

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. Z130603A

The Department of Taxation and Finance received a Petition for Advisory Opinion from Petitioner [REDACTED] (“Petitioner”). Petitioner asks whether any taxes apply to the purchase of minutes of airtime, texts, and megabytes of Internet access that may be purchased through its kiosks (hereafter “additional telecommunication rights”). We conclude that, as detailed below, Petitioner must collect the sales tax due on the sales of the additional telecommunication rights made on or after April 13, 2015, but not before that date, and Petitioner is not liable for the § 186-e excise tax due.

Facts

Petitioner operates kiosks in many retail locations in the State, at which customers may enter into contracts for various prepaid telecommunication plans or purchase additional telecommunication rights on their existing plans. Many of the plans include texting and Internet access services. In most cases, the customer already has a prepaid account with a carrier or with a distributor who has purchased the telecommunication capacity from the carrier and is responsible for performance of the telecommunication service (collectively referred to as the “carrier”). However, customers can enter into a contract with the carrier through Petitioner’s kiosks. Petitioner’s terms and conditions for the use of its kiosks include the following:

- This payment kiosk is provided as a convenience by [Petitioner] to the customers of various entities that provide prepaid calling products and services using those entities’ own or resold telecommunication networks. These entities are referred to here as “Companies” or “Company.” . . .
- The Company from which you are purchasing of [sic] prepaid products through this payment kiosk is solely responsible for the products and services you purchase. [Petitioner] shall not be responsible for any defects or other problems with the products or services purchased using this payment kiosk.

Customers can purchase additional telecommunication rights in regard to three main types of prepaid plans at Petitioner’s kiosks, as detailed below.

Prepaid Long-Distance Landline Calling Plans

At Petitioner's kiosks, customers can buy additional rights for the above plans, which permit a customer to make long-distance landline calls by calling an access number, followed by the number that the customer wants to call. To add minutes to such plans, the customer must have an account with a long-distance carrier, which the customer can enter into at Petitioner's kiosk. After the customer pays cash at one of its kiosks, Petitioner is able to communicate with the carrier's computer to have the additional service time added to the account. Generally, the carrier's system will be able to automatically recognize the customer's telephone number (landline or cell) used to open the account and will decrement the available balance for the cost of all calls made and any other charges incurred. Once the balance of the account has been exhausted, no further use of the services is allowed. Most of the prepaid long-distance landline calling rights obtainable through Petitioner's kiosks are for international long distance landline calls only. All the prepaid long-distance landline calling rights are for voice services only, i.e., they do not provide the customer with Internet access.

Domestic Prepaid Wireless Plan Rights

Customers use Petitioner's kiosks to buy prepaid wireless calling plan rights, i.e., buy additional calling minutes, text-sending rights, or data megabytes, for a wireless account with a United States carrier. In the mobile phone industry, "prepaid" refers to a type of mobile phone account that requires the customer to purchase service credit before the service can be used. In general, there are two types of prepaid arrangements. "Unlimited plans" are those prepaid plans through which the customer buys the right to an unlimited amount of specified telecommunication services, such as calling, texting, and Internet access, for a specified time, e.g., daily, weekly, or monthly. "Pay-as-you-go" plans require the customer to buy specified amounts of the above-mentioned telecommunication services to be used over a specified length of time. A variant pay-as-you-go plan type does not require the customer to buy any certain quantity of telecommunication services; rather, the carrier merely specifies the cost per minute of calling, per text, or per megabyte of data. These variant pay-as-you-go plans require customers to use the purchased telecommunication rights within a specified period of time.

There are two ways to top-up a prepaid cellphone account at Petitioner's kiosks. The customer can pay for the amount of the top-up at the kiosk, choose the correct service provider plan, and then enter the phone number the customer wishes to replenish. Petitioner's kiosk is able to communicate with the carrier for the customer's plan and request it to add minutes. Alternatively, a customer can top up by purchasing a card at the kiosk in a specified denomination (e.g., \$50) for a specified amount of calling, texting and Internet access rights and then calling the toll-free number on the card and entering the PIN on the card when prompted to have the additional telecommunication services embodied in the card added to the customer's pre-existing account with the carrier. A customer can also use a cellphone's Unstructured Supplementary Service Data (USSD) protocol command to send the PIN number to the cell phone operator, which then is able to add the additional dollar amount purchased by the customer to the customer's account.

