

Amendments Affecting the Application of the Sales and Use Tax and Excise Tax Imposed on Mobile Telecommunications Service

On May 29, 2002, Governor George E. Pataki signed Chapter 85 of the Laws of 2002. This legislation included amendments to the Tax Law which conform the applicable provisions of the sales and use tax (sales tax) and excise tax on mobile telecommunications services such as cellular calling plans, to the Federal Mobile Telecommunications Sourcing Act (Public Law 106-252), hereinafter referred to as the Federal Sourcing Act. The amendments to the Tax Law described in this memorandum are effective beginning August 2, 2002.

Among other things, the Federal Sourcing Act enacted uniform standards for determining which taxing jurisdictions could impose transaction taxes, such as sales and excise taxes, on mobile telecommunications service (siting). Chapter 85 conforms the sales tax and excise tax law to the Federal Sourcing Act through several amendments to Article 28 and Article 9, section 186-e, of the Tax Law.

Definitions common to the sales and excise taxes

Chapter 85 amended the Tax Law to incorporate the following definitions from the Federal Sourcing Act for purposes of both the sales tax and the excise tax:

Mobile telecommunications customer generally means the person or entity that contracts with a *home service provider* for *mobile telecommunications services*. However, in determining the *place of primary use*, if the end user of the *mobile telecommunications services* is not the contracting party, the end user of the *mobile telecommunications services* is the mobile telecommunications customer.

Mobile telecommunications customer **does not include** either:

- a *reseller* of mobile telecommunications service; or
- a *serving carrier* under an arrangement to serve a *mobile telecommunications customer* outside the *home service provider's licensed service area*.

Mobile telecommunications service means a *commercial mobile radio service* and **does not include**:

- prepaid telephone calling service; or
- air-ground radio telephone service, defined as a radio service in which common carriers are authorized to offer and provide radio telecommunications service for hire to subscribers in aircraft.

Commercial mobile radio service means a *mobile service* or the functional equivalent of a *mobile service* that is:

- provided for profit (i.e., with the intent of receiving compensation or monetary gain);
- an interconnected service; and
- available to the public or a substantial portion thereof.

Mobile service means a radio communications service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes:

- both one-way and two-way radio communications services;
- a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation; and
- any service for which a license is required in a personal communications service under Part 24 of Title 47 of the Code of Federal Regulations in effect on June 1, 1999.

Place of primary use means the street address within a *taxing jurisdiction* where a *mobile telecommunications customer's* use of the *mobile telecommunications service* primarily occurs, and must be:

- the residential street address or the primary business street address of the *mobile telecommunications customer*;
- within the *licensed service area* of the *home service provider*, and
- includes the address from which a not-for-profit entity, or a governmental or quasi-governmental entity such as a public benefit corporation, conducts operations.

Home service provider means a facilities-based carrier or *reseller* as defined below, with which the *mobile telecommunications customer* contracts for the provision of *mobile telecommunications service*.

Licensed service area means the geographic area in which a *home service provider* is authorized by law or contract to provide *mobile telecommunications service* to a *mobile telecommunications customer*.

Reseller means a provider who purchases a telecommunications service from another telecommunications service provider and then resells, uses as a component part of, or integrates the purchased services into a *mobile telecommunications service*. *Reseller* **does not include** a *-serving carrier* with which a *home service provider* arranges for the services to its *mobile telecommunications customers* outside the *home service provider's licensed service area*.

Serving carrier means a facilities-based carrier providing *mobile telecommunications service* to a *mobile telecommunications customer* outside the *home service provider's* or *reseller's licensed service area*.

Taxing jurisdiction means any of the several states, the District of Columbia, or any territory or possession of the United States, any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other political subdivision within the territorial limits of the United States with the authority to impose a tax, charge, or fee.

In addition, for sales tax purposes only, the definition of *purchaser* was amended to include a *mobile telecommunications customer*.

