

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-94 (51)S
Sales Tax
December 20, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940722A

On July 22, 1994 a Petition for Advisory Opinion was received from KPMG Peat Marwick, 345 Park Avenue, New York, NY 10154.

The issues raised by Petitioner, KPMG Peat Marwick, are:

1. Whether there is any sales or use tax due on the original purchase of cellular telephones by XYZ which will ultimately be transferred as part of a cellular telephone service.
2. Whether XYZ's purchase of cellular telephones should be treated as items for promotion or advertising purposes when the telephones are offered at a reduced price or at no charge to XYZ's customers, whereby the purchase of the telephones would be subject to tax as a retail sale and not excluded from tax as a sale for resale as set forth in Section 526.6(c)(4) of the New York State Sales and Use Tax Regulations.
3. What is the correct tax base on the cellular telephones which may be sold by XYZ to its customers at a reduced price or at no charge in conjunction with a contract providing for telephone carrier services.
4. Whether the commission received by XYZ from the telephone carrier for securing a telephone service contract with its customers is subject to sales or use tax.
5. Whether the telephone installation and activation fees charged to customers on behalf of a telephone carrier are subject to sales or use tax.

XYZ, Inc. (hereinafter "XYZ" or "the Company") is a retail establishment which sells electronic equipment, including cellular telephones (or "telephones"). As a retailer, XYZ does not pay sales tax on its purchases of cellular telephones since the telephones are for resale, but charges sales tax on the retail price of the telephones sold by XYZ to its customers.

Along with the purchase of a cellular telephone, the customer would need to contract for telephone service from a cellular telephone carrier (or "telephone carrier"). XYZ is an authorized agent of a telephone carrier and can offer service contracts to its customers.

Further, customers of XYZ have several options which include (a) the customer may purchase a telephone from XYZ; (b) the customer may purchase a telephone from XYZ and contract for telephone service through XYZ in its capacity as an agent for the telephone carrier;

and (c) the customer may contract for telephone service through XYZ in its capacity as an agent for the telephone carrier, without the purchase of a telephone.

As a result, XYZ offers to its customers pricing programs for the retail purchase of telephones, which may include a reduced price or no charge for the telephone to the customer under circumstances whereby the customer contracts for the telephone service through XYZ as an agent for the cellular telephone carrier. XYZ is compensated by the telephone carrier through a commission received upon activation of the service contract and will receive this commission regardless of whether XYZ offers the telephone to the customer at the full retail selling price, at a reduced price, or at no charge.

Although a customer may receive the telephone for a reduced price or at no charge as part of contracting with the telephone carrier, XYZ receives profits due to the commissions received from the telephone carrier for securing a telephone service contract with its customers and charges to its customers for installation and activation of the telephone service ("activation"). The cost of the telephone, commissions earned, installation and activation fees are viewed as a whole by XYZ in determining its pricing and retail strategy for cellular telephones.

Section 1101 of the Tax Law states, in part:

Definitions.-- ... (b) 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:

(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....

Section 526.6 of the New York State Sales and Use Tax Regulations states, in part:

Retail sale. [Tax Law, §1101(b)(4)] (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.

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(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.

(iii) A resale certificate may not be used by the person making the purchases described in subparagraphs (i) and (ii) of this paragraph for such purchases.

Example 2: A bank has purchased premiums which will be given to depositors upon the opening of an account in a new branch. As the bank is not in the business of selling such items, and as it in fact does not sell such items to its customers, the sale to the bank of such items of tangible personal property is a retail sale which is taxable at the time of purchase. The bank has not purchased these items for resale.

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 catalog.

Section 526.6(c)(4) of the Sales and Use Tax Regulations sets forth specific criterion under which purchases of tangible personal property will not be considered to have been purchased for resale. The specific criterion are:

- a) Property which is purchased and given away without charge for promotional or advertising purposes;
- b) Property which is purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost; or
- c) Property which is purchased for promotional or advertising purposes and is not ordinarily sold by that person in the operation of his business.

In the instant matter criteria "a", above, is not applicable since XYZ does not give away cellular telephones without charge for promotional or advertising purposes. Criteria "b" does not apply since XYZ's purchases of cellular telephones for resale to customers at a reduced price or for inclusion at no charge to the customer in conjunction with the customer's purchase of a contract for cellular telephone services for which XYZ receives commissions and in which the cost of the telephone, commissions to be earned, installation and service fees are the basis for XYZ in determining its pricing are not considered to be purchases of property for promotional or advertising purposes and are not considered to be sold for a minimal charge which does not reflect its true cost. Criteria "c" does not apply since XYZ ordinarily sells cellular telephones in the operation of its business.

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Accordingly, XYZ's original purchase of cellular telephones are considered to be purchases for resale purposes regardless of whether the telephones are sold individually or transferred in conjunction with the sale of a cellular telephone service. Anthony J. Ragusa, Jr. d/b/a The Stereo Advantage, Adv Op Comm T&F, January 7, 1993, TSB-A-93(b)(S); KPMG Peat Marwick, Adv Op Comm T&F, May 3, 1994, TSB-A-94(23)S.

XYZ's purchases of cellular telephones are not considered to be purchases of items for promotional or advertising purposes when offered to the customer at a reduced price or when offered at no charge to the customer when such offering is in conjunction with the sale of a contract for cellular telephone service. Anthony J. Ragusa, Jr. d/b/a The Stereo Advantage, *supra*; KPMG Peat Marwick, *supra*.

XYZ must collect the tax imposed under Section 1105(b) of the Tax Law on the total receipts from the sale of the cellular telephone service to a customer, including any installation or activation fees or other charges billed to the customer on behalf of a telephone carrier. Installation fees and activation fees are considered to be nothing more than an adjunct or component of the charges for cellular telephone service. These services are part and parcel of basic telephone service supplied by the telephone carrier. Rochester Telephone Corporation, Advisory Op, Comm of T & F, December 9, 1987 TSB-A-87(1), Cellular Telephone Company, Advisory Op, Comm of T & F, October 11, 1989 TSB-A-89(38)S.

The sales commission received by XYZ from the telephone carrier for securing a cellular telephone service contract with the telephone carrier's customer will not be subject to sales or use tax.

DATED: December 20, 1994

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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