

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

TSB-A-97(84)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970806A

On August 6, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from America One Communications, 2980 Fairview Park Drive, Suite 1400, Falls Church, VA 22042-4525.

The issues raised by Petitioner, America One Communications, are:

1. Whether Petitioner must pay sales or use tax on the purchase of cellular telephones which will ultimately be transferred as part of a cellular telephone service package.

2. Whether Petitioner will be entitled to utilize the resale exclusion from sales and use tax on the purchase of cellular telephones which it will offer for "free" or at a reduced rate as part of a cellular telephone service package.

3. What is the correct sales tax base for the cellular telephones sold by Petitioner to its customers at a reduced price or at no charge in conjunction with a contract providing for the cellular telephone service.

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

Petitioner is a corporation that resells cellular services. Petitioner engages in direct mail marketing throughout the State of New York. The direct mailing material provides that, in order to request the cellular services, potential customers should phone into a call center or complete and return the application enclosed in the original mailing. The call center and the return address are both located outside the State of New York.

If the potential customer passes the initial credit screening process, then Petitioner offers the customer a wide variety of service plans and options from which to choose. All of the service plans require that the customer contract for at least one full year of service. Some of the options include the purchase of a cellular phone and the choice of services such as call waiting, call forwarding and voice mail. Certain service plans may also include "free" minutes and/or a "free" phone. The service plans that include "free" cellular telephones are priced to recoup the cost of the cellular telephones within the life of the contract. Customers who prematurely terminate their contracts incur a contract breakage fee to offset the cost of the phone. Other plans require that the customers pay a fee for the cellular telephones. The fee charged for the cellular telephone is usually a discounted amount based on the package selected, but in some cases the customer will be charged the actual cost paid by Petitioner. The cellular telephones are shipped to customers directly from the seller's warehouses. All sellers used to supply the cellular telephones fulfill orders from warehouses that are located outside the State of New York.

Petitioner sells some of its customers a bundled package that includes the cellular telephone and a contract for cellular telephone service. The cost of the cellular telephone and the service fees are both considered by Petitioner when it determines its pricing strategy. Petitioner prices the package to yield a gross profit, even when the cellular telephone is provided "free" or at a reduced price.

Applicable Law and Regulations

Section 1101 of the Tax Law states, in part:

Definitions.-- ... (b) When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property. ...

Section 526.6 of the New York State Sales and Use Tax Regulations states, in part:

Retail sale. (Tax Law, §1101(b) (4)) (a) The term retail sale or sale at retail means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

* * *

(c) Resale exclusion. (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

* * *

(4)(i) Tangible personal property which is purchased and given away without charge, for promotion or advertising purposes is not purchased for resale. It is a retail sale to the purchaser thereof, and is not a sale to the recipient of the property.

(ii) Tangible personal property which is purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost, or which is not ordinarily sold by that person in the operation of his business, is a retail sale to the purchaser thereof, and not a sale to the recipient of the property.

(iii) A resale certificate may not be used by the person making the purchases described in subparagraphs (i) and (ii) of this paragraph for such purchases.

Example 2: A bank has purchased premiums which will be given to depositors upon the opening of an account in a new branch. As the bank is not in the business of selling such items, and as it in fact does not sell such items to its customers, the sale to the bank of such items of tangible personal property is a retail sale which is taxable at the time of purchase. The bank has not purchased these items for resale.

Example 3: A vendor purchases catalogs and distributes them to his potential customers for a minimal charge, which does not reflect the cost to him. He is the retail purchaser of the catalog, and is required to pay the tax thereon. He cannot charge his customer tax on the charge for the catalog.

Opinion

In this case, Petitioner does not give away cellular telephones for promotional or advertising purposes. Petitioner regularly sells cellular telephones in the operation of its business. The cost of the cellular telephone and the service fees are both considered by Petitioner when it determines its pricing strategy. Petitioner prices the service package to recoup the cost of the phone, even when the cellular telephone is provided "free" or at a reduced price. Therefore, Petitioner's purchases of cellular telephones for sale to customers at a reduced price or for inclusion at no charge to the customer in conjunction with the customer's purchase of a contract for cellular telephone services are not considered to be purchases of property for promotional or advertising purposes and are not considered to be sold for a minimal charge which does not reflect the property's true cost. Anthony J. Ragusa, Jr. d/b/a The Stereo Advantage, Adv Op Comm T&F, January 7, 1993, TSB-A-93(6)(S); KPMG Peat Marwick, Adv Op Comm T&F, May 3, 1994, TSB-A-94(23)S; KPMG Peat Marwick, Adv Op Comm T&F, December 20, 1994, TSB-A-94(51)S.

Accordingly, Petitioner's purchases of cellular telephones are considered to be purchases for resale regardless of whether the telephones are sold separately or sold in conjunction with the sale of a cellular telephone service, and such purchases are not subject to sales or compensating use tax. Anthony J. Ragusa, Jr. d/b/a The Stereo Advantage, *supra*; KPMG Peat Marwick, *supra*; Section 526.6(c)(1) of the Sales and Use Tax Regulations. Where Petitioner purchases telephones from a supplier required to be registered for New York State sales tax purposes Petitioner must give to its supplier a properly completed New York State Resale Certificate (Form ST-120) within 90 days from the date of purchase.

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Petitioner must collect tax imposed under Section 1105(b) of the Tax Law on the total receipts from the sale of the cellular telephone service to a customer, including any early termination fees or other charges billed to the customer when such service is to be provided within New York State, excluding interstate or international services. Early termination fees and other service related charges are considered to be an adjunct or component of the charges for cellular telephone service.

DATED: December 29, 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.