

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

TSB-A-05(4)S
Sales Tax
February 2, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S031202B

On December 2, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from PricewaterhouseCoopers LLP, 1301 Avenue of the Americas, New York, New York, 10019.

The issues raised by Petitioner, PricewaterhouseCoopers LLP, are:

(1) Whether commissions paid by a mobile telephone service provider to a seller of mobile telecommunications equipment (mobile telephones and mobile telephone accessories) for establishing and renewing contracts for the provision of mobile telecommunications service by the provider to customers are subject to New York State and local sales taxes.

(2) Whether a seller of mobile telecommunications equipment may purchase such equipment for resale when the equipment is sold at a discount to customers in conjunction with the establishment or renewal of a contract for mobile telecommunications service between the customer and the mobile telephone service provider.

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

A mobile telephone service provider (Service Co) provides mobile telecommunications services in New York State. A seller of mobile telecommunications equipment (Salesco), which is an affiliate of Service Co, will sell mobile telephone equipment (Equipment) in New York. The Equipment consists of mobile telephones and mobile telephone accessories.

Salesco is not a provider or reseller of telecommunications service. However, Salesco acts as a commissioned salesperson and agent of Service Co for the purpose of finding purchasers of Service Co's telecommunications service. Salesco earns a commission from Service Co for establishing or renewing contracts for the provision of mobile telecommunications service between Service Co and customers. Salesco will, among other regular sales of Equipment, sell Equipment concurrently with the establishment or renewal of a contract for mobile telecommunications service between Service Co and the Equipment purchaser. Establishment or renewal of the service contract will also be made by employees of Service Co or an affiliate of Service Co at retail outlets maintained by Service Co or its affiliate. In order to encourage the establishment or continuation of these contracts, Equipment will be sold by Salesco to such customers at a discounted price. The discounted price is typically more

than half the wholesale price paid for the Equipment by Salesco. Sales tax is collected by Salesco on the amounts charged the customer for the Equipment.

Salesco will use a portion of the commission fee paid by Service Co to “fund” the discounted cost for the Equipment sold to customers. If the Equipment is damaged or defective, the customer’s recourse and remedy for repair or replacement is through Salesco (which might ultimately process the problem through the distributor or manufacturer of the equipment). If the customer terminates the contract early or otherwise defaults on the contract for the provision of mobile telecommunications service, Service Co may be entitled to damages arising from the early termination or default. However, regardless of whatever damages the customer may owe Service Co occasioned by the early termination or default of the service contract, the customer retains possession and ownership of the Equipment. In the event of a default on the service contract, neither Salesco nor Service Co is contractually entitled to damages or recoupment of the discount in the purchase price for the Equipment though such price was premised upon the establishment or renewal of the service contract.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(2) Purchaser. A person who purchases property or to whom are rendered services, the receipts from which are taxable under this article, including a mobile telecommunications customer.

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article, including gas and gas service and electricity and electric service of whatever nature, valued in money, whether received in money or otherwise . . .

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. . . .

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105(a) of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

(b) (1) 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 and except any telecommunications service the receipts from the sale of which are subject to tax under paragraph two of this subdivision; (C) a telephone answering service; and (D) a prepaid telephone calling service.

(2) The receipts from every sale of mobile telecommunications service provided by a home service provider, other than sales for resale, that are voice services, or any other services that are taxable under subparagraph (B) of paragraph one of this subdivision, sold for a fixed periodic charge (not separately stated), whether or not sold with other services.

(3) The tax imposed pursuant to this subdivision is imposed on receipts from charges for intrastate mobile telecommunications service of whatever nature in any state if the mobile telecommunications customer's place of primary use is in this state.

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

Retail sale (a) The term *retail sale* or *sale at retail* means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

* * *

(c) Resale exclusion. (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

* * *

(4)(i) Tangible personal property which is purchased and given away without charge, for promotion or advertising purposes is not purchased for resale. It is a retail sale to the purchaser thereof, and is not a sale to the recipient of the property.

(ii) Tangible personal property which is purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost, or which is not ordinarily sold by that person in the operation of his business, is a retail sale to the purchaser thereof, and not a sale to the recipient of the property.

* * *

Example 3: A vendor purchases catalogs and distributes them to his potential customers for a minimal charge, which does not reflect the cost to him. He is the retail purchaser of the catalog, and is required to pay the tax thereon. He cannot charge his customer tax on the charge for the catalog.

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

Sale of utility and similar services.

(a) Imposition. (1) Section 1105(b) of the Tax Law imposes a tax on the receipts from every sale . . . 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.

