

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

TSB-A-89 (45)S
Sales Tax
November 20, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S890808C

On August 8, 1989, a Petition for Advisory Opinion was received from G.T.E Telemessenger Incorporated, G.T.E Place W. Airfield Drive, D/FW Airport, TX 75261-9810.

The issue raised is whether voice messaging services, telephone answering services, and certain long-distance WATS line services provided by Petitioner, G.T.E. Telemessenger Incorporated, are subject to sales tax; and if so, what is the proper rate of tax to collect.

The principal service offered by Petitioner is providing voice massaging services to its subscribers. Upon subscribing to Petitioner's voice massaging service, a subscriber is issued an identification number and a mailbox number (i.e. an electronic "address" within the Petitioner's computer system "VMX"). The voice messaging services offered by Petitioner allow one subscriber attempting to contact another subscriber to store a message for that second subscriber in the Petitioner's system. Subscribers using Petitioner's Voice messaging service are not able to engage in simultaneous two-way communication with other subscribers. To access the Petitioner's system, the subscriber makes a telephone call either over public telephone lines or over a wats line supplied by the Petitioner. The Petitioner's system then requests an identification number and, once given, validates that the caller is a subscriber. The subscriber is then told whether he has any messages and is asked to press a number to receive them. After retrieving his messages, a subscriber is then given the option of replying to the messages, or redirecting the messages, or leaving a new message for another subscriber or for multiple subscribers.

If a subscriber wishes to redirect a message to a third subscriber, a voice message is stored in the third subscriber's mailbox which will alert that subscriber to pick up the redirected message when the subscriber calls in to check his messages. The original redirected message is not duplicated, it stays on the original computer disk on which it was originally stored. A subscriber wishing to leave a message for multiple subscribers (i.e., broadcast the message) stores the message on Petitioner's voice messaging system and then instructs the system as to which subscribers should be given access to the message. As with a redirected message which is left to a single subscriber, a broadcast message is stored only once on the computer disk memory. Upon calling into the system, each subscriber to whom the message was addressed will then be alerted that he has a message waiting and will be asked to retrieve the message.

The VMX does not generate any information or data for the subscriber. The VMX only stores and provides for retrieval of the sender's voice message, per the sender's instructions. The receiver obtains the sender's message by calling in and listening to the message. No tangible record of the message is created or distributed. Once the message has been received by the receiver the message is erased, unless the VMX is instructed otherwise by the receiver.

Petitioner currently bills the subscriber a flat rate each month for the voice messaging service. The rate is constant regardless of the number of messages sent or received. A subscriber may have numerous extensions hooked up to the system. These extensions may be located all over the country or may be located in the same building. All extensions for a subscriber will normally be connected to a single VMX.

The telephone answering service allows a person attempting to contact a subscriber using Petitioner's service to store a message for that subscriber in Petitioner's system. In order to utilize the telephone answering aspect of Petitioner's services, a subscriber must request, from the local public telephone company, call forwarding service to an additional local phone number which ties into Petitioner's messaging system. The subscriber is billed directly by the public telephone company for the call forwarding service. The normal state sales tax is imposed by the public telephone company, upon the basic telephone service and the call forwarding service. If a person attempts to call a subscriber who is away from his telephone and who has forwarded his calls to Petitioner's voice message system, Petitioner's system will play back a recorded message from the subscriber asking the caller to leave a message. Any message left by the caller is stored in the Petitioner's system for later retrieval by the subscriber.

A few subscribers have an integrated service in which calls automatically roll over to Petitioner's message system after a pre-set number of rings. All subscribers must follow the same procedures outlined above to retrieve a reply to a message or to retrieve a redirected or broadcast message. Subscribers using Petitioner's telephone answering service are not able to engage in simultaneous two-way communication with other subscribers.

It is the Petitioner's subscribers, not Petitioner itself, which utilize a telecommunications system to access the service provided by Petitioner. Petitioner is not a regulated provider of telephone services. In addition, Petitioner has no local or long distance facilities. Petitioner is charged by the local public telephone company for basic local exchange service. Since local exchange service is a taxable telecommunications service, the telephone company collects sales tax from Petitioner and remits it to the State. All local calls to Petitioner's system are made by subscribers over public telephone company networks. The subscribers pay the public telephone company for the telecommunication services used to access Petitioner's system. Payment is made by coins or credit card if the telephone call originates from a pay phone, or payment is made when the subscriber pays his monthly phone bill.

Long distance phone calls to Petitioner's system are made by subscribers using either a long distance carrier (e.g., Sprint, MCI, AT&T) or by using a wats line provided by Petitioner. The subscribers which use a long distance carrier for the telecommunication services needed to access Petitioner's system are billed directly by the long distance carrier.

