

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

TSB-A-98(16)C
Corporation Tax
September 9, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C980512B

On May 12, 1998, a Petition for Advisory Opinion was received from Kurt E. DeSoto, 1776 K Street, NW, Washington, D.C. 20006.

The issues raised by Petitioner, Kurt E. DeSoto, are (1) whether an answering service is subject to the excise tax imposed on telecommunication services under section 186-e of the Tax Law; and (2) whether a company that is providing an answering service is subject to the franchise taxes imposed on transportation and transmission corporations under sections 183 and 184 of the Tax Law.

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

Company A provides an answering service to its customers. To provide the answering service, a Company A employee (referred to as a receptionist) answers telephone calls intended for the Company A's customers. The receptionist explains that the customer is unavailable and asks the caller whether he or she would like to leave a message for the customer. The caller then explains the reason for the call and the receptionist distills the information and formulates a relatively short message for the customer. The receptionist enters the name and telephone number of the caller and the message for the customer into a computer. After reading back the message to confirm that it conveys the caller's intent, the receptionist is ready to transmit the message to the customer's pager unit.

In distilling the information from the caller and formulating a message for the customer, the receptionist would not ordinarily transcribe a message provided by the caller verbatim. As example of a routine call received by the answering service is as follows:

Receptionist: Good morning. Mr. Jones' office.

Caller: Hello, may I speak with Mr. Jones please.

Receptionist: Mr. Jones is unavailable. Would you like to leave a message for Mr. Jones?

Caller: Yes. He sent us some documents relating to the Acme purchase and we have several questions about them. We really need to speak with him before 5:00 today.

Receptionist: Is that 5:00 Eastern Standard Time?

Caller: No. 5:00 Pacific Standard Time.

Receptionist: Your name please.

Caller: Mr. Smith.

Receptionist: At what number can he reach you?

Caller: My number is 111-222-3333.

Receptionist: Your message will be as follows:

Please call Mr. Smith before
5:00 p.m. Pacific Time at 111-
222-3333 to discuss questions
re: the Acme purchase documents

Is that correct?

Caller: Yes. That's correct.

Receptionist: Thank you very much.

After verification, the message is then transmitted to Mr. Jones' pager unit along with the time and date of the call in accordance with the terms of Company A's agreement with the particular customer.

In some instances, the information provided by the caller will be longer or more complicated or the caller will be less clear in providing the information. In those instances, the process of distilling the information and formulating a message to transmit to the customer's pager will require more effort on the part of the receptionist. Some callers may ask questions regarding the customer's hours of operation or when the customer will be available or will call back. In response, the receptionist will explain that the caller is speaking with the customer's answering service and that the customer will be contacted immediately and will respond as quickly as possible. The receptionist may provide general information such as office hours and may direct the message to a specific individual other than the person originally requested by the caller.

In many cases, the receptionist may refer to a "painted screen" which prompts questions intended to solicit the specific information which the customer may need in order to respond appropriately to the caller. Again, the receptionist may often need to interpret the caller's responses or re-phrase the questions in order to obtain the relevant information. In certain emergency situations, the receptionist or other Company A employees may contact the customer directly by telephone or may transmit the message to more than one individual until receipt of the message is acknowledged.

Company A bills its customers at a contracted monthly rate which includes a fixed allowance of calls to be answered. To the extent that the customer's call volume exceeds the monthly allowance, a supplemental bill is rendered. The billable call volume is based upon the number of calls answered for the customer

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rather than the number of messages transmitted. For example, the billable call count would include calls when the caller does not leave a message, including those when general information is provided. All calls, other than those which are clearly dialed to a wrong number, are logged and customers may retrieve messages by calling in to speak with a receptionist or by requesting written details.

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 a corporation liable for tax under sections 183 and 184 of Article 9 of the Tax Law is not subject to tax under Article 9-A of the Tax Law.

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 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.

Section 184.1 of the Tax Law provides that a corporation is subject to the franchise tax under section 184 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, if it is formed for or principally engaged in local telephone business. The term "local telephone business" means 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"). The term "telecommunication services" has the same meaning for purposes of section 184 as for section 186-e of the Tax Law.