Opinion

Salesco, an affiliate of Service Co, will sell Equipment in New York. Service Co provides mobile telecommunications services in New York State. Salesco is not a provider or reseller of telecommunications service. However, Salesco is a commissioned sales agent of Service Co for the purpose of finding purchasers of Service Co's telecommunications service. Salesco earns a commission from Service Co for establishing or renewing contracts for the provision of mobile telecommunications service between Service Co and customers. Sales commissions received by a sales agent from its supplier are not receipts from the sale of an enumerated taxable service under section 1105 of the Tax Law. Moreover, the sales

commissions do not constitute receipts from a retail sale of tangible personal property under section 1105(a) of the Tax Law. Accordingly, the commissions paid by Service Co to Salesco for the establishment or renewal of mobile telecommunications service contracts between Service Co and customers are not receipts from a taxable sale of tangible personal property or services. Salesco is not required to collect State and local sales taxes from Service Co on such commissions. See *William H. Wishinsky, PC*, Adv Op Comm T&F, July 31, 2001, TSB-A-01(22)S; *KPMG Peat Marwick*, Adv Op Comm T&F, December 20, 1994, TSB-A-94(51)S.

Salesco sells Equipment to customers. These sales are often concurrent with the establishment or renewal of a contract for mobile telecommunications service between Service Co and the customer. Customers cannot effectively utilize the mobile telecommunications service they purchase without the requisite equipment needed to initiate and/or receive such communications. To encourage the initial sale or continuation of these contracts for telecommunications service, Salesco will sell Equipment to such customers at a discounted price. Salesco expects to fund the discounts with the commissions paid by Service Co to Salesco. The telecommunications service and Equipment are separately available for sale and have been sold as such. Therefore, the sales of telecommunications service and sale of Equipment are not integrated so as to make the transactions inseparable, even though the Equipment is not offered at the discounted price in the absence of the customer's purchase of the telecommunications service.

Section 526.6(c)(4) of the Sales and Use Tax Regulations sets forth specific criteria under which purchases of tangible personal property will not be considered to have been purchased for resale. Property which is: (1) purchased and given away without charge for promotional or advertising purposes; (2) purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost; or (3) which is purchased for promotional or advertising purposes and is not ordinarily sold by that purchaser in the operation of its business, is considered as having been purchased and consumed at retail. Purchases of such property are thus not eligible for exemption from tax as purchases for resale.

In the instant case, Salesco is not giving the Equipment away "without charge" for promotional or advertising purposes. Likewise, Salesco is not selling Equipment that it purchased for promotional or advertising purposes for a minimal charge not reflective of its true cost. Salesco receives commissions from Service Co, and the cost of the Equipment and the commissions Salesco expects to earn are the basis used by Salesco in determining its pricing for the Equipment. Salesco sells the equipment at a discount price which amount is generally greater than 50% of the wholesale cost of the Equipment to Salesco. Lastly, Salesco ordinarily sells Equipment in the operation of its business. The Equipment, therefore, is purchased by Salesco for resale, albeit often at a reduced price in conjunction with a customer's purchase of a contract for cellular telephone services which Salesco, as agent for Service Co, simultaneously sells to the customer.

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Accordingly, Salesco's original purchases of Equipment are considered to be purchases for resale regardless of whether the Equipment is sold separately or in conjunction with the sale of a contract for mobile telecommunications service. See *Anthony J. Ragusa, Jr. d/b/a The Stereo Advantage*, Adv Op Comm T&F, January 7, 1993, TSB-A-93(6)S; *KPMG Peat Marwick*, Adv Op Comm T&F, May 3, 1994, TSB-A-94(23)S; *KPMG Peat Marwick*, Adv Op Comm T&F, December 20, 1994, TSB-A-94(51)S.

Salesco must collect sales tax on the charges to customers for the sale of the Equipment. Service Co (and Salesco as agent for Service Co) must collect the tax imposed under section 1105(b) of the Tax Law on the receipts from the sale of mobile telecommunications service to customers. (See Technical Services Bureau Memorandum entitled *Amendments Affecting the Application of the Sales and Use Tax and Excise Tax Imposed on Mobile Telecommunications Service*, July 30, 2002, TSB-M-02(4)C, (6)S, for discussion about the imposition and collection of tax on mobile telecommunications services.)

Salesco's sales of tangible personal property and Equipment which are not in conjunction with or otherwise related to its sales of Service Co's mobile telecommunications service contracts, are also subject to sales tax.

DATED: February 2, 2005

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