Most of the accounts that customers can top up using Petitioner's kiosks include Internet access, but a few include only voice and texting services. These plans do not require the customer to dial an access number to make a call.

Foreign Prepaid Wireless Plan Rights

Petitioner also offers a method for topping up cellphones for individuals who live abroad and have contracts for wireless service with a carrier in their country. The cellphone must have a non-U.S. number, although the cellphone may be in the United States at the time of the top up. The end-user of the cellphone may have an unlimited plan or a plan that has a fixed per minute charge. Any telecommunication rights purchased expire after a specified period of time. The plans do not require the customer to dial an access number to make a call. The plans could include Internet access. Once credit is added to the account, the cellphone could be used in the United States (if the end-user's carrier has roaming enabled on the phone), but the vast majority of the time customers add minutes to a phone that is not in the United States. Petitioner maintains that it is not able to monitor the terminal points of phone calls or texts made using the minutes it sells.

Petitioner was unable to provide complete descriptions of all the domestic and foreign prepaid wireless plans sold through its kiosks, but from the information provided they all appear to qualify as "commercial mobile radio service[s]" within the meaning of Tax Law § 1101(b)(25), which this Advisory Opinion will assume to be the case.

Analysis

The Tax Law includes two taxes that apply to telecommunication services, namely the sales taxes imposed under § 1105(b) and the excise tax imposed by § 186-e. Below we consider how these taxes apply to the additional telecommunication rights that can be purchased through Petitioner's kiosks.

Application of the Sales and Use Tax to the Prepaid Services Obtained at Petitioner's Kiosks

The Tax Law imposes sales tax on a number of telecommunication services, including "telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service." Tax Law § 1105(b)(1)(B). Another category of taxable telecommunication services are prepaid telephone calling services. *See* Tax Law § 1105(b)(1)(D). The term "prepaid telephone calling service" is defined in Tax Law § 1101(b)(22)(A) as follows:

the right to exclusively purchase telecommunication services, that must be paid for in advance and enable the origination of one or more intrastate, interstate or international telephone calls using an access number (such as a toll free network access number) and/or authorization code, whether manually or electronically

dialed, for which payment to a vendor must be made in advance, whether or not that right is represented by the transfer by the vendor to the purchaser of an item of tangible personal property. Such term, except with respect to the tax imposed by section one hundred eighty-six-e of article nine of this chapter, includes a prepaid mobile calling service.

Prepaid telephone calling services are taxable when the consideration for the service is collected. *See* Tax Law § 1101(b)(22)(A); TSB-M-00(3)S. The person collecting the consideration is deemed the vendor of the service and must collect tax at the combined State and local rate in effect where the sale is made. *See Id.*¹

The long-distance landline calling service plan rights available through Petitioner's kiosks are prepaid. Those rights can be used only to make phone calls, and require the dialing of an access number. Thus, they qualify as prepaid telephone calling services. Accordingly, Petitioner should collect tax on the sale of those rights at the combined State and local tax rate in effect at the location of the kiosk where the sale occurred. *See* Tax Law §§ 1101(b)(22), 1105(b)(1)(D).

With regard to the domestic and foreign wireless plan rights available at Petitioner's kiosks, the definition of prepaid telephone calling services, as shown above, includes prepaid mobile calling services, which was added by Part V of Chapter 59 of the Laws of 2015, effective on and after April 13, 2015. That law defined prepaid mobile calling services as follows:

the right to use a commercial mobile radio service, whether or not sold with other property or services, that must be paid for in advance and is sold for use over a specified period of time or in predetermined units or dollars that decline with use in a known amount, whether or not that right is represented by or includes the transfer to the purchaser of an item of tangible personal property.

Tax Law § 1101(b)(22)(B). The domestic and foreign wireless plan rights that can be purchased through Petitioner's kiosks qualify as prepaid mobile calling services on or after the April 13, 2015 effective date of Part V because the rights consist of commercial mobile radio service, are paid for in advance, and are sold for use over a specified period of time or in predetermined units or dollars that decline with use in a known amount. Accordingly, Petitioner should likewise collect tax on sales of those rights at the combined State and local tax rate in effect at the kiosk where they are sold.

