

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(29)S
Sales Tax
July 24, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000323A

On March 23, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Sprint Communications Company, L.P., 6500 Sprint Parkway # HL-5A622, Overland Park, Kansas, 66251.

The issues raised by Petitioner, Sprint Communications Company, L.P., are:

- 1) Whether the backhauling services provided by Petitioner as described herein are subject to sales and compensating use tax.
- 2) If the services are subject to sales and compensating use tax, whether Petitioner sells such backhauling services to its customers for resale.

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

Petitioner provides two types of backhauling services to its customers: 1) United States Backhaul Plus Internet Protocol Port (USBH+IP) and 2) International Carrier Backhaul (ICBH).

USBH+IP allows customers, including foreign telephone companies and Internet service providers, to connect with Petitioner's Internet network. This connectivity provides access to United States-based Internet content for Internet users in foreign countries. Only Internet protocol (IP) traffic is transported through this product, not traditional voice telephone calls.

Customers are responsible for sending their IP traffic to a cable landing station or satellite earth station. The cable landing station or satellite earth station is the point at which the traffic enters the United States. From that point, Petitioner backhauls (or transports) the traffic via its facilities to an IP port located at Petitioner's Internet node. An IP port is a physical "plug" or "jack" to which the circuit connects. Via the IP port, the customer's Internet traffic is sent out on the Internet over Petitioner's Internet network. USBH+IP traffic can go in both directions; any return traffic takes the exact reverse path as incoming traffic.

Contracts for USBH+IP are in yearly increments with a minimum period of one year. There are separate cost components for the backhaul service and the IP port. Backhaul is priced based on mileage (between the cable landing station or satellite earth station and Petitioner's Internet node), the bandwidth required, and the contract term. The IP port is priced based on bandwidth (or capacity) required and term of the contract. Installation and other charges may apply or may be

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waived, and quantity discounts may be available for multiple circuit orders. Any property installed is and remains the property of Petitioner.

Specifically, in providing the USBH+IP to its customers, the IP traffic will 1) enter the United States via a cable landing station or satellite earth station located in New York State and backhauled to Petitioner's IP port located either in or out of New York State or 2) enter the United States via a cable landing station or satellite earth station located outside of New York State and backhauled to Petitioner's IP port located in New York State.

ICBH allows foreign customers to connect to points in the United States. Customers can send any type of information on these circuits that they wish - voice, video, data, or a combination. ICBH circuits can terminate at any point in the United States other than Petitioner's IP node. For example, traffic can be backhauled to a customer's United States business location or to an IP node owned by any company other than Petitioner. Customers are responsible for sending their traffic to a cable landing station or satellite earth station. The cable landing station or satellite earth station is the point at which the traffic enters the United States. From that point, Petitioner backhauls the traffic via Petitioner's facilities to the termination point designated by the customer. ICBH functions much like a "private line" from the cable landing station or satellite earth station to its termination point. The customer can choose virtually any termination point, but the termination point for a particular circuit is always the same. ICBH traffic can go in both directions; any return traffic takes the exact reverse path as incoming traffic.

Contracts for ICBH are in yearly increments with a minimum of one year. Backhaul is priced based on mileage (between the cable landing station or satellite earth station and the customer-designated termination point), the bandwidth required, and the contract term. Installation and other charges may apply or may be waived, and quantity discounts may be available for multiple circuit orders. Any property installed is and remains the property of Petitioner.

Specifically, in providing ICBH to its customers, the IP traffic will 1) enter the United States via a cable landing station or satellite earth station located in New York State and Petitioner will backhaul such traffic to a customer-designated termination point located either inside or outside of New York State or 2) enter the United States via a cable landing station or satellite earth station located outside of New York State and Petitioner will backhaul such traffic to a customer-designated termination point located in New York State.

Applicable Law and Regulations

Section 1105(b)(1) of the Tax Law imposes sales tax, in part, upon:

The receipts from every sale, other than sales for resale, of the following...(B)
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 of the Sales and Use Tax Regulations provides, in part:

(a) Imposition. (1) Section 1105(b) of the Tax Law imposes a tax on the receipts from every sale, except a sale for resale or a sale specifically exempt under section 1115(b)(i) and (ii), (c) or (e) of the Tax Law, of

* * *

(ii) telephony and telegraphy and telephone and telegraph service of whatever nature, except interstate and international telephony and telegraphy and telephone and telegraph service.

(2) 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. The inclusion of the word “service” indicates an intent to tax, under this provision, items that are furnished as a continuous supply while the vendor-vendee relationship exists.

* * *

(d) 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.

* * *

(4) A service is not considered telegraphy or telephony if either of these services is merely an incidental element of a different or other service purchased by the customer.

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Opinion

Petitioner provides the USBH+IP service to customers who include foreign telephone companies and foreign Internet service providers. The foreign based customers who purchase this service are provided connectivity with Petitioner's Internet network which makes possible access to United States-based Internet content for Internet users in foreign countries who purchase services from Petitioner's customers. In order for Petitioner to provide this service, the foreign based customers must send its IP traffic to a cable landing station or satellite earth station. The USBH+IP service results when Petitioner transports the customer's IP traffic over Petitioner's facilities to an IP port located at Petitioner's Internet node.

The provision of ICBH service by Petitioner allows foreign customers to send information by voice, video, data, or a combination thereof from an origination point in a foreign country to a termination point in the United States. In executing this service Petitioner's foreign customers send their traffic to a cable landing station or satellite earth station and from that point Petitioner transports such traffic to the United States-based termination point designated by the customer.

In providing the USBH+IP and ICBH services described above, Petitioner transports customers' IP traffic from a cable landing station or satellite earth station to Petitioner's IP port or some other termination point in the United States. Petitioner asserts that its USBH+IP and ICBH services constitute international telephony or telegraphy which is not subject to sales tax under section 1105(b). Petitioner has requested that the taxability of its backhauling services be addressed in varying situations in which the locations of the cable landing station or satellite earth station and the IP port in the case of the USBH+IP, or designated termination point in the case of the ICBH, may be in or out of New York.

In Matter of Southern Pacific Communications Company, Dec Tax App Trib, May 14, 1991, TSB-D-91(41)S, the Tribunal affirmed the determination of the Administrative Law Judge that where a telephone service is interstate in nature, any attempt to isolate the purely intrastate components of the service as a taxable service is impermissible. The Tribunal relied in part on Western Union Telegraph Company, Dec St Tx Comm, February 4, 1983, TSB-H-83(57)S, which determined that a telegraph service where the messages originated and terminated in New York was taxable intrastate telegraphy regardless of the fact that the messages were routed through computers located in New Jersey.

In Network Consultants, Inc., Adv Op St Tx Comm, August 13, 1982, TSB-A-82(31)S, a company was providing a switching service for telephone calls between Canada and the United States. The switching equipment was located in Buffalo. The opinion focused on the fact that the telephone communication was between points in Canada and the United States in determining that the company was providing nontaxable international telephony.

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In both the USBH+IP and ICBH services, the data or information being transported by Petitioner originates outside of the United States. Therefore, in accordance with Matter of Southern Pacific Communications Company, supra, the USBH+IP and ICBH services constitute the provision of international telephony or telegraphy and are not subject to the sales tax imposed under Section 1105(b) of the Tax Law, regardless of the location of the cable landing station or satellite earth station and IP port or designated termination point.

In view of the conclusion that the USBH+IP and ICBH services constitute nontaxable international telephony or telegraphy, it is not necessary to address Issue 2 related to the resale exclusion with respect to such services.

DATED: July 24, 2000

/s/
John W. Bartlett
Deputy Director
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.