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

TSB-A-91(17)C
Corporation Tax
September 20, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C910419B

On April 19, 1991, a Petition for Advisory Opinion was received from ATC Long Distance, 1515 South Florida Highway, Suite 400, Boca Raton, Florida 33432.

The issue raised by Petitioner, ATC Long Distance, is whether under section 186-a of the Tax Law, a long distance carrier of telecommunications services that does not originate nor bill to any service address in New York, can still maintain the resale exemption for local exchange carrier access service and whether Petitioner must pay the section 186-a tax on international traffic passing through New York State.

Petitioner through its subsidiaries, Claydesta Digital and Microtel, Inc., is a long distance reseller of telecommunications services based in the Southeast and Southwest United States. Petitioner's network allows usage to terminate in New York using local exchange carrier access services. However, Petitioner does not have any customers in New York nor does it originate any traffic in New York using those local exchange carrier access services.

Petitioner sends most of its international traffic through an international gateway in New York. None of the international calls terminate in New York State.

Section 186-a of the Tax Law imposes a tax equal to three percent of the gross income of every utility subject to the supervision of the New York State Department of Public Service, which has gross income in excess of $500, and a tax equal to three percent of the gross operating income of every utility, not subject to the supervision of the New York State Department of Public Service, that is doing business in New York State and has gross operating income in excess of $500.

Section 186-a.2 of the Tax Law provides that the word "utility" includes every person (whether or not such person is subject to the supervision of the Department of Public Service) who sells telephony or telegraphy delivered through mains, pipes or wires, or furnishes telephone or telegraph service by means of mains, pipes or wires; regardless of whether such activities are the main business of such person or are only incidental thereto. The word "person" means persons, corporations, companies, associations, etc.

Section 186-a.2 also provides that the words "interexchange carrier" mean and include any seller of telephone service between two or more exchanges that qualifies as a common carrier within the meaning of section 153(h) of Title 47 of the United States Code.

Section 186-a.2 of the Tax Law further provides that the words "gross income" and "gross operating income" with respect to the sale of telephony and telegraphy or the furnishing of telephone

or telegraph service shall include receipts received in or by reason of all sales made or service furnished in New York State (whether or not for ultimate consumption or use by the purchaser) but, if telephony, including carrier access service, or telegraphy which is sold in New York State by a utility or telephone service, including carrier access service, or telegraph service which is furnished in New York State by a utility is then resold by the purchaser with respect to such a sale, there shall be allowed a deduction from the receipts of such purchaser from the resale, the amount paid to his reseller or furnisher for such telephony or telegraphy or telephone or telegraph service. For the purpose of such deduction, the fact that an interexchange carrier which has purchased carrier access service for resale, is not able to specifically identify and separate the portion of such service which was actually resold in a particular sale of telephone service to its customers shall not be grounds to disallow such deductions.

Section 186-a.2 of the Tax Law was amended by Chapter 61 of the Laws of 1989 to insure against the double taxation of receipts of telephone and telegraph corporations by providing for the taxation on the initial sale or furnishing of telephony or telegraphy within New York State rather than taxation on the sale or furnishing of telephony or telegraphy for ultimate consumption or use by the purchaser within New York State. The amendment provided that the sale for resale deduction (other than exempt carrier access services sold by an exchange telephone company to an interexchange telephone company) is not allowed on or after July 1, 1989. This made into law, the policy existing at that time which allowed an exchange telephone company to deduct from gross income the receipts received from the sale of carrier access service within New York State to an interexchange telephone company, where the interexchange telephone company resold the carrier access service as part of interexchange telephone company service.

Chapter 190 of the Laws of 1990 also amended section 186-a.2 of the Tax Law by eliminating any resale exclusion to an exchange carrier. This conforms the sale of carrier access service to the remainder of resold telephone service under section 186-a. Concomitant with the inclusion of carrier access service in the taxable base of the seller thereof, the purchaser (the interexchange carrier) of such service, if it resells the same, is allowed a deduction of the purchase price it paid for such service if (1) the purchase price of such services paid by the interexchange carrier was taxed under section 186-a to the exchange carrier and (2) the interexchange carrier resells such service to its customers, rather than self-using such service or consuming it for other than resale as telephone service.

Accordingly, on and after July 1, 1990 there is no provision in section 186-a of the Tax Law for a resale exemption for a local exchange carrier selling carrier access service to an interexchange carrier who resells such service. Therefore, the local exchange carrier is required to include in the determination of its gross income or gross operating income, its receipts for providing, in New York State, carrier access service to interexchange carriers. The section 186-a tax imposed on the sale of such carrier access service is not imposed on the interexchange carrier. It should be noted, that the local exchange carrier's tariff set by the Public Service Commission reflects the increased cost incurred by the local exchange carrier because of the 1990 amendment to section 186-a of the Tax Law.

Accordingly, if Petitioner or its subsidiaries, Claydesta Digital or Microtel, Inc., is subject to tax under section 186-a, such taxpayer is authorized to make a deduction, pursuant to section 186-a.2, for the purchase price of carrier access service that was taxed to the local exchange carrier and which is resold by such taxpayer to its customer. If Petitioner, Claydesta Digital or Microtel, Inc. is not subject to tax under section 186-a, such corporation is not entitled to relief for the section 186-a tax on carrier access service paid by the local exchange carrier.

With respect to international traffic passing through New York State, the international carrier that is providing access to the gateway in New York for international traffic includes in its determination of gross income or gross operating income, that portion of its revenue from the foreign transmission service that is attributable to New York State, computed pursuant to the provisions of section 184.4(c) of the Tax Law. The section 186-a tax imposed for providing such access to the gateway in New York is not imposed on the interexchange carrier. It should be noted, that the international carrier's tariff set by the Federal Communications Commission reflects the cost incurred by the international carrier for the tax imposed under section 186-a of the Tax Law.

Section 186-a.2-a of the Tax Law provides that the deduction permitted in section 186-a.2 with respect to resold telephony or telegraphy or telephone or telegraph service which was purchased in New York (including the provision relating to resold carrier access service) shall be allowed against interstate and international revenues prior to apportionment to New York.

Accordingly, if Petitioner or its subsidiaries, Claydesta Digital or Microtel, Inc., is subject to tax under section 186-a, such taxpayer is authorized to take a deduction, pursuant to section 186-a.2-a, for the purchase price of service that was taxed to the international carrier and which is resold by such taxpayer to its customer. If Petitioner, Claydesta Digital or Microtel, Inc. is not subject to tax under section 186-a, such corporation is not entitled to relief for the section 186-a tax on service paid by the international carrier.

It should be noted that the facts submitted by the Petitioner are not sufficient enough to enable a determination as to whether Petitioner, Claydesta Digital or Microtel, Inc. is subject to tax under section 186-a of the Tax Law.

DATED: September 20, 1991

s/PAUL B. C0BURN
Deputy Director
Taxpayer Services Division

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