

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

TSB-A-97(25)C
Corporation Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.C971015A

On October 15, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from RGT Utilities, Inc., 1221 Avenue of the Americas, New York, New York 10020.

The issue raised by Petitioner, RGT Utilities, Inc. is whether it was subject to tax under Article 9 of the Tax Law before January 1, 1995 and whether its tax status was changed by the enactment of Chapter 2 of the Laws of 1995, effective January 1, 1995.

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

Petitioner is a Delaware corporation qualified to do business in New York State. It maintains its principal offices in the City of New York. Its sole business is to provide telecommunications services to businesses located in the Rockefeller Center complex and adjacent office buildings, as well as other office buildings, in Manhattan. Substantially all of the revenues of Petitioner are derived from the provision of regulated telephone services.

Petitioner is regulated by the Public Service Commission as a telephone utility. It was issued a Certificate of Public Convenience and Necessity by the Public Service Commission to operate as a reseller of telephone service on January 14, 1986, in Case 29240. That Certificate authorized Petitioner "to provide all forms of telephone service on an inter-city basis throughout New York State". Petitioner was issued an Amended Certificate of Public Convenience and Necessity by the Public Service Commission on March 17, 1992, in Case 91-C-0690. In addition to the inter-city authority contained in the original Certificate, the Amended Certificate authorized Petitioner "to provide all forms of telephone services on an intracity basis throughout New York State."

Petitioner currently has on file with the Public Service Commission a full and detailed tariff setting forth the rates, terms and conditions for its offering of local and toll telephone services, on a resale basis, throughout New York State.

In addition, over the years Petitioner has been required to comply with the provisions of the Public Service Law and the Public Service Commission's Rules and Regulations applicable to telephone corporations. Over the years, Petitioner has been required to seek, and has received, Public Service Commission approval to, among other things, change its rates, terms and conditions for providing telephone service; change the manner in which it timed and billed for calls; change its name; transfer its assets or property; effectuate a corporate reorganization; and issue securities and/or debt.

Petitioner is deemed a telephone utility by the Federal Communications Commission(FCC). It possesses a Section 214 Certificate from the FCC authorizing it to provide international telephone service as a reseller; it also has on file with the FCC tariffs governing the rates, terms and conditions for its international service as well as for its resale of interstate long distance service.

Applicable Law

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax on domestic or foreign corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office, in New York State. Section 209.4 of the Tax Law provides that corporations liable for tax under section 183 of Article 9 of the Tax Law are not subject to tax under Article 9-A.

Section 183 of Article 9 of the Tax Law imposes a franchise tax on a domestic or foreign corporation formed for or principally engaged in the conduct of a telegraph or telephone business, for the privilege of exercising its corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office, in New York State.

For taxable years commencing before January 1, 1995, section 184 of Article 9 of the Tax Law imposed an additional franchise tax on every corporation formed for or principally engaged in the conduct of telephone or telegraph business.

As amended by Chapter 2 of the Laws of 1995, for taxable years beginning on or after January 1, 1995, section 184 of Article 9 of the Tax Law imposes an additional franchise tax on every corporation formed for or principally engaged in the conduct of local telephone business, or telegraph business.

Section 184.1 of Article 9 of the Tax Law defines "local telephone business" as "the provision or furnishing of telecommunication services for hire wherein the service furnished by the provider thereof consists of carrier access service or the service originates and terminates within the same local access and transport area ("LATA"), ... or within the LATA-like Rochester non-associated independent area. The term "telecommunication services" shall have the meaning ascribed to such term in section one hundred eighty-six-e of this article."

To determine the classification and proper taxability of a corporation under either Article 9 or Article 9-A, an examination of the nature of the corporation's activities is necessary, regardless of the purpose for which the corporation was organized. In Matter of Stat Equipment Corp and Matter of Bi-County Ambulance and Ambulette Transport Corp, Dec Tax App Trib, January 25, 1996, TSB-D-96(3)C, the Tax Tribunal stated the test for proper classification of business activities as follows:

We stated the test in Matter of Capitol Cablevision Sys. (Tax Appeals Tribunal, June 9, 1988):

"(i)t is well established that classification for corporation tax purposes is to be determined by the nature of the taxpayer's business and not by the words in its certificate of incorporation, nor by focusing on one aspect of its business operations. The business must be viewed in its entirety and from the perspective of its customers - what they buy and pay for. (Quotron Sys v Gallman, 39 NY2d 428; Matter of Holmes Elec. Protective Co. v McGoldrick, 262 AD 514, affd 288 NY 635; Matter of McAllister Bros. v Bates, 272 AD 511)" (Matter of Capitol Cablevision Sys., supra).

Ordinarily, a corporation is deemed to be principally engaged in the activity from which more than 50 percent of its receipts are derived. See e.g. Re Joseph Bucciero Contracting Inc., Adv Op St Tax Commn, July 23, 1981, TSB-A-81(5)C.

