

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

TSB-A-93 (6)S
Sales Tax
January 7, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S910913A

On September 13, 1991 a Petition for Advisory Opinion was received from Anthony J. Ragusa, Jr. d/b/a The Stereo Advantage, 5195 Main Street, Williamsville, New York 14221.

The issue raised by Petitioner, Anthony J. Ragusa, Jr. d/b/a The Stereo Advantage, is whether Petitioner's sale of certain cellular telephones are the sale of promotional items which may not be purchased for resale under Section 526.6(b)(4) of the Sales and Use Tax Regulations.

Petitioner is a retail establishment which sells electronic equipment, including cellular telephones. As a retailer, Petitioner does not pay sales tax on cellular telephones purchased for purpose of resale. Petitioner does charge sales tax on the retail price of the cellular phones sold to customers.

A cellular telephone is of no use to a purchaser unless the purchaser contracts for telephone service from a cellular telephone carrier. Although cellular telephone carriers generally sell telephone equipment and provide telephone service, retail establishments such as Petitioner do not provide telephone service. However, Petitioner is an authorized agent of a telephone service carrier and can offer service contracts to customers in that capacity. The options to a customer of Petitioner are (a) the customer may purchase a telephone from Petitioner; (b) the customer may purchase a telephone and contract for telephone service through Petitioner in its capacity as agent for the carrier; or (c) the customer may contract for service through Petitioner in its capacity as agent for the carrier, without the purchase of a telephone.

One such service carrier, Buffalo Telephone Company (also know as Cellular One), has approached retail establishments such as Petitioner and asked them to offer service contracts with Buffalo Telephone Company. The service carrier is also a wholesale supplier of cellular telephones to Petitioner. Petitioner is compensated by the service carrier through a variety of programs which include: (a) reduced prices on cellular telephones; (b) a commission on activation of service contracts; (c) participation in advertising costs; and (d) incentive discounts. Petitioner offers to its customers pricing programs for the retail purchase of telephones, which include a reduced price for the telephone when the customer contracts for carrier service through Petitioner as agent. The commission paid to Petitioner by the carrier is payable only if the customer contracts for one full year of service. In the event that the customer defaults on the one year contract obligation to the carrier, Petitioner forfeits the commission to the carrier. Nevertheless, the price of the telephone to the customer under such circumstances is not modified. The amount of the commission paid by the carrier is the same commission whether or not the customer purchases a telephone, and that commission is forfeited as well if the customer defaults on the one year service contract with the carrier.

Of Petitioner's telephone business, only 9% of the telephones sold were purchased from Buffalo Telephone Company and sold for less than \$49. However, in each case Petitioner profits from the overall package transaction. Even though a customer may receive a reduced price for a telephone, Petitioner's overall cellular telephone department is profitable due to discounts and commissions from the service carrier and charges to the customer for installation and service. The cost of the telephone, commissions earned, installation fees and service fees are viewed as a whole by Petitioner in determining its pricing and retail strategy for cellular telephones. Competition from similar retailers also will dictate pricing strategies.

Buffalo Telephone Company has no control over the price at which Petitioner sells its telephone equipment. Petitioner receives the same commission from Buffalo Telephone Company whether or not a telephone is purchased and regardless of the retail price charged to the customer for the telephone. Competition with other retail sellers of telephone equipment is an important factor in Petitioner's pricing strategies. For example, Buffalo Telephone Company itself discounts its telephone equipment significantly when the purchaser also buys telephone service.

Section 526.6(c) of the Sales and Use Tax Regulations define the resale exclusion as follows:

(c) Resale exclusion. (1) where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either on the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

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(4)(i) Tangible personal property which is purchased and given away without charge, for promotion or advertising purposes is not purchased for resale. It is a retail sale to the purchaser thereof, and is not a sale to the recipient of the property.

(ii) Tangible personal property which is purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost, or which is not ordinarily sold by that person in the operation of his business, is a retail sale to the purchaser thereof, and not a sale to the recipient of the property.

(iii) A resale certificate may not be used by the person making the purchases described in subparagraphs (i) and (ii) of this paragraph for such purchases.

Example 2: A bank has purchased premiums which will be given to depositors upon the opening of an account in a new branch. As the bank is not in the business of selling such items, and as it in fact does not sell such items to its customers, the sale to the bank of such items of tangible personal property is a retail sale which is taxable at the time of purchase. The bank has not purchased these items for resale.

Example 3: A vendor purchases catalogs and distributes them to his potential customers for a minimal charge, which does not reflect the cost to him. He is the retail purchaser of the catalog, and is required to pay the tax thereon. He cannot charge his customer tax on the charge for the catalog.

Section 526.6(c)(4) of the Sales and Use Tax Regulations sets forth three sets of circumstances under which purchases of tangible personal property will not be considered to have been purchased for resale. The categories are:

- a) Property which is purchased and given away without charge for promotional or advertising purposes.
- b) Property which is purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost, and
- c) Property which is purchased for promotional or advertising purposes and is not ordinarily sold by that person in the operation of his business.

Categories "a" and "c" above are clearly inapplicable to Petitioner in the instant case since Petitioner does not give away cellular telephones which is the product sold by Petitioner in the ordinary operation of his business.

In the instant case the thing being sold by Petitioner to its customers is a combination of a cellular telephone and a service contract for telephone services, the total selling price of which yields a gross profit to Petitioner.

Therefore, the purchase of cellular telephones by Petitioner from Buffalo Telephone Company for resale to its customers at a discount when purchased by the customers in conjunction with the purchase of a service contract for telephone service upon which Petitioner receives commissions does not constitute property purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost and thus does not come within the circumstances indicated in category "b"

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Accordingly, the purchase of cellular telephones by Petitioner from Buffalo Telephone Company under the circumstances described above does not fall within the exclusions provided by Section 526.6(c)(4) of the Sales and Use Tax Regulations and thus are not subject to the imposition of sales tax, in accordance with the provisions of Section 526.6(c)(1) of said regulations.

DATED: January 7, 1993

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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