



FINANCE
NEW • YORK
THE CITY OF NEW YORK
DEPARTMENT OF FINANCE

April 18, 2003

Re: Request for Ruling
General Corporation Tax
Utility Tax

FLR 024798-611

Dear _____ :

This is in response to your request for a ruling dated November 15, 2002 regarding the application of the New York City General Corporation Tax to the situation described below. This office received additional information on January 16, 2003.

FACTS

The facts presented are as follows:

("the Taxpayer") is in the business of reselling long distance telephone services to customers in New York City and its environs. The Taxpayer purchases long distance minutes from other carriers and resells them to end-users. The Taxpayer is a "switchless reseller" and has no facilities, lines or other physical property in New York City that it uses to effect the resale. The Taxpayer has no employees or offices in the City. All business transactions are handled from the company's offices in _____.

The Taxpayer received a Certificate of Public Convenience and Necessity from the New York State Department of Public Service to operate as a reseller of telephone services within New York State.

ISSUE

You have requested a ruling as to whether the Taxpayer is subject to the New York City General Corporation Tax.

CONCLUSION

The Taxpayer is subject to the New York City General Corporation Tax as a vendor of utility services.

DISCUSSION

The New York City General Corporation Tax (the "GCT") is imposed on domestic and foreign corporations for the privilege of doing business, employing capital, owning or leasing property or maintaining an office in the City. §11-603.1 of the Administrative Code of the City of New York (the "Code"). However, section 11-603.4 of the Code provides an exemption for certain corporations subject to the New York City Utility Tax (the "Utility Tax"). The Utility Tax is imposed on two types of entities, "utilities" and "vendors of utility services" for the privilege of exercising a franchise, holding property, or doing business in New York City. §11-1102(a) of the Code. A utility is defined in section 11-1101.6 of the Code as "[e]very person subject to the supervision of the department of public service."¹ A vendor of utility services is defined in part as "[e]very person not subject to the supervision of the department of public service" that sells or provides various utility services including "telecommunications services." A utility is taxed on "gross income" defined in Code section 1101.4, while a vendor of utility services is taxed on "gross operating income", a narrower tax base, defined in Code section 1104.5.

Under section 11-603.4 of the Code, utilities are exempt from the GCT. There is no comparable exemption for vendors of utility services. A vendor of utility services is subject to both the Utility Tax and the GCT but is permitted to reduce its business income, for purposes of the GCT, by the ratio that its gross operating income subject to Utility Tax bears to its total gross operating income.

Because it is providing telecommunications services in New York City, the Taxpayer is clearly subject to the Utility Tax. A corporation that provides services to customers in New York City on a regular basis is considered to be doing business in New York City for purposes of the GCT. The question of whether the Taxpayer is subject to the GCT depends on whether the Taxpayer is a utility or vendor of utility services for Utility Tax purposes, which, in turn, depends on whether, under the law, it is deemed to be subject to the supervision of the PSC.

In Cable & Wireless, Inc. v. The City of New York Department of Finance, 190 Misc. 2d 410, 735 N.Y.S. 2d 717. (Supreme Court, New York County, 2001) (hereafter "Cable &

¹ The actual supervision is done by the Public Service Commission (hereafter the "PSC"), which is an entity within the Department of Public Service.

Wireless") the court directly addressed the issue of whether a reseller of telecommunications services is subject to the supervision of the PSC.

In Cable & Wireless, the court examined the history of the Utility Tax in detail, distinguishing traditional utilities subject to the supervision of the PSC from resellers of telephone services. The court noted that traditional utilities were monopolies that "provided services or commodities viewed as necessities." In contrast, with regard to resellers, the court quoted a 1989 PSC Opinion on Regulatory Policies and stated, "the PSC has concluded that 'resale activity tends to exhibit the characteristics of effective competition...[and] as [t]here are no significant effective barriers to entry and resellers generally do not have the ability to control prices or exercise market power,' regulation has little role to play." Cable & Wireless, 190 Misc. 2d at 417. The court noted further, "[w]hile during the relevant periods, resellers such as Cable, were required to file tariffs and Certificates of Public Convenience and Necessity, to meet certain minimum service requirements, and were subject to resolution of customer service disputes and financial reporting and accounting rules, enforcement and supervision, as indicated below, had been relaxed so that many of these requirements were pro forma." 190 Misc. 2d at 418.

The facts in this case are substantially the same as in Cable & Wireless. As a reseller, the Taxpayer is operating in a highly competitive market and is subject to reporting requirements that are basically pro forma. We, therefore, conclude that insofar as the Taxpayer is not subject to meaningful supervision by the PSC, for purposes of the Utility Tax, the taxpayer is a vendor of utility services. The Taxpayer is, therefore, subject to the GCT.

The Department reserves the right to verify the information submitted.

Sincerely,

Devora B. Cohn
Associate Commissioner
For Legal Affairs