

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

TSB-A-89(25)S
Sales Tax
July 28, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITIONER NO. S890202A

On February 2, 1989 a Petition for Advisory Opinion was received from the Tigon Corporation, 17085 Knoll Trail Drive, Dallas, Texas 75248.

The issue raised is whether the voice messaging and telephone answering services offered by Petitioner are subject to sales or use tax pursuant to Section 1105(b) of the Tax Law.

Petitioner provides its customers with access to its computer through a program which it has designed. The customer may access the computer and leave a personalized message directed to a particular individual or group of individuals. Control of transferring this information to the designee is maintained and accomplished via Petitioner's computer. The customer may also access the computer to receive personalized messages designated to his attention.

Petitioner maintains that no rental of equipment occurs, rather the customer has purchased the right to access a computer through which he may provide and maintain information. In all cases the information that is deposited and/or retrieved is oral. There is no written or tangible report.

Regarding Petitioner's answering service, Petitioner's customer may, for a flat monthly fee, have outside callers access its system to leave a message. This message may later be retrieved by Petitioner's customer.

Section 1105(b) of the Tax Law imposes a sales tax upon: "The receipts from every sale, other than sales for resale. . . of telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service."

The Sales and Use Tax Regulations define the term "telephony and telegraphy" to include "use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals." 20 NYCRR 527.2(d)(2). The term does not apply to a service which is essentially something other than telephony and telegraphy, although telephony and telegraphy may figure as an incidental element of the service. 20 NYCRR 527.2(d)(4). The tax on the sale of telephony and telegraphy is thus not applicable to the receipts of cable television companies, because, while as an incident to the service provided there may be telegraphic or telephonic transmission of a signal, the essential object of the service is to provide "entertainment or enjoyment." New York State Cable Television Association v. State Tax Commission, 88 Misc 2d 601, aff'd 59 AD2d 81. (It is to be noted that in the discussion of cable television in 20 NYCRR 527.2(d)(3), the reference to the exempt distribution of cable television programs is a reference to distribution to the ultimate consumer.)

As suggested by the regulation provision cited above, the essence of telephony and telegraphy is the transmission of "intelligence to a distant point by means of electricity." 74 AM Jur 2d, Telecommunications §1. Also critical to the concept is the role of the purveyor of telephony and telegraphy as "a mere conduit, transmitting to third-party recipients messages given it by various originators." Quotron Systems v. Gallman, 39 NY2d 428; Technical Services Bureau Memorandum, TSB-M-80(18)S. Further, it makes no difference to the question whether the sender or receiver of the transmission purchases the service. New York Quotation Co. v. Bragalini, 7 AD2d.

Section 527.2(a)(2) of the sales tax regulation state:

"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." (Emphasis supplied)

Section 527.2(d)(2) provides, in part, as follows:

"The term `telephony and telegraphy' includes use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals.

Example 3: Message switching services, transmitted to a computer are lines leased from a communication carrier are telegraph services subject to the tax imposed under section 1105(b) of the Tax Law.

Petitioner is providing, inter alia, a network upon which its customers can communicate by computer or electronically with one another by entering and retrieving messages. Petitioner does not provide any additional information to its customers nor does it manipulate or otherwise process its customers information into another form; rather, Petitioner stores its customer's information so that its customer or someone designated by the customer may later retrieve the same information.

Sales tax could not be imposed upon "Cable TV" subscriptions merely because the charge for such contained an element of telephony or telegraphy. Here, the opposite is true. The essential element of petitioner's service is for its customers to electronically communicate with each other "Transmission of intelligence to a distant point by means of electricity." Unlike a conventional telephone answering service where a person actually writes down messages for the person purchasing the service, every element of petitioner's service is performed by electronic means. Therefore, Petitioner is providing a "telephone or telegraph service the receipts from which are

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subject to the tax imposed under section 1105 (b) of the Tax Law. Those messages that are interstate or international are exempt from sales tax.

DATED: July 28, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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