

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

TSB-A-01(22)S
Sales Tax
July 31, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000920A

On September 20, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from William H. Wishinsky, PC, 24 South Drive, Roslyn, NY 11576. Petitioner, William H. Wishinsky, PC, furnished additional information with respect to the Petition on November 1, 2000.

The issue raised by Petitioner is whether commissions paid by a distributor or cellular phone carrier to a retailer for the sale of cellular telephones and prepaid calling cards are subject to State and local sales and use taxes.

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

A retail establishment sells cellular telephones and/or prepaid calling cards. Monthly or quarterly the distributor or cellular phone carrier pays to the retail establishment a commission on the total amount of such sales.

Applicable Law and Regulations

Section 1101(b)(3) of the Tax Law defines the term “receipt,” in part, as follows:

Receipt. The amount of the sale price of any property and the charge for any service taxable under this article . . . valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses

Section 1105 of the Tax Law provides in part:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

(b) The receipts from every sale, other than sales for resale, of the following:

. . . (D) a prepaid telephone calling service. . . .

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Section 1105(c) of the Tax Law imposes sales tax upon the receipts from every sale, except for resale, of certain enumerated services.

Section 526.5(e) of the Sales and Use Tax Regulations provides, in part:

Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

Opinion

Sales commissions received by a sales agent from its supplier are not receipts from the sale of an enumerated taxable service under Section 1105 of the Tax Law by the agent to its supplier. Moreover, the sales commissions do not constitute receipts from a retail sale of tangible personal property under Section 1105(a) of the Tax Law by the agent to its supplier. Accordingly, the commissions paid by a distributor or cellular phone carrier to a retail establishment for its sale of cellular phones and/or prepaid calling cards are not receipts from a taxable sale, and the retail establishment is not required to collect State and local sales and use taxes from the distributor or carrier on such commissions. See KPMG Peat Marwick, Adv Op Comm T&F, December 20, 1994, TSB-A-94(51)S.

The commission paid by a distributor or cellular phone carrier to a retail establishment for the sale of cellular phones and/or prepaid calling cards is not considered in determining the amount of the taxable receipts from the sale of a cellular phone or prepaid calling card by the retail establishment to a retail customer. The retail establishment must collect tax on the amount charged to the customer for a cellular phone or prepaid calling card. See Section 1101(b)(3) of the Tax Law and Section 526.5(e) of the Sales and Use Tax Regulations.

DATED: July 31, 2001

/s/
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Technical Services Division

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