(Tax Law Sections 1101(b)(2), (24), (25), (26), and (27))

Sales Tax Provisions (Articles 28 and 29)

Sales tax on mobile telecommunications services sold for a flat rate

Section 1105(b)(1)(B) of the Tax Law imposes sales tax on the receipts from every sale of telephony and telegraphy and telephone and telegraph service of whatever nature, except interstate and international telephony and telegraphy and telephone and telegraph service. Prior to the enactment of Chapter 85, the charges for mobile telecommunications services sold for a flat rate (not separately stated), were subject to sales tax under section 1105(b)(1)(B) of the Tax Law.

Chapter 85 amended the sales tax law to provide a separate imposition of sales tax under new section 1105(b)(2) of the Tax Law on receipts from every sale of mobile telecommunications service provided by a home service provider, other than sales for resale, that are voice services or that are any other services taxable under section 1105(b)(1)(B) of the Tax Law, sold for a flat rate (for example, a typical cellular calling plan), whether or not sold with other services. Thus, for example, the total charge for a given number of minutes of air time that may be used for voice transmission is subject to sales tax under new section 1105(b)(2). However, separately stated charges (so long as reasonable) for calling minutes that are not covered under a flat-rate plan continue to be subject to sales tax under section 1105(b)(1)(B) of the Tax Law.

Example 1: Mr. Smith buys a cellular calling plan from a home service provider which includes up to 2500 minutes of use for a flat-rate charge of \$49.95 per month. The contract provides that additional charges will apply for calling minutes that exceed the minutes allowed under the plan. In November 2002, Mr. Smith does not exceed the calling minutes allowed under the plan, and is charged \$49.95 for the month. Such charge is subject to sales tax under section 1105(b)(2) of the Tax Law, regardless of whether the calls made under the plan were intrastate, interstate, or international calls.

Example 2: The facts are the same as in *Example 1*, except that Mr. Smith exceeds the calling minutes allowed under the plan. The \$49.95 flat-rate charge is subject to tax under section 1105(b)(2) of the Tax Law, and the separate charges for intrastate calls included in

the excess minutes are subject to sales tax under section 1105(b)(1)(B) of the Tax Law. The separate charges for interstate or international calls included in the excess minutes are not subject to sales tax.

New sales tax sourcing rules

Prior to the enactment of Chapter 85, home service providers of mobile telecommunications service used several different methods of sourcing their receipts subject to sales tax to taxing jurisdictions. These methods included sourcing the receipts to the telephone exchange of the customer, to the location of the nearest cell tower, or to the billing address of the customer.

Chapter 85 added section 1111(l)(3)(b) to the sales tax law to adopt the Federal Sourcing Act's rule with respect to siting sales of mobile telecommunications services by sourcing the receipts for these services to the customer's "primary place of use." New section 1111(l)(3)(b) provides that all receipts from any charges for mobile telecommunications services billed by a home service provider are sourced to the taxing jurisdiction where the mobile telecommunications customer's place of primary use is located, regardless of where the mobile telecommunications service originates, terminates or passes through. Accordingly, the mobile telecommunications customer's place of primary use is considered the point of delivery of the mobile telecommunications service, and controls both the tax incidence and the tax rate, for purposes of state and local sales taxes¹. This rule applies regardless of the Tax Law section under which the mobile telecommunications service is taxable.

Other new elements of the sales tax sourcing rules enacted by Chapter 85 are as follows:

- sales tax is imposed on charges for intrastate mobile telecommunications service, regardless of the state within which the call is made, if the mobile telecommunications customer's place of primary use is in New York State; and
- receipts from the sale of mobile telecommunications service by a home service provider are exempt from sales tax if the mobile telecommunications customer's place of primary use is within a *taxing jurisdiction* located outside of New York State.

Example 3: The facts are the same as in *Example 2*. Mr. Smith's place of primary use is in Rochester, NY. The \$49.95 flat-rate charge and the separate charges for intrastate calls are sourced to Mr. Smith's place of primary use in Rochester. As in *Example 2*, the separate charges for interstate calls are not subject to sales tax.