The subscribers which use a wats line provided by Petitioner are billed by the Petitioner for the telecommunication services needed to access Petitioner's system based on usage. Petitioner leases wats lines from a long distance carrier (US Sprint). Each wats line terminates at one of Petitioner's Voice Messaging Computer systems (VMX) located across the country. One of the computer systems is located in New York City. The VMX located in New York City services subscribers

located in several states. Therefore, the wats line terminating at the New York City VMX carries both intrastate and interstate calls.

Petitioner receives an invoice each month from US Sprint for the calls made by Petitioner's subscribers on the New York VMX wats line. US Sprint's invoice includes all applicable state & local sales taxes for the intrastate portion of the bill. Petitioner pays US Sprint for the wats line usage including any state and local taxes for the intrastate calls made.

Petitioner then passes on to its subscribers the same unit rate, charged to Petitioner by US Sprint, with a mark-up to cover Petitioner's administrative costs incurred in billing its subscribers for the wats line usage.

Section 1105(b) of the Tax Law imposes a sales tax upon: "The receipts from every sale, other than sales for resale. . .of telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service."

The Sales and Use Tax Regulations define the term "telephony and telegraphy" to include "use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals." 20 NYCRR 527.(2)(d)(2). The term does not apply to a service which is essentially something other than telephony and telegraphy, although telephony and telegraphy may figure as an incidental element of the service. 20 NYCRR 527.(2)(d)(4). The tax on the sale of telephony and telegraphy is thus not applicable to the receipts of cable television companies, because, while as an incident to the service provided there may be telegraphic or telephonic transmission of a signal, the essential object of the service is to provide "entertainment or enjoyment." New York State Cable Television Association v. State Tax Commission, 88 Misc 2d 601, aff'd 59 AD2d 81. (It is to be noted that in the discussion of cable television in 20 NYCRR 527.2(2)(d)(3), the reference to the exempt distribution of cable television programs is a reference to distribution to the ultimate consumer.

As suggested by the regulation provision cited above, the essence of telephony and telegraphy is the transmission of "intelligence to a distant point by means of electricity." 74 AM Jur 2d, Telecommunications §1. Also critical to the concept is the role of the purveyor of telephony and telegraphy as "a mere conduit, transmitting to third-party recipients messages given it by various originators." Quotron Systems v. Gallman, 39 NY2d 428; Technical Services Bureau Memorandum, TSB-M-80(18)S. Further, it makes no difference to the question whether the sender or receiver of the transmission purchases the service. New York Quotation Co. v Bragalini, 7 AD2d.

Section 527.2(a)(2) of the sales tax regulation state:

"Although this tax is generally known as the "consumer's utility tax," the intention of the statute is to tax the enumerated sales and services whether or not rendered by a company subject to regulation as a utility company. The words "of whatever nature" indicate that a broad construction is to be given the terms describing the items taxed. The inclusion of the word "service" indicates an intent to tax, under this provision, items that are furnished as a continuous supply while the vendor-vendee relationship exists." (Emphasis supplied)

Section 527.2(d)(2) provides, in part, as follows:

"The term 'telephony and telegraphy' includes use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals.

Example 3: Message switching services, transmitted to a computer are over lines leased from a communication carrier are telegraph services subject to the tax imposed under section 1105(b) of the Tax Law.

Petitioner is providing, inter alia, a network upon which its customers can communicate by computer or electronically with one another by entering and retrieving messages. Petitioner does not provide any additional information to its customers nor does it manipulate or otherwise process its customers information into another form; rather, Petitioner stores its customer's information so that its customer or someone designated by the customer may later retrieve the same information.

Sales tax could not be imposed upon "Cable TV" subscriptions merely because the charge for such contained an element of telephony or telegraphy. Here, the opposite is true. The essential element of petitioner's service is for its customers to electronically communicate with each other. "Transmission of intelligence to a distant point by means of electricity." Unlike a conventional telephone answering service where a person actually writes down messages for the person purchasing the service, every element of petitioner's service is performed by electronic means. Therefore, Petitioner is providing a "telephone or telegraph service the receipts from which are subject to the tax imposed under section 1105(b) of the Tax Law. Re Tigon Corporation Advisory Op Comn of T & F, July 28, 1989, TSB-A-89(25)5. Since Petitioner is selling a telephone service, it may purchase for resale, service such as local exchange services and WATS line services. The proper rate of tax to collect, is the rate in effect in the locality in which Petitioner's customer's exchange is located. Those messages that are interstate or international are exempt from sales tax.

DATED: November 20, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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