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Office of Counsel
Advisory Opinion Unit

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Corporation Tax
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Sales Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z090317B

Petitioner, [REDACTED], requests an Advisory Opinion about whether its video switching service constitutes a telecommunication service subject to State and local sales tax and the telecommunications excise tax. We conclude that it is. Petitioner also asks whether it may purchase transmission services and certain equipment for resale if the service and equipment will be resold in the same form as purchased. We conclude that it may. Finally, Petitioner asks whether its sales of control panels to its customers qualify for exemption under Tax Law section 1115(a)(38), which applies to tangible personal property used or consumed by a broadcaster. We conclude that the control panel may be eligible for that exemption, provided Petitioner's customer meets the requirements for the exemption.

Facts

Petitioner operates a video switching service center in New York City. Petitioner's service enables customers to send video programming transmissions to other customers of Petitioner's service. Customers that subscribe to this service are given access to a port on Petitioner's switch and unlimited switching/routing capability for a flat monthly fee. The port allows the customer to connect to Petitioner's switching equipment and allows Petitioner's employees/operators to provide switching services. For an additional and separately-stated charge, a customer has the option to rent a touch screen control panel that allows the customer to remotely control the destination of the video on their own. The control panel remains the property of Petitioner, and may be either installed by Petitioner at the customer's location, or shipped to and installed by the customer. Petitioner's technicians will maintain and troubleshoot the control panel remotely and visit the customers once or twice a year to repair the touch screen. If a customer does not opt to rent a touch screen control panel, Petitioner's employees/operators will provide the switching services. Petitioner's employees/operators will sometimes perform switching services for customers who do have a control panel, because some customers prefer that Petitioner's employee/operator make the switch and confirm that it is complete.

In most cases, the customers connect to Petitioner's switching center by purchasing a TV-1/SDI fiber circuit from an independent local fiber-optic circuit provider. Petitioner will assist in the installation of the customer's fiber-optic circuit line at Petitioner's New York facility and test the circuits in coordination with the third party provider. Once the customer's TV-1/SDI line is connected to the port provided by Petitioner, the video can be routed to its destination over the receiving customer's TV-1/SDI circuit. Every time a new customer is added, Petitioner will download and send a refresh update to all customer terminals.

Further, Petitioner's employees/operators are available to troubleshoot any technical problems that may arise with the control panel or switching equipment in the New York facility. Employees may also assist customers with the switching process if needed. Petitioner's employees/operators may schedule or assist customers with scheduling advance order switches in the reservations system.

Petitioner's services also include conversion of U.S. TV signals to European TV signals and vice-versa, and conversion of analog to digital signals and vice-versa, when necessary.

Petitioner asks the following questions:

1. Are Petitioner's switching services subject to New York State and local sales tax or the telecommunications excise tax when the customer purchases transmission services from a third party?
2. May Petitioner purchase transmission services and control panels exempt from sales tax if it resells the services and property to customers in the same form as purchased?
3. Does Petitioner's control panel qualify for exemption under Tax Law section 1115(a)(38) as equipment used by a broadcaster, provided the customer meets all the requirements of this exemption?

Analysis

Issue 1

Petitioner's video switching service is a telecommunication service subject to both state and local sales tax and the telecommunications excise tax. Tax Law section 1105(b)(1)(B) imposes sales tax on receipts from every sale, other than sales for resale, of "telephony and telegraphy and telephone and telegraph service of whatever nature." "The words 'of whatever nature' indicate that a broad construction is to be given the terms describing the items taxed." Sales and Use Tax Regulation § 527.2(a)(2). Tax Law section 1105(b) imposes tax on receipts from "intrastate communication by means of devices employing the principles of telephony and telegraphy." Sales and Use Tax Regulation § 527.2(d)(1). The terms "telephony and telegraphy" include the "use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals." Sales and Use Tax Regulation § 527.2(d)(2). Services that provide a "conduit for the transmission of information" and "the acceptance and delivery of data" are subject to tax as telephony and telegraphy of whatever nature. *Easylink Services Int'l, Inc.*, DTA No. 821440 (Tax Appeals Tribunal, Jul. 27, 2009).

