

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

TSB-A-07(21)S  
Sales Tax  
August 27, 2007

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S061017D

On October 17, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from David E. Werth, CPA, Tronconi Segarra & Associates, LLP, 6390 Main Street, Williamsville, New York 14221.

The issue raised by Petitioner, David E. Werth, CPA, is whether sales of prepaid cards that entitle the purchaser to download ringtones, wallpaper, and games to a cellphone are subject to New York State sales and use tax.

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

Petitioner's client (Retailer) is engaged in retail operations in the state of New York. One of the products Retailer offers for sale is advertised as a "prepaid mobile card." Each prepaid mobile card provides the purchaser with a distinct number of download credits, and each card is sold for a designated dollar amount. At the time of sale, the customer selects a card to purchase based on the number of download credits the customer intends to use. Each credit may be redeemed with a third-party provider to download various types of ringtones, wallpaper, and games for use on a cellphone.

At the time of purchase, Retailer gives the customer a receipt that identifies the third-party provider and provides a Personal Identification Number (PIN) and instructions for redeeming the credit for the desired download. Using the PIN provided on the receipt, the purchaser can redeem the credit for the download by either sending a cellphone text message to the provider or downloading the content via the Internet.

For the sales of prepaid mobile cards, Retailer records a portion of the sales proceeds as commission revenue on its books and records, and the remaining amount is shown as a liability to the provider which is paid to the provider weekly.

**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:

\* \* \*

(6) Tangible personal property. Corporeal personal property of any nature. However, except for purposes of the tax imposed by subdivision (b) of section eleven hundred five, such term shall not include gas, electricity, refrigeration and steam. Such term shall also include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser....

\* \* \*

(22) "Prepaid telephone calling service" means the right to exclusively purchase telecommunication services, that must be paid for in advance and enable the origination of one or more intrastate, interstate or international telephone calls using an access number (such as a toll free network access number) and/or authorization code, whether manually or electronically dialed, for which payment to a vendor must be made in advance, whether or not that right is represented by the transfer by the vendor to the purchaser of an item of tangible personal property. In no event shall a credit card constitute a prepaid telephone calling service. If the sale or recharge of a prepaid telephone calling service does not take place at the vendor's place of business, it shall be conclusively determined to take place at the purchaser's shipping address or, if there is no item shipped, at the purchaser's billing address or the location associated with the purchaser's mobile telephone number.

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. 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: . . . (D) a prepaid telephone calling service.

## Opinion

Retailer sells prepaid mobile cards that allow the holder to download ringtones, wallpaper, and games to mobile telephones. Ultimately, the downloaded ringtones, wallpaper, and games are provided to the holder of the card by a third-party provider.

The prepaid mobile cards are similar in nature to gift certificates. The purchase of a gift certificate that entitles the holder to present the certificate in full or part payment (up to the stated dollar value for the certificate) for the purchase of unspecified goods and services at some future date is not generally considered to be a taxable transaction under section 1105 of the Tax Law at

the time the certificate itself is purchased. See *First Colony Company*, Adv Op Comm T&F, March 1, 1999, TSB-A-99(13)S. Rather a sale occurs at the time and place the certificate is presented in exchange for the delivery of property or services and sales tax is due only on the taxable property and/or services that are purchased. Therefore, sales by Retailer of prepaid mobile cards as described in this Opinion are not subject to sales tax.

When the customer redeems the prepaid mobile card to access the download of a product or service, the third-party provider redeeming the card and delivering the product or service as directed by the holder of the card will be responsible for collecting and remitting any sales tax that may be due on the product or service.

It is assumed for the purposes of this Opinion that the third-party provider is not a telephone service provider and that the cards may not be used to purchase telephone service. If these prepaid mobile cards were to be considered part of a prepaid telephone calling service, the provisions for sales tax imposed on prepaid telephone calling services under section 1105(b)(1)(D) of the Tax Law would apply.

DATED: August 27, 2007

/s/  
Jonathan Pessen  
Tax Regulations Specialist IV  
Taxpayer Guidance Division

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.