¹The state sales tax includes the sales tax imposed within the Metropolitan Commuter Transportation District (MCTD) (i.e., the city of New York and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester). Local sales taxes include the sales taxes imposed by counties, cities, and school districts.

Example 4: A mobile telecommunications customer's place of primary use is in Albany, NY. While on vacation in Cape May, NJ, the customer places a cellular call from Cape May to Wildwood, NJ. Since the customer's place of primary use is in Albany, NY, a separate charge for this intrastate mobile telecommunications service is subject to applicable state and local sales taxes in New York.

Example 5: The facts are the same as in *Example 4*, except that the call is made from Cape May, NJ to Dover, DE. Even though the customer's place of primary use is in Albany, NY, a separate charge for this interstate mobile telecommunications service is not subject to sales taxes in New York.

Example 6: Mr. and Mrs. Jones are residents of Pittsfield, MA. Their place of primary use is in Pittsfield, MA (the residential street address within the licensed service area of their home service provider). While vacationing in Lake George, NY, they make cellular telephone calls, both within and without New York State. Since the Jones' place of primary use is in Pittsfield, MA, the separate charges for cellular telephone calls they make while in Lake George, NY, are not subject to New York State or local sales taxes, even if they are intrastate calls.

(Tax Law sections 1105(b)(3), 1111(l)(3)(b), and 1115(cc))

Sales tax rules for computing receipts from charges for mobile telecommunications service

Chapter 85 specifies that receipts from the sale of mobile telecommunications services provided by a home service provider, which are taxable under new section 1105(b)(2), include charges for:

- (a) commercial mobile radio service, and property and services ancillary thereto, including, but not limited to:
 - dial tone;
 - voice service;
 - directory information;
 - call forwarding;
 - caller-identification; and
 - call-waiting; and

- (b) any other service and property provided by the home service provider to its mobile telecommunications customers that is aggregated with and not separately stated on the customer's bill from the charges for the services and property included in (a), above, including:
 - Internet access service (see TSB-M-97(1.1)S);

- a mobile telecommunications service that the mobile telecommunications customer originates in a foreign country to the extent included in a fixed periodic charge for mobile telecommunications services;
- any interstate or international telephony or telegraphy, or telephone or telegraph service of whatever nature that is not voice service; and
- any property or service that is not telephony or telegraphy, or telephone or telegraph service.

However, if a home service provider uses an objective, reasonable, and verifiable standard to identify each of the components described in **(a)** and **(b)**, above, then the home service provider may separately account for and quantify (break-out) the portion of the total charge attributable to each of the components.

If a home service provider separately sells the various components, then the portion of the charge attributable to each component is based on the price of the property or service as separately sold. If a home service provider does not separately sell the various components, then the portion of the charge attributable to each component is based on the prevailing retail price of comparable property or services sold separately by other home service providers. In any case, the portion of the total charge attributable to each component must be reasonable and proportionate to the total charge to the mobile telecommunications customer.

Once properly broken-out, the charges attributable to the separate components described in **(b)** are not receipts from charges for mobile telecommunications service. However, the receipts from the charges for the separate components may be subject to sales tax based on the individual nature of the property or service, as in the case of an information service subject to tax under section 1105(c)(1) of the Tax Law.

Example 7: Mrs. Johnson's place of primary use is an address in Buffalo, NY. She receives both cellular telephone service and Internet access service from her home service provider. The home service provider separately states the charge on Mrs. Johnson's bill for the cellular service and for the Internet access service. The charge for the cellular service is subject to sales tax, while the charge for Internet access service (so long as reasonable) is not, because it is separately stated.

Example 8: The facts are the same as in *Example 7*, but the charges for the cellular service and the Internet access service are not separately stated. In this instance, the total charge is considered a receipt from the charge for mobile telecommunications service and is subject to sales tax, under section 1105(b)(2).

Example 9: The facts are the same as in *Example 8*, except the home service provider properly identifies, accounts for, and quantifies the receipts from each of the components of the total charge attributable to the cellular service and the Internet access service based on objective, reasonable and verifiable standards. In this instance, the home service provider is only required to collect and pay over sales tax that is attributable to the receipts associated

with the cellular service. The portion of the receipt attributable to the Internet access service is excluded from taxation.

