

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

TSB-A-96 (18)S
Sales Tax
March 22, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940601C

On June 1, 1994, a Petition for Advisory Opinion was received from Kasden Complete Services, 500 West 34th St., New York 10018.

The issue raised by Petitioner, Kasden Complete Services, is whether the purchase of a non-income producing telephone switching device (PBX switch) that routes incoming calls from AT&T and other provider lines to the internal telephone equipment owned by a hotel is subject to sales tax.

Petitioner states that its hotels charge guests for making telephone calls from the guest rooms. Petitioner indicates that its hotels collect or pay sales tax as well as the State taxes on telephone services imposed under Article 9 of the Tax Law and applicable local excise or utility taxes on these charges.

Section 1105(e) of the Tax Law imposes a tax upon "The rent for every occupancy of a room or rooms in a hotel in this state, except that the tax shall not be imposed upon (1) a permanent resident, or (2) where the rent is not more than two dollars a day."

Section 1105(b) of the Tax Law imposes a tax on "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 . . ."

While section 1105(b) imposes a tax on telephone service, it also provides an exclusion for the resale of this service. The resale exclusion does not apply to the tax imposed by section 1105(e).

In addressing the taxation of charges by hotels for telephone service under section 1105(b), which is eligible for the resale exclusion, or section 1105(e), former Commissioner Tully stated that "a hotel or motel must collect the sales tax on the sale of telephone service and may claim a credit or refund for the tax paid to the telephone company on that portion of the service which has been furnished to the guests" (See, TSB-M-78(9)S). This presumes that the charge for the telephone service is separately stated and not merely an incident of the room charge, which is taxable under section 1105(e).

Section 1115(a)(12) of the Tax Law provides as follows:

Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, or telephone central office equipment or station apparatus or comparable telegraph equipment for use directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication, but not

including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment or apparatus

Section 528.13(f)(1) of the sales tax regulations provides that "Telephone and telegraph central office equipment or station apparatus, used directly and predominantly in receiving at destination or initiating and switching telephone and telegraph communication is exempt, when such equipment and apparatus is purchased or leased by the vendor of such service for sale." (Emphasis supplied)

Section 528.13(c)(4) of the Sales Tax Regulations provides guidance as to the meaning of "predominantly" with respect to production as follows:

(4) Machinery or equipment is used predominantly in production, if over 50 percent of its use is directly in the production phase of a process.

When a hotel or motel sells a separately stated telephone service that is subject to tax under section 1105(b) of the Tax Law rather than section 1105(e), it may be eligible for exemption on the purchase of certain telephone equipment under section 1115(a)(12) provided it meets the requirements of that section. The exemption will only be available if the equipment is used directly and predominantly (over 50%) in receiving at destination or initiating and switching telephone communication which is provided for sale.

DATED: March 22, 1996

/s/
DORIS S. BAUMAN
Director
Technical Services Bureau

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