Section 186-a of Article 9 of the Tax Law provides, in part:

1. Notwithstanding any other provision of this chapter, or of any other law, a tax equal to three and one-half per centum of its gross income is hereby imposed upon every utility doing business in this state which is subject to the supervision of the state department of public service ... which taxes shall be in addition to any and all other taxes and fees imposed by any other provision of law for the same period.

2. As used in this section, (a)(i) the word "utility" includes every person (including every provider of telecommunication services) subject to the supervision of the state department of public service ... (b) the word "person" means ... corporations ... (c) the words "gross income" mean and include receipts received in or by reason of any sale, conditional or otherwise ... made or service rendered for ultimate consumption or use by the purchaser in this state ... without any deduction ... "Gross income" also includes profits from the sale of securities ... profits from the sale of real property ... profit from the sale of personal property ... also receipts from interest, dividends, and royalties ... without any deduction therefrom for any expenses whatsoever incurred in connection with the receipt thereof, also profits from any transaction (except sales for resale and rentals) within this state whatsoever.

As amended by Chapter 2 of the Laws of 1995, section 186-a(2) of Article 9 of the Tax Law also states, "Provided, however, gross income with respect to a provider of telecommunication services shall not include receipts from the sale of telecommunication services as such services are defined in section one hundred eighty-six-e of this article."

Section 186-e.2(a) of Article 9 of the Tax Law, added by Chapter 2 of the Laws of 1995, imposes an excise tax "on the sale of telecommunication services by a provider of telecommunication services" from any intrastate telecommunication services and any interstate and international telecommunication services (other than interstate and international private telecommunication services) which originate or terminate in New York State and which telecommunication services are charged to a service address in New York State regardless of where the amounts charged for the services are billed or ultimately paid.

Section 186-e.1(e) of Article 9 of the Tax Law defines "provider of telecommunication services" as "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."

Section 186-e.1(g) of Article 9 of the Tax Law defines "Telecommunication services" as "telephony or telegraphy, or telephone or telegraph service...."

Opinion

When determining the classification and proper taxability of Petitioner, the business activities "must be viewed in its entirety and from the perspective of its customers - what they buy and pay for" as stated in Stat Equipment Corp, supra. The determination of whether Petitioner is subject to tax under Article 9-A or section 183 of Article 9, depends on what activity Petitioner is principally engaged in.

Herein, Petitioner is a corporation that operates as a telephone utility subject to the jurisdiction of the State Public Service Commission and the Public Service Law. Substantially all of its revenues are derived from the provision of regulated telephone services. It provides all forms of telephone service on an inter-city and intra-city basis throughout New York State. It offers local and toll telephone services as well as international telephone service and interstate long distance service. As such, Petitioner is principally engaged in the conduct of a telephone business and subject to tax under section 183 of Article 9 of the Tax Law.

Chapter 2 of the Laws of 1995 (effective for taxable years beginning on or after January 1, 1995) amended section 184 of Article 9 of the Tax Law to provide that a telephone corporation is subject to tax only if it is formed for or principally engaged in the conduct of a **local** telephone business. Prior to the enactment of such chapter, a telephone corporation was subject to tax under section 184 if it was principally engaged in the conduct of a telephone business.

Accordingly, for taxable years beginning before January 1, 1995, Petitioner was principally engaged in the conduct of a telephone business and subject to tax under section 184. Moreover, as Petitioner is subject to franchise tax under section 183 of Article 9 of the Tax Law, it is not subject to tax under Article 9-A of the Tax Law.

For taxable years beginning on or after January 1, 1995, Petitioner is principally engaged in a local telephone business if more than 50 percent of its receipts are derived from the conduct of a local telephone business. However, the determination of whether Petitioner is principally engaged in a local telephone business so that it is subject to tax under current section 184 is a question of fact not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts" Tax Law, S 171, subd. twenty-fourth; 20 NYCRR 901.1(a).

Section 186-a of the Tax Law was amended by Chapter 2 of the Laws of 1995 to remove the provisions subjecting telephone and telegraph service receipts to tax under that section. The charges representing these receipts are now subject to tax under newly enacted section 186-e of the Tax Law, Excise Tax on Telecommunication Services. (See 1995 Legislation Affecting Telephone and Telegraph Businesses and Other Providers of Telecommunication Services, Technical Services Bureau Memorandum, December 13, 1995, TSB-M-95(3)C.)

Since Petitioner was and is subject to the supervision of the Department of Public Service, it is subject to tax on its "gross income" under current section 186-a and under section 186-a prior to January 1, 1995. On and after January 1, 1995, "gross income" does not include receipts from the sale of telecommunication services which are subject to tax under section 186-e of the Tax Law. The services provided by Petitioner constitute telecommunication services as described in section 186-e.1(g) of the Tax Law and Petitioner is a provider of telecommunication services as described in section 186-e.1(e) of the Tax Law. Petitioner's receipts from these services are subject to tax under section 186-e of the Tax Law.

DATED: October 28, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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