

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

TSB-A-97(49)S
Sales Tax
TSB-A-97(17)C
Corporation Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z970403B

On April 3, 1997, a Petition for Advisory Opinion was received from Netcom On-Line Communication Services, Inc., Two North Second Street, Plaza A, San Jose, California 95113.

The issue raised by Petitioner, Netcom On-Line Communication Services, Inc., is whether the sale of Internet access subscription services to New York customers is subject to the sales and use taxes under Articles 28 and 29 of the Tax Law or to the telecommunications excise tax under section 186-e of Article 9 of the Tax Law.

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

Petitioner is domiciled outside of New York State and its activities are described below.

Internet Access Services

Petitioner is in the business of providing subscription services to individuals and businesses for access to the Internet. Petitioner offers subscribers unlimited use of the Internet for a low, flat-rate monthly fee.

Petitioner's Internet access services are available to subscribers on a nationwide basis by way of a national Point-of-Presence ("POP") network. A local Internet gateway provides the individual user access to the Internet on a local rate basis. This network extends to virtually every major market and constitutes Petitioner's main operational asset.

Petitioner has several POPs located in New York. A POP typically consists of a leased office building room with modems and routing equipment. There are no employees at any of Petitioner's POP locations in New York. In the event of technical difficulties at a POP, an attempt is made to correct the problem via remote communication. If this is not successful, a technician is sent to the Petitioner's POP to correct the problem. Each POP has a local phone number which a customer calls to access Petitioner's services.

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Petitioner has two types of accounts: a "dial-up" account and a "network" account. Petitioner's dial-up account customers in New York will initiate a communications program on their computer which instructs the computer to dial Petitioner's POP at the designated local access number. A central office (i.e., a regional telephone operating company ("RTOC")) maintains the connection between customer's computer and Petitioner's POP. Charges for this connection are billed to the customer by the RTOC.

It is important to note that Petitioner is not able to determine the physical location from which a subscriber's computer initiates communications with Petitioner's POP. However, at the close of each billing cycle (i.e., monthly) Petitioner's billing system is able to identify the latest POP accessed by a subscriber. Petitioner also maintains records of subscribers' billing addresses.

Once connected to Petitioner's POP, the customer is routed through one or more central offices to Petitioner's Hub in New Jersey. Petitioner has no Hub in New York. All communication charges incurred beyond the POP are paid by Petitioner. Once connected to the New Jersey Hub, the customer is then routed through one or more central offices to Petitioner's main operation center. Petitioner's main operation center is located outside of New York.

Once connection is established with the main operation center, a customer's user identification and password are authenticated. The customer is then routed back to the POP into which the customer was initially connected and is assigned an "IP" (or identification) address by the POP equipment. The customer is now enabled to access the Internet.

From this point on, all activity of the customer will be routed from the local POP to the New Jersey Hub and then onto the "Internet." Once a customer leaves Petitioner's network and gets onto the Internet, there is no way to track the geographic termination point of the customer's activity.

For "network" accounts, the above steps also apply, but with some modifications. First, all network customers generally maintain a dedicated connection between their place of business and Petitioner's POP. There is no authentication process for network customers.

These dedicated connections can be either point-to-point or frame-relay. Under point-to-point, both the connection from the customer's place of business to the RTOC and from the RTOC to Petitioner's POP are lines leased by the network customer from the RTOC. Petitioner may arrange for the line, but all customer billings for these leased lines are handled by the RTOC. With frame-relay, only the connection from the network customer's place of business to the RTOC is leased by the network customer from the RTOC. The connection from the RTOC is leased from the RTOC by Petitioner. As with "dial-up" customers, the geographic termination point of network customers' activities over the Internet cannot be determined.

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Other Incidental Product/Service Offerings

As described above, Petitioner's core business is providing Internet access to customers for a low, flat-rate monthly fee. In its effort to be the premier provider of Internet access and to insure that its subscribers enjoy a rich, dynamic and valuable Internet experience, Petitioner offers, **generally at no extra cost to subscribers**, various "incidental" products and services. Specifically, Petitioner provides its subscribers with access to the following:

1. a personalized, daily electronic newsletter;
2. the ability to create a custom web-site;
3. an electronic mail service ("E-mail");
4. 1-800 telephone service providing access to customer/sales support personnel as well as an alternative means of accessing the Internet; and
5. various Internet software tools designed to make it easier for subscribers to have a more enjoyable and powerful Internet experience.

With certain exceptions, section 1105(b) of the Tax Law imposes sales tax upon receipts from the sales of telephony and telegraphy and telephone and telegraph services. With certain exceptions, section 186-e of the Tax Law imposes a telecommunications excise tax on the sale of telecommunication services by any person which is a provider of telecommunication services.

A recent Technical Services Bureau Memorandum, Internet Access Charges Not Subject to Sales Tax and Telecommunications Excise Tax, January 24, 1997, TSB-M-97(1)C and (1)S provides in part:

Effective on or after February 1, 1997 the Department is implementing the new Internet policy recommended in its January 1997 report on *Improving New York State's Telecommunications Taxes*. Internet access charges are considered an unenumerated service not subject to the New York State and local sales tax. Neither is Internet access considered a telecommunications service subject to the Section 186-e telecommunications excise tax.

Internet access is the connection provided to the Internet usually by a "dial-up" service using a modem or a direct connection... Internet access charges may also include items such as communications/navigation software, E-mail privileges, news headlines, and certain website services. When these services are furnished as part of a combined Internet access charge, they are deemed incidental to the provision of Internet access and the charge is not subject to sales tax....

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Under the new Internet policy implemented February 1, 1997, the Internet access service that is provided by Petitioner to its customers (whether the customers are located within or without New York State) through "dial-up" or either type of "network" service (point-to-point or frame relay) is not included among the enumerated services that are subject to the New York State and local sales and compensating use taxes under Articles 28 and 29 of the Tax Law (see, Hometown Online, Adv Op Comm T&F, May 28, 1997, TSB-A-97(30)S) and is not considered a telecommunications service subject to the telecommunications excise tax under section 186-e of the Tax Law. Furthermore, the daily electronic newsletter, the ability to create a custom web-site, the e-mail access, the Internet software, and the toll-free customer service that are included as part of Petitioner's flat-rate monthly fees are incidental to the Internet access service and do not make the service taxable. Accordingly, beginning February 1, 1997, the flat-rate monthly fees that Petitioner charges its customers for access to the Internet and related amenities are not subject to the New York State and local sales and compensating use taxes under Articles 28 and 29 of the Tax Law or the telecommunications excise tax under section 186-e of the Tax Law.

DATED: July 23, 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.