Section 186-e.1(g) of the Tax Law defines "telecommunication services" as "telephony or telegraphy, or telephone or telegraph service, including, but not limited to, any transmission of voice, image, data, information and paging, through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar media or any combination thereof and shall include services that are ancillary to the provision of telephone service ... and also include any equipment and services provided therewith. Provided, the definition of telecommunication services shall not apply to separately stated charges for any service which alters the substantive content of the message received by the recipient from that sent."

To determine the classification and proper taxability of a corporation under either Article 9-A or sections 183 and 184 of Article 9, an examination of the nature of the corporation's activities is necessary, regardless of the purposes for which the corporation was organized. See Matter of McAllister Bros., Inc. v Bates, 272 AD 511, 517. In Matter of Stat Equipment Corp and Matter of Bi-County Ambulance and Ambulette Transport Corp, Dec Tax App Trib,

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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-e.2(a) of the Tax Law imposes an excise tax "on the sale of telecommunication services by any person which is a provider of telecommunication services...."

Section 186-e.1(e) 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."

In CCC Telex Service, Inc, Adv Op Comm T & F, July 18, 1989, TSB-A-89 (9)C, it was held that where the petitioner was principally engaged in a telephone answering service business, it would be classified as a general business corporation and would be subject to tax under Article 9-A of the Tax Law.

In Marken Properties, Inc, Relay Communications Center, Inc, and Relay Communications Corporation, Adv Op Comm T & F, June 26, 1997, TSB-A-97(16)C, the issues involved the taxation of Marken, which held the assets of the three corporations; Corp, which was a licensed radio common carrier of voice and conventional paging airtime services; and Center, which was a provider of telephone answering services. Center conducted all administrative and billing functions for the three corporations and the bills separately stated the charges for the telephone answering services and retail equipment sales made by Center and the charges for voice paging airtime services and resold paging airtime services made by Corp. The opinion held that Marken and Center were principally engaged in general business activities and were subject to tax under Article 9-A of the Tax Law, and it appeared that Corp was principally engaged in a telephone business that was taxable under section 183 of the Tax Law. If more than 50 percent of Corp's receipts are derived from local telephone business as defined in section 184.1 of the Tax Law, Corp would also be taxable under section 184 of the Tax Law. The opinion also held that the voice paging airtime services and

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resold conventional paging airtime services provided by Corp were telecommunication services under section 186-e.1(g) of the Tax Law, and, as a provider of telecommunication services, Corp was subject to the excise tax imposed under section 186-e. With respect to Center, it may provide its customers with pagers as part of its provision of telephone answering services. However, Center does not separately bill for paging airtime services. Those charges are included in the charges for the telephone answering services. Therefore, the opinion held that since the paging airtime services provided by Center were not resold as separately billed paging services, Center was not considered the provider of telecommunication services under section 186-e.1(e) of the Tax Law and not subject to the excise tax imposed section under 186-e.

In this case, from the perspective of Company A's customers (see, Stat Equipment, supra), what they buy and pay for is a telephone answering service. Like CCC Telex, supra, and Center in Marken Properties, supra, Company A is engaged in general business activities and is subject to franchise tax under Article 9-A of the Tax Law rather than sections 183 and 184 of the Tax Law.

Company A, in providing its telephone answering services, transmits customer's messages to the customer's pager unit. However, like Center in Marken Properties, supra, Company A does not separately bill for paging airtime services. Those charges are included in the amount billed to the customer for the telephone answering services which is a contracted monthly rate that includes a fixed allowance of calls to be answered, whether or not there is a message to transmit. Since the paging services provided by Company A are not resold as separately billed paging services, Company A, like Center in Marken Properties, supra, is not considered the provider of telecommunication services under section 186-e.1(e) of the Tax Law. Accordingly, Company A is not subject to the tax imposed under section 186-e of the Tax Law.

DATED: September 9, 1998

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

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