Tax Law section 186-e imposes a telecommunications excise tax on gross receipts from the sale of telecommunications services. For purposes of the excise tax, telecommunications service is defined as "telephony and telegraphy and 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 (such as, but not limited to, dial tone, basic service, directory information, call forwarding, caller-identification, call waiting and the like) and also include any equipment and services provided therewith." Tax Law § 186-e.1(g).

Switches are devices that open and close circuits by reading the incoming data and establishing a transmission path to the destination equipment. *See, e.g.*, Newton's Telecommunications Dictionary (21st ed. 2005) at 808. Switching is part of the transmission process, even though it may occur over a short distance, or virtually no distance. Petitioner's video switching service enables the transmission of video between its customers. This service constitutes the use or operation of equipment for the transmission of sound or other signals, using principles of telephony and telegraphy (*see* Sales and Use Tax Regulation § 527.2(d)), and the "transmission of . . . data . . . through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar media or any combination thereof." Tax Law section

186-e.1(g). Accordingly, this service is “telephony and telegraphy and telephone and telegraph service” for sales tax purposes, and “telecommunications service” for purposes of the telecommunications excise tax.

Sales tax is imposed only on receipts from the sale of intrastate telecommunication services. *See* Tax Law § 1105(b)(1)(B). Whether a transmission is intrastate or interstate is determined based on its origination and termination points; that is, the origination and termination points of the transmission being sold. Intrastate telecommunications are transmissions that both originate and terminate in New York, regardless of where the transmission is routed or passes through. *See Matter of Western Union*, TSB-H-83(57)S. Services that are billed on a per-transmission basis are subject to sales tax as intrastate services if the transmissions originate and terminate in New York. Services that are billed on a flat fee basis (e.g., single monthly charge for unlimited usage), that entail a fee that remains constant for a fixed billing period, regardless of usage, and that enable transmissions that originate and terminate in New York, are subject to New York State and local sales taxes, because these fees represent receipts from the sale of access to and the provision of telecommunications service in New York. *See New York Telephone Company*, TSB-A-88(8)S; *Rochester Telephone Corporation*, TSB-A-88(1)S. If intrastate services are provided in combination with interstate and/or international services for a single charge, the entire charge is subject to sales tax. Moreover, all charges for these services are presumed to be subject to sales tax until the contrary is established. *See* Tax Law § 1132(c). Thus, unless there are reasonable, separately stated charges for the intrastate service and the interstate and/or international services on the invoice given to the customer, the total receipt is subject to the sales tax. *See* Tax Law § 1132(c); Sales and Use Tax Regulations § 527.1(b). If the services offered are exclusively interstate and/or international, the separately stated, reasonable charges for this service would be excluded from sales tax. *See Commonwealth Long Distance, Inc.*, Adv Op Comm T&F, July 29, 1994, TSB-A-94(33)S. This requirement is not satisfied by stating an allocated amount based on an estimate of one or more user’s interstate and/or international usage; rather, it must be based on the actual charges to the customer for interstate and/or international service. Petitioner must maintain records to indicate the origination and termination of such services to document that such services are not subject to sales tax. *See Taxation of Internet Telephony*, June 20, 2007, NYT-G-07(3)S.

As relevant here, the telecommunications excise tax is imposed on the gross receipts from (1) intrastate telecommunication service; (2) interstate and international telecommunication service if the service originates or terminates in New York and is charged to a service address in New York; and (3) private telecommunications services attributable to New York, or any combination thereof. *See* Tax Law § 186-e.2.

When Petitioner sells its switching service on a stand-alone basis, the transmission originates and terminates at the switch. Thus, because the switch is located in New York, the entire charge for the switching service is subject to sales and excise taxes. Petitioner contends that its switching service is similar to a conference bridging service, and should not be subject to either sales or excise taxes when sold on a stand-alone basis. Conference bridging services were determined not to be telecommunication services and are thus not subject to tax unless they are sold in conjunction with a telecommunication service. *See Taxability of Audio Conferencing Services*, NYT-G-06(1)C &(3)S. Conversely, switching services are telecommunication services, because they constitute the transmission of data through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar media or any combination thereof, and the operation of apparatus for the transmission of sound, sound reproduction or coded or other signals. *See* Tax Law section 186-e.1(g); Sales and Use Tax Regulation § 527.2(d)(2). Thus, Petitioner’s switching service is subject to both sales and excise tax when sold on a stand-alone basis.