Excise tax on mobile telecommunications service (Article 9)

New excise tax sourcing rules

Prior to the enactment of Chapter 85, home service providers of mobile telecommunications service sourced their gross receipts subject to excise tax imposed under section 186-e of the Tax Law to the service address in New York State, which was defined as the location of the subscriber's primary use of the telecommunications equipment as determined by telephone number, authorization code, or location in New York State where bills were sent. If the mobile telephone switching office or similar facility was outside the subscriber's assigned service area, the location of the mobile telephone switching office or similar facility in New York State that received and transmitted the signals of the telecommunication (such as the cell antenna location which transmits the call) was deemed to be the service address.

The excise tax imposed under section 186-e of the Tax Law has been amended to conform to the sourcing rule provisions of the Federal Sourcing Act with respect to gross receipts from the sale of mobile telecommunications service. The section 186-e amendments provide that the excise tax is imposed on gross receipts from charges for mobile telecommunications service where the customer's place of primary use is within New York State, regardless of where the mobile telecommunications service originates, terminates or passes through.

Example 10: A mobile telecommunications customer who is on vacation in Cape May, NJ places a cell phone call from Cape May to Wildwood, NJ. The mobile telecommunications customer's place of primary use is an address in Albany, NY. Since the customer's place of primary use is in New York State, the charge for this intrastate mobile telecommunications service is subject to the excise tax.

Example 11: A woman using her cellular telephone calls Pittsburgh, PA, from Buffalo, NY. Her place of primary use of her cellular service is an address in Albany, NY. Since her place of primary use is in New York State, the charge for this mobile telecommunications service is subject to the excise tax.

Example 12: A woman using her cellular telephone calls Pittsburgh, PA, from Sacramento, CA. Her place of primary use of her cellular service is an address in Albany, NY. Since her place of primary use is in New York State, the charge for this mobile telecommunications service is subject to the excise tax.

Example 13: A woman using her cellular telephone places a call from Watertown, NY to Jamestown, NY. Her place of primary use of her cellular service is an address in Buffalo, NY. This mobile telecommunications service is routed through New Jersey and Pennsylvania. Although the transmission is routed out of state, her place of primary use is in New York State and 100% of the charge is subject to the excise tax.

Example 14: Mr. and Mrs. Jones are residents of Pittsfield, MA. Their place of primary use is in Pittsfield, MA (the residential street address within the licensed service area of their home service provider). While vacationing in Lake George, NY, they make cellular telephone calls, both within and without New York State. Since the Jones' place of primary use is in Pittsfield, MA, the charges for cellular telephone calls they make while in Lake George, NY, are not subject to the excise tax.

Gross receipts subject to excise tax

Prior to the enactment of Chapter 85, the charges for **all** mobile telecommunications services, including cellular calling plans sold for a flat rate, were included in gross receipts and subject to the excise tax under section 186-e.

Chapter 85 amended the excise tax law to provide a separate imposition of excise tax under new section 186-e(2)(a)(4) of the Tax Law on gross receipts from mobile telecommunications services provided by a home service provider. Thus, the total charge is subject to the excise tax under new section 186-e(2)(a)(4). This is so, even if the charge is for a calling plan that includes other services or property.

Gross receipts include all charges for mobile telecommunications services made by a home service provider. Any charge billed by or for a home service provider is deemed provided by that home service provider. The existing excise tax provisions continue to apply for sales of telecommunications service other than sales of mobile telecommunications service (see TSB-M-95(3)C).

Chapter 85 specifies that gross receipts from the sale of mobile telecommunications service provided by a home service provider, which are taxable under new section 186-e(2)(a)(4), include charges for:

(a) commercial mobile radio service, and property and services ancillary thereto, including:

- dial tone;
- voice service;
- directory information;
- call forwarding;
- caller-identification; and
- call-waiting; and

(b) any other service and property provided by the home service provider to its mobile telecommunications customers that is aggregated with and not separately stated on the customer's bill from the charges for the services and property included in (a), above, including:

- internet access service (see TSB-M-97(1.1)C); and
- any property or service that is not telecommunication service.

