

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

TSB-A-98(12)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S971022A

On October 22, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Deloitte & Touche LLP, 2 World Financial Center, 8th Floor, New York, New York 10281-1426.

The issue raised by Petitioner, Deloitte & Touche LLP, is whether the purchase of telephone network access to fiber optic lines by a local exchange carrier is subject to New York State and local sales taxes or if such a purchase is considered for resale.

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

Petitioner's client is a competitive local exchange telephone carrier that has not previously conducted any business operations in New York State. The client will begin offering local telephone service in a New York municipality. The client has entered into a fiber optic use agreement (the Agreement) with an in-state network owner for use of a fiber optic network in the municipality, through which the client's local telephone service will be provided. The network owner received a special franchise from the municipality to lay the fiber optic lines. The network owner has been primarily a construction company, not an incumbent local exchange or interexchange carrier, and has not provided telecommunications services or equipment to its customers.

The client will use the network owner's fiber optic network as a component of its competitive local exchange telephone network in the New York marketplace. The fiber optic lines of the network owner will be used in conjunction with the client's own network, as well as with the network of the incumbent local exchange carrier. The combined network will be used by the client to provide local exchange and other telecommunications services to end-users in New York. The client will be responsible for collecting and remitting all applicable sales taxes associated with charges assessed to the network's end-users.

Under the Agreement, the client will pay an initial lump sum plus monthly network access fees to the network owner for the exclusive use of a portion of its fiber optic network in New York for a period of 11 years. The Agreement prohibits the network owner from leasing the use of this portion of the network to anyone else during its term. The network owner will provide the necessary construction and installation services required to connect its fiber optic network with the client's origination and termination equipment. The charges for these construction and installation services will be separately stated from the network access fees and are not at issue in this Opinion.

The network owner will also maintain and repair the lines to ensure that the lines operate properly. The network owner must perform all routine and scheduled maintenance on the fiber optic network. In addition, it will be

required to operate and maintain one or more "operation centers." An operation center is a centralized monitoring station to ensure the network is operational. The network owner's personnel will staff the operational centers 24 hours a day, seven days a week.

Applicable Law and Regulations

Section 1101(b) of the Tax Law provides, in part:

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:

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume ..., conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105(b) of the Tax Law imposes sales tax, in part, 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

Section 527.2(a)(2) of the Sales and Use Tax Regulations as it pertains to the tax imposed under Section 1105(b) of the Tax Law provides, in part:

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

Section 527.2(d) of the regulations provides, in part:

Telephony and telegraphy; telephone and telegraph service.

(1) The provisions of section 1105(b) of the Tax Law with respect to telephony and telegraphy and telephone and telegraph service impose a tax on receipts from intrastate communication by means of devices employing the principles of telephony and telegraphy.

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

* * *

(5) The tax on utility services applies to every charge for any telephone and telegraph service. Among these charges are monthly message rate and intrastate toll charges and charges for special services, such as installation, change of location, conference connections, tie-lines, WATS lines and the furnishing of equipment.

Section 527.2(e) of the regulations provides:

Sales for resale. Purchases of utility services by a utility for resale as such may be made without payment of the sales tax. The purchaser must furnish the supplier of the utility to be resold with a resale certificate (Form ST-120). When the utility services are resold by the purchaser he must collect the sales tax on the receipts from his sales as imposed under section 1105(b) of the Tax Law. A purchase of a utility service which is not resold is subject to tax as a purchase at retail.

Opinion

The initial lump sum payment plus the monthly network access fees that Petitioner's client will pay to the network owner for access to a portion of its fiber optic network will not be subject to New York State and local sales taxes. The purchase of access to the fiber optic network will be considered a purchase of a telephone service for resale as such by Petitioner's client in conducting its local exchange and other telecommunication services. This fiber optic network will form an integral component of the client's overall telecommunication facilities and Petitioner's purchase of such access is not unlike the purchase of "leased lines" shared among telephone companies. (See, Commonwealth Long Distance, Inc., Adv Op Comm T&F, July 29, 1994, TSB-A-94(33)S.) For sales tax purposes, it is of no consequence whether Petitioner's client or the in-state fiber optic network owner is subject to regulation by the Public Service Commission as a "telephone corporation," as defined in Section 2(17) of the Public Service Law, or is otherwise subject to regulation as a utility. (See, 20 NYCRR 527.2(a)(2).)

It is noted that when Petitioner's client purchases access to the fiber optic network, the client should provide the network owner with a properly completed Resale Certificate (Form ST-120) within 90 days after the rendition of the service. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations.

DATED: February 27, 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.