Petitioner's switching service may also be subject to sales and excise taxes when sold with other transmission services. If Petitioner sells other transmission services to its customers (e.g., TV-1/SDI Line), the origination point would be the service address from which the transmission is initiated and the termination point would be the service address at which the transmission is received. This transmission is intrastate, and subject to both sales and excise taxes, if both the initiating and receiving equipment is located in New York State. Interstate and international transmissions are not subject to State or local sales tax, however they would be subject to the telecommunications excise tax if the transmissions originate or terminate in New York and are charged to a New York service address.

Issue 2

Purchases of telecommunication services that are resold as telecommunication services are exempt from both the sales and excise taxes. See Tax Law §§ 186-e.2(b)(1); 1105(b). If Petitioner purchases switching services or other transmission services (e.g. TV-1/SDI Line) and resells these services to their customers as telecommunication services, Petitioner may purchase these services without payment of the sales or excise taxes. In order to claim an exempt purchase for resale, Petitioner must provide the vendor with properly completed forms ST-121, *New York State and Local Sales and Use Tax Exempt Use Certificate*, and CT-120, *Resale Certificate for Telecommunication Purchases*,¹ within 90 days after the provision of the service. Telecommunication services used by Petitioner in the provision of a service other than telecommunication service (e.g., information services) are not purchased for resale as telecommunication services and may not be purchased exempt from either the sales or excise tax. See *Matter of Phone Programs, Inc.*, DTA No. 815759 (Tax Appeals Tribunal, Apr. 6, 2000).

Petitioner may also purchase the control panels for resale. The customer has the option of renting a control panel so that it can accomplish the switches without Petitioner's assistance. As relevant here, tangible personal property may be purchased for resale if it is resold "as such, or as a physical component part of tangible personal property." Because the customer's purchase of the control panel is optional, it is not integral to Petitioner's performance of its telecommunication service and it retains its character as tangible personal property when rented to a customer. Consequently, Petitioner may purchase the control panels for resale, because they are tangible personal property that is resold to its customers as such. Petitioner must collect sales tax from its customer on its charge for the rental of the control panel.

Issue 3

Petitioner's control panel may qualify for exemption under Tax Law section 1115(a)(38)(B). That exemption applies to machinery, equipment, or other tangible personal property for use or consumption by a broadcaster "directly and predominantly in the transmission of live or recorded programs over-the-air or through a cable television or direct broadcast satellite system by such broadcaster." For purposes of this exemption, "broadcaster" means a television or radio station licensed by the Federal Communications Commission, but does not include a cable systems operator or direct broadcast satellite system operator. Transmission of a program may include transmission from a broadcaster to its affiliated radio or television stations, from "on location" broadcast sites, or from a broadcaster to its listening or viewing audience. Transmission can be accomplished by a variety of means, including but not limited to, satellite, Internet, traditional telecommunication services, or some combination thereof. See *Publication 825, A Guide to Sales Tax in New York State for Broadcasters*. Petitioner's control panels may be used to effect a transmission of a program by a broadcaster. Thus, if

¹ The CT-120 may be used for purchases of telecommunication services on and after January 1, 2009.

Petitioner's customer is a broadcaster as defined for purposes of Tax Law section 1115(a)(38)(B), and otherwise meets the criteria for that exemption (e.g., more than 50% of its use for transmission of programs), it may be able to rent the control panel exempt from sales tax. Petitioner may rent the control panel to a customer without collecting State and local sales tax, provided it accepts from the customer in good faith a properly completed ST-121, *Exempt Use Certificate*, not later than 90 days after delivery of the control panel to the customer. See Tax Law § 1132(c)(1). In order to be properly completed, Form ST-121 must contain all the required information (including the purchaser's Certificate of Authority number), must have the appropriate box checked off indicating a claim for exemption under Tax Law section 1115(a)(38), and must be signed by the purchaser.

DATED: September 22, 2010

/S/

DANIEL SMIRLOCK
Deputy Commissioner and Counsel

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.