Prior to these amendments, the excise tax provisions provided that if the total charge made by a home service provider included charges for taxable and other components (the other components not being separately stated on the customer's bill), the total charge was subject to the tax imposed under section 186-e. Chapter 85 provides an exception to this rule. If a home service provider uses an objective, reasonable, and verifiable standard to identify each of the components described in **(a)** and **(b)**, above, then the home service provider may separately account for and quantify (break-out) the portion of the total charge attributable to each of the components.

If a home service provider separately sells the various components, then the portion of the charge attributable to each component is based on the price of the property or service as separately sold. If a home service provider does not separately sell the various components, then the portion of the charge attributable to each component is based on the prevailing retail price of comparable property or services sold separately by other home service providers. In any case, the portion of the total charge attributable to each component must be reasonable and proportionate to the total charge to the mobile telecommunications customer.

Once properly broken-out, the charges attributable to the separate components described in **(b)** are not taxable gross receipts from charges for mobile telecommunications service.

Example 15: A woman, while in New York City, uses her cellular telephone to call Albany, NY and uses it also for Internet access service. Her place of primary use of her cellular service is an address in Buffalo, NY. Her home service provider separately states the charge on her bill for the call and for the Internet access service. The charge for the call is subject to the excise tax. Since the charge for Internet access service (so long as reasonable) is separately stated, it is not subject to the excise tax.

Example 16: The facts are the same as in *Example 15*, however, the charges for the call and Internet access service are not separately stated. In this instance, the total charge is considered a gross receipt from the charge for mobile telecommunications service and is subject to the excise tax.

Example 17: The facts are the same as in *Example 16*, except the home service provider properly identifies, accounts for, and quantifies the gross receipts from each of the components of the total charge attributable to the call and the Internet access service based on objective, reasonable and verifiable standards. In this instance, the home service provider is subject to the excise tax on the gross receipts that are attributable to the gross receipts associated with the call. The gross receipts attributable to the Internet access service are excluded from the excise tax.

Metropolitan Transportation Business Tax Surcharge (MTA surcharge)

In addition, the MTA surcharge imposed under section 186-c of the Tax Law has been amended to conform with these excise tax rules. The MTA surcharge is imposed on the gross receipts of a home service provider from charges for mobile telecommunications services, where the customer's place of primary use is within the Metropolitan Commuter Transportation District (MCTD). The MCTD includes the counties of New York, Bronx, Queens, Kings, Richmond, Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester.

Example 18: A mobile telecommunications customer who is on vacation in Cape May, NJ places a cell phone call from Cape May to Wildwood, NJ. The mobile telecommunications customer's place of primary use is an address in Queens, NY. Since the customer's place of primary use is in the MCTD, the charge for this mobile telecommunications service is subject to the excise tax and the MTA surcharge.

(Tax Law sections 186-e and 186-c)

Administrative and procedural provisions for sales tax and excise tax

Certain administrative and procedural provisions of the Federal Sourcing Act have been incorporated into the Tax Law. In general these provide safe harbors to home service providers when they assign a mobile telecommunications customer to a place of primary use and then determine within what taxing jurisdictions that place resides. Under the Federal Sourcing Act if a state develops an electronic database of addresses for home service providers to use, that meets certain standards, home service providers who use such a database are held harmless from any error or omission resulting from use of such database. In the absence of such a database, these provisions provide that a home service provider is held harmless from any tax, charge, or fee liability that otherwise would be due solely as a result of an assignment of a street address to an incorrect taxing jurisdiction, if the home service provider uses an enhanced (Zip+ 4) Zip code to assign each street address to a specific taxing jurisdiction and uses due diligence to ensure that each street address is assigned to the correct taxing jurisdiction. The home service provider is also authorized to use the address provided by a mobile telecommunications customer in a service contract in effect on July 28, 2002, as the customer's place of primary use until the expiration of such a contract.