If the charge for the additional telecommunication rights available through Petitioner's kiosks includes a charge that is expressly for Internet access, that charge would not be subject to tax under Federal or State law. *See* 47 U.S.C.A. § 151 n. ("Internet Tax Freedom Act"); Tax

¹ A third category of telecommunication services subject to sales tax is certain mobile telecommunications services that are "sold for a fixed periodic charge." Tax Law § 1105(b)(2). This category is not relevant to the services sold through Petitioner's kiosks, which are all prepaid services and thus are not sold for a "fixed periodic charge."

Law § 1115(v). If the top-up includes Internet access, but the charge for the Internet access is not broken out separately, Petitioner must collect tax on that portion of its charges unless it can reasonably identify the charges for Internet access from its books and records that it keeps in the regular course of its business. *See* 47 USCA § 151 n., at § 1106.

The domestic and foreign prepaid wireless plan rights purchased *before* the April 13, 2015 effective date of Part V do not qualify as prepaid telephone calling services for sales tax purposes because they do not use access numbers or authorization codes to make a call. *See* former Tax Law § 1101(b)(22). Thus, such sales were taxable under Tax Law § 1105(b)(1)(B) to the extent that the plans were used for intra-state calls or other intra-state telecommunication services. Petitioner is not the party required to provide the telecommunication services, as the customer's account is with the carrier, which the carrier debits upon the customer's use of the plan's minutes. Under these circumstances, the sale occurs when the carrier debits the account upon the customer's use of the plan's minutes and not when Petitioner accepts the consideration from the customer. Accordingly, for sales occurring prior to April 13, 2015, Petitioner was not the seller of the domestic and foreign prepaid wireless plans purchased through its kiosks and was not required to collect tax on the monies paid to it by its customers. *See* TSB-A-02(37)S; TSB-A-98(34)S; TSB-M-00(3)S.

Application of § 186-e Excise Tax to the Prepaid Services Obtained at Petitioner's Kiosks

Tax Law § 186-e.2(a)(1) imposes an excise tax on the sale of telecommunication services, except a mobile telecommunication service taxable under § 186-e.2(a)(2), by any person who is a provider of telecommunication services, based on its gross receipts from, as pertinent here, "(i) any intrastate telecommunication services; (ii) any interstate and international telecommunication services (other than interstate and international private telecommunication services) which originate or terminate in this state and which telecommunication services are charged to a service address in this state, regardless of where the amounts charged for such services are billed or ultimately paid." Tax Law § 186-e.2(a)(2) imposes an excise tax on the sale of mobile telecommunication services by a provider of telecommunication services on the gross receipts from any mobile telecommunications service provided by a home service provider where the mobile telecommunications customer's place of primary use is within the State. "Provider of telecommunication services" is defined in Tax Law § 186-e.1(e) as any person who furnishes or sells telecommunication services; telecommunication service is defined in Tax Law § 186-e.1(g) as "telephone or telegraphy, or 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 . . ." The term "mobile telecommunication service" for § 186-e tax purposes is defined in pertinent part as "commercial radio service" and it excludes "prepaid telephone calling services," as set forth above. *See* Tax Law §§ 186-e.1(h); 186-e.2(a)(2); 1101(b)(24).

Thus, to be liable for the § 186-e excise tax, whether the service is a telecommunication service taxable under Tax Law § 186-e.2(a)(1) or mobile telecommunication service taxable

under Tax Law § 186-e.2(a)(2), it is necessary to be a provider of telecommunication services. Here, Petitioner is not the provider of any of the telecommunication services obtainable at its kiosks, because Petitioner is not liable for the transmission of the service to the customer. Petitioner is not furnishing or selling the transmission of the telecommunication service, but, rather, is merely facilitating the sale of the telecommunication service between the carrier liable for the telecommunication services being sold, and the customer.² Therefore, Petitioner is not liable for the tax imposed by § 186-e.

DATED: April 25, 2016

/S/

DEBORAH R. LIEBMAN
Deputy 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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.

² This is true for sales of the additional telecommunication rights obtained through Petitioner's kiosks both before and after the May 1, 2015 effective date of Part P of Chapter 59 of the Laws of 2015, which did not make a substantive change in the scope of the tax. *See* TSB-M-15(5)C.