

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

NYT-G-07(2)C
Corporation Tax
NYT-G-07(3)S
Sales Tax
June 20, 2007

Taxation of Internet Telephony

The Tax Department has received inquiries as to whether telecommunication services using Voice over Internet Protocol (VoIP) are subject to state and local sales taxes and the telecommunications excise tax.

VoIP service would enable a user to make and receive calls to and from any domestic telephone number. Such service may be billed either on a call-by-call or flat fee basis. For both call-by-call and flat fee plans, there may not be an ability to identify intrastate versus interstate calls. Such service may be offered separately or bundled with other services (e.g., Internet access, voice mail) or with tangible personal property (i.e., equipment).

Tax Law section 1105(b)(1)(B) imposes sales tax on 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 telephone service and except any telecommunications service the receipts from the sale of which are subject to tax as mobile telecommunications service under section 1105(b)(2). “The words ‘of whatever nature’ indicate that a broad construction is to be given the terms describing the items taxed.” Sales and Use Tax Regulation § 527.2(a)(2). Tax Law section 1105(b) imposes tax on receipts from “intrastate communication by means of devices employing the principles of telephony and telegraphy.” Sales and Use Tax Regulation § 527.2(d)(1). The terms “telephony and telegraphy” include the “use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals.” Sales and Use Tax Regulation § 527.2(d)(2).

Tax Law section 186-e imposes a telecommunications excise tax on gross receipts from the sale of telecommunication services. For purposes of the excise tax, *telecommunication services* are defined as “telephony or telegraphy, or telephone or telegraph service, including, but not limited to, any transmission of voice, image, data, information and paging, through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar media or any combination thereof and shall include services that are ancillary to the provision of telephone service (such as, but not limited to, dial tone, basic service, directory information, call forwarding, caller-identification, call-waiting and the like) and also include any equipment and services provided therewith.” Tax Law § 186-e.1(g).

VoIP service enables the user to make and receive telephone calls. Such service constitutes the use or operation of equipment for the transmission of sound or other signals, using principles of telephony and telegraphy (see Sales and Use Tax Regulation § 527.2(d)), and the “transmission of voice . . . through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar media or any combination thereof.” Tax Law section 186-e.1(g). Accordingly, such service constitutes “telephony and telegraphy and telephone and telegraph service” for sales tax purposes, and “telecommunication services” for purposes of the

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telecommunications excise tax. The use of the Internet or internet routing protocols for transmission of all or part of the call does not change this result.

Sales tax is imposed only on receipts from intrastate calls. See Tax Law § 1105(b)(1)(B). As relevant here, the telecommunications excise tax is imposed on the gross receipts from (1) intrastate telecommunication services; (2) interstate and international telecommunication services if the service originates or terminates in New York and is charged to a service address in New York (the entire gross receipt in such case is subject to tax); and (3) private telecommunication services attributable to New York, or any combination thereof. See Tax Law § 186-e.2.

Services provided to a New York service address that are billed on a flat fee basis (e.g., single monthly charge for unlimited usage), where the fee remains constant for a fixed billing period, regardless of the number or duration of calls, are subject to New York state and local sales taxes, as such fees represent receipts from the sale of access to telecommunications service provided in New York. See, *New York Telephone Company*, Adv Op Comm T&F, January 5, 1988, TSB-A-88(8)S; *Rochester Telephone Corporation*, Adv Op Comm T&F, December 9, 1987, TSB-A-88(1)S. Moreover, all charges for such services are presumed to be subject to sales tax until the contrary is established. See Tax Law § 1132(c). Thus, if intrastate telephone service is provided with interstate and/or international telephone services for a single charge, the entire charge is subject to sales tax, unless there is a reasonable, separately stated charge for the interstate and/or international services on the invoice or other statement of the price given to the customer. See Tax Law § 1132(c); see also Sales and Use Tax Regulations § 527.1. If the service offered is entirely interstate and/or international, the charges for such service would be excluded from sales tax. See *Commonwealth Long Distance, Inc.*, Adv Op Comm T&F, July 29, 1994, TSB-A-94(33)S. Interstate and international calling services billed on a call-by-call basis are not subject to sales tax. However, the provider must maintain records to indicate the origination and termination of such calls to document that such calls are not subject to sales tax.

Finally, if non-taxable property or discrete services (other than Internet access) are bundled with taxable VoIP services and sold to the customer for a single charge, the entire charge will be subject to sales tax unless the charge for such property and/or discrete services is reasonable and separately stated on the invoice or other statement of the price provided to the customer. See Tax Law § 1132(c); Sales and Use Tax Regulations § 527.1. For purposes of the telecommunications excise tax, the term *telecommunication services* includes “any equipment and services provided therewith.” Tax Law § 186-e(g). Thus, revenues derived from equipment and other services (other than Internet access) provided with VoIP services would be considered gross receipts subject to tax under section 186-e. If VoIP is bundled with Internet access for a single charge, the entire charge will be subject to both sales and excise taxes “unless the Internet access provider can reasonably identify the charges for Internet access from its books and records kept in the regular course of business.” § 1106(a) of the Internet Tax Freedom Act (see

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47 U.S.C. § 151). In order to be reasonably identified, such charges must be objective and verifiable, and reasonable in relation to the total charge. See, e.g., Tax Law § 1111(1)(2).

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