tax Law imposes a tax on the receipts from every sale, except a sale for resale or a sale specifically exempt under section 1115(b)(i) and (ii), (c) or (e) of the Tax Law, of

* * *

(ii) telephony and telegraphy and telephone and telegraph service of whatever nature, except interstate and international telephony and telegraphy and telephone and telegraph service.

(2) Although this tax is generally known as the "consumer's utility tax," the intention of the statute is to tax the enumerated sales and services whether or not rendered by a company subject to regulation as a utility company. The words "of whatever nature" indicate that a broad construction is to be given the terms describing the items taxed. The inclusion of the word "service" indicates an intent to tax, under this provision, items that are furnished as a continuous supply while the vendor-vendee relationship exists.

* * *

(d) *Telephony and telegraphy; telephone and telegraph service.*

(1) The provisions of section 1105(b) of the Tax Law with respect to telephony and telegraphy and telephone and telegraph service impose a tax on receipts from intrastate communication by means of devices employing the principles of telephony and telegraphy.

(2) The term “telephony and telegraphy” includes use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals.

Opinion

Petitioner is located solely in San Antonio, Texas with no physical presence in New York State. Petitioner’s customers are offshore Call Centers located within foreign countries. Petitioner is buying and reselling telecommunication services from Verizon Business to transmit calls placed by Petitioner’s customers. Petitioner’s customers, the offshore Call Centers, contract with a licensed offshore telecommunications provider to switch calls through the provider’s International Private Line Circuit (IPLC).

Incoming calls from an offshore Call Center connect over the IPLC to the Call Center’s CPE in a telecommunications collocation facility which is located within New York State. Petitioner contracts with Verizon Business to route these calls through the Verizon network across the PSTN to the local exchange carrier or cellular phone carrier to complete the calls. In the case of U.S. callers making outbound calls, Petitioner contracts with Verizon Business to route these calls from the Verizon Business POP to the Call Center’s CPE located at the collocation facility within New York State. Petitioner bills its customers for the services that are purchased by Petitioner from Verizon Business and resold.

Sales of telephony and telegraphy and telephone and telegraph service of whatever nature except for interstate and international telephony and telegraphy and telephone and telegraph service are subject to sales tax. See section 1105(b)(1)(B) of the Tax Law.

In the matter of *Southern Pacific Communications Co.*, Det Tax App Trib, May 14, 1991, DTA No. 800275, the Tribunal held that while components of the telephone services provided by the taxpayer included long distance service between points within New York State, the components were clearly part of the overall interstate service provided by the taxpayer.

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Accordingly, the intrastate portion of the interstate service was deemed to be a component part or adjunct to the overall interstate services and not subject to sales tax.

Similarly, in the present case, Petitioner's telecommunications service is an integral component part of the interstate or international calls placed by its customers (the offshore Call Centers). Petitioner states that all calls placed by Petitioner's customers either originate or terminate at an offshore Call Center located in a foreign country. Accordingly, regardless of whether these calls are routed to or from a New York address, they are interstate or international in nature. See *Commonwealth Long Distance, Inc.*, Adv Opn Comm T & F, July 29, 1994, TSB-A-94(33)S. Petitioner's service is an integral component part of these interstate or international calls, and it appears from the facts in this Opinion that Petitioner's service is only provided to its customers in connection with these calls. Therefore, Petitioner is providing an interstate or international telecommunications service that is not subject to sales tax. The service was not subject to sales tax for the period from August 1, 2004 to September 30, 2006, or under current law.

Section 186-e of the Tax Law imposes an excise tax on all providers of telecommunication services with receipts from intrastate telecommunication services, or receipts from any interstate telecommunication services which originate or terminate in New York State when the services are charged to a service address in New York. A provider of telecommunications services is any person who furnishes or sells telecommunication services regardless of whether such activities are the main business of such person or are only incidental thereto. Petitioner is purchasing telecommunications services from Verizon Business and reselling those services to its customers and is therefore a provider of telecommunication services within the meaning of section 186-e.

As a provider of telecommunication services, Petitioner is subject to tax on intrastate telecommunication services and interstate telecommunication services when either the origination or termination point is within New York State and the interstate telecommunication service is billed to a service address in New York. "Service address" means the location of the telecommunication equipment from which the telecommunication is originated or at which the telecommunication is received from the provider of telecommunication services. See section 186-e.1(f) of the Tax Law.

Petitioner's telecommunication service is interstate or international in nature for purposes of the excise tax under section 186-e of the Tax Law, as well as for sales tax purposes. Accordingly, the service is not subject to tax under section 186-e when the service is charged to a service address outside New York, regardless of where the charges are ultimately billed or paid. In the present case, based on the facts in this Opinion, the service address is the offshore Call

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Center which is located outside New York. Therefore, Petitioner's telecommunication service is not subject to tax under section 186-e. The service was not subject to tax for the period from August 1, 2004 to September 30, 2006, or under current law.

DATED: June 17, 2009

/s/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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.