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Sales Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z080508B

A petition received May 8, 2008 requests an advisory opinion about whether “wallpaper,” games, and “music and sounds” sold by a mobile telecommunications provider are subject to the tax on the furnishing of utility services imposed by Tax Law section 186-a, the telecommunications excise tax imposed by Tax Law section 186-e, and the sales tax imposed by section 1105(b)(2). We conclude that receipts from the sale of these products are not subject to the tax imposed by section 186-a or the telecommunications excise tax imposed by section 186-e. Nor are these products subject to State and local sales taxes on mobile telecommunications service imposed by section 1105(b)(2). However, receipts from the sale of games are taxable under Tax Law section 1105(a).

Facts

The mobile telecommunications provider referred to in the petition is a facilities-based carrier, using its own facilities to provide service, and thus is not subject to the supervision of the New York State Department of Public Service. The provider contracts with mobile telecommunications customers to provide mobile telecommunications service. The provider also offers “wallpaper,” games, and “music and sounds” for sale to its customers. These products are available for purchase at the customer’s option. Wallpaper is a picture that appears on the screen of a mobile phone. A customer can download wallpaper to his or her phone for a separate charge for each wallpaper scene. Games include arcade games, puzzles, sports games, and casino games. There is a separate charge for downloading each game. “Music and sounds” consist of customized “ring tones” that alert the customer to an incoming call, and “ringback tones,” which are music, comedy clips, or celebrity messages that callers hear instead of the standard ringing sound. There is a separate charge for downloading each ring tone. There is also a separately-stated recurring monthly charge for each ringback tone. Each of the separately-stated charges for downloading these products appears on the customer’s bill for mobile telecommunications service.

Analysis

The provider’s receipts from the sale of these products are not subject to the tax imposed by section 186-a. That section imposes tax on the gross operating income of utilities doing business in this state that are not subject to the supervision of the New York State Department of Public Service. See Tax Law §186-a.1(c). “Gross operating income” includes receipts from “any sale, conditional or otherwise, made for ultimate consumption or use of gas, electricity, steam, water or refrigeration, or . . . gas, electric, steam, water or refrigeration service in this state” Tax Law §186-a.2(d). The provider’s receipts from sales of the products described above do not come within the definition of gross operating income

for purposes of Tax Law section 186-a.2(d) In any event, the rate of tax imposed on gross operating income is zero for taxable years beginning on and after January 1, 2005. See Tax Law §186-a.1(c).

Furthermore, these products are not subject to the telecommunications excise tax imposed by Tax Law section 186-e or the sales tax on mobile telecommunications service imposed by Tax Law section 1105(b)(2). The excise tax is imposed on the gross receipts from mobile telecommunications service provided by a home service provider when the customer's place of primary use is within New York. See Tax Law section 186-e.2(a)(4). Sales tax is imposed on "the receipts from every sale of mobile telecommunications service by a home service provider, other than sales for resale." Tax Law §1105(b)(2). Both the term "gross receipt from the sale of mobile telecommunications service" for purposes of the excise tax and "receipt from the sale of mobile telecommunications service" for purposes of sales tax include "charges for mobile telecommunications service" as defined in Tax Law section 1111(l)(1). See also Tax Law §186-e.1(a)(1). "Charges for mobile telecommunications services" means "any charge by a home service provider to its mobile telecommunications customer for (A) commercial mobile radio service, and shall include property and services that are ancillary to the provision of commercial mobile radio service (such as dial tone, voice service, directory information, call forwarding, caller identifications and call-waiting), and (B) any service and property provided therewith." Tax Law § 1111(l)(1).

The wallpaper, games, ring tones, and ringback tones described above are not "commercial mobile radio service" (see Tax Law §1101(b)(25)), nor are they ancillary services. Ancillary services include directory assistance, call forwarding, caller identification and call waiting. See Tax Law section 1111(l)(1)(A). The products described in the petition are not similar to the ancillary services described in the Tax Law. Rather, the wallpaper, ringtones, and ringback tones are digital audio and visual files, while games constitute prewritten computer software. Because these items are provided with the mobile telecommunications service, they are included among taxable "charges for mobile telecommunications services" for purposes of the sales and excise taxes.

Nevertheless, these items are not subject to sales and excise tax as charges for mobile telecommunications service. Tax Law sections 186-e.2(b)(4) and 1111(l)(2) allow a home service provider to separately account for property and services that are not mobile telecommunications service or ancillary services, as long as it uses a "reasonable, objective and verifiable standard." If the provider does so, the sales are exempt from tax. Thus, if the home service provider separately sells the property or service, the charge is based on the price for the property or service when separately sold. The charge for the property or service must be reasonable and proportionate to the total charge for mobile telecommunications service. Here, the provider separately charges for wallpaper, games, ringtones, and ringback tones. As long as those charges are reasonable in relation to overall charge for service, the provider may exclude the receipts from the sale of these products from the Section 186-e telecommunications excise tax and the sales tax on mobile telecommunications service imposed by Tax Law section 1105(b)(2).

Finally, although charges for downloaded games are not subject to sales tax as a mobile telecommunication service, they are taxable as sales of prewritten computer software under Tax Law section 1105(a). Tax Law section 1111(l)(2) states that “[n]othing herein shall be construed to exempt from tax or subject to tax any such service or property otherwise subject to tax or exempt from [sales] tax.” Wallpaper, ringtones, and ringback tones constitute digital audio and visual files that are not tangible personal property or enumerated services for sales tax purposes. *See, e.g., Apple Computer, Inc.*, TSB-A-07(14)S, May 17, 2007; *Martin R. Timm*, TSB-A-05(34)S, September 27, 2005, *Universal Music Group*, TSB-A-01(15)S, April 18, 2001. However, games are considered to be prewritten computer software. Games are software because they include coded instructions that cause the equipment (in this case, the mobile phone) to perform a function; they are prewritten software because they are not “designed and developed by the author or other creator the specifications of a specific purchaser.” Tax Law § 1101(b)(14). Prewritten computer software is included in the definition of tangible personal property, regardless of the means by which it is conveyed to the purchaser. *See* Tax Law § 1101(b)(6). Thus, although downloaded games are not taxable as a mobile telecommunication service, they are taxable as tangible personal property. *See* Tax Law § 1105(a). Receipts from the sale of games sold or billed by the customer’s home service provider are sourced to the taxing jurisdiction where the customer’s place of primary use is located. *See* Tax Law § 1111(l)(3). Those receipts will be subject to New York State and local sales tax if the customer’s place of primary use is in New York.

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/S/

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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.