

Amended PLR 08-005

**As of June 10, 2009 this Private Letter Ruling supersedes the
prior ruling issued for this number.**

FINAL PRIVATE LETTER RULING

08-005

REQUEST LETTER

June 3, 2008

VIA Facsimile – Response Needed by June 15, 2008

Pam Hendrickson
Chair of State Tax Commission
State Tax Commission
210 North 1950 West
Salt Lake City UT 84134

Re: Sales Tax/Telecommunications Gross Receipts Tax

Dear Ms Hendrickson:

This letter concerns Utah’s sales tax and telecommunications license tax on telecommunications services purchased by Internet Service Providers (“ISPs”).

Recently, in passing the Internet Tax Freedom Act Amendments Act, Public Law 110-108 (‘the Act’), the federal government extended its moratorium on the imposition of any sales or use tax on Internet service through the year 2014. Additionally, effective July 1, 2008, the Act also expands the definition of “Internet access” to include telecommunications services “to the extent such services are purchased, used or sold by a provider of Internet access to provide Internet access.” Therefore, sales and gross receipts taxes of any kind cannot be imposed on telecommunications services purchased by ISPs for purposes of providing Internet service to their customers.

New York State, has issued guidance in a formal Department Memorandum on this issue. TSB-M-08(4)C,(2)S. The memorandum states that telecommunications sales and excise taxes, which are imposed on ISPs on their purchase of telecommunications service for purposes of providing Internet Service, will no longer be imposed on such purchases or sales after June 30, 2008, in accordance with federal law. A copy of this Memorandum is attached for your reference.

We request the State Tax Commission acknowledge this impending change in federal policy and issue guidance on whether the Department agrees to the provisions outlined in the Act. If no

formal pronouncement is planned, we are seeking written guidance from the Department regarding Public law 110-108 and how it will affect the taxation of telecommunications services purchased by ISPs in Utah from both a sales and telecommunications gross receipts tax standpoint. Please note that time is of essence, as the federal law takes effect on July 1, 2008. Thank you for your assistance in this matter.

If you have any questions, please call me at ###.###.####.

Respectfully Submitted,

NAME
Principal

Attachment

RESPONSE LETTER

NAME
ADDRESS

Re: Private Letter Ruling 08-005 Amended
Sales Tax/Telecommunications Gross Receipts Tax on Internet Service Providers

Dear NAME,

This letter is in response to your request for tax guidance. You have asked the Tax Commission to issue a formal opinion on the applicability of recent changes to the Internet Tax Freedom Act resulting from Public Law 110-108.

This letter ruling is not intended as a statement of broad Commission policy. It is an interpretation and application of the tax law as it relates to the facts presented in your request letter and the assumptions stated in this ruling.

Facts and Assumptions

In your request you specify the application of Public Law 110-108 to Internet Service Providers (“ISP’s”). More particularly, you reference “the taxation of telecommunications services purchased by ISPs” (emphasis added). In a subsequent phone conversation you clarified that your client sells telecommunications services related to Internet access, to ISP’s. To that end, we will not address the application of the federal law to services or goods provided by ISP’s to its customers, but rather, only the purchase of telecommunications services by ISP’s from your client. You have not specifically stated that those services will be resold or that they will be used

by an ISP to provide Internet access. However, we will make this assumption. It appears, then, based on that assumption, that these services may be used in one of two ways. First, they may be incorporated as an enhancement along with basic Internet access to the ISP's customers, and that the ISP will sell a "package" to its customers. Second, they may be purchased by the ISP to assist in delivering products or services directly to its customers.

Before making our ruling, we note that you provided a copy of a Department Memorandum issued by the State of New York. It appears that this ruling addresses only sales of telecommunications services by ISP's to their customers. This appears to be a different fact situation from your request. Therefore, we do not consider that ruling to be relevant to your specific request.

Relevant Authority

Internet Tax Freedom Act and Amendments

Internet Tax Freedom Act

Effective October 1, 1998, the Internet Tax Freedom Act ("ITFA" or "Act"), Public Law 105-277 (47 U.S.C. § 151 note) placed a moratorium on any state or local tax on Internet access, defined under Section 1101(e)(3)(D) (current version at § 1101(d)(3)(D)) of the Act as:

a service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

Internet Nondiscrimination Act

Effective December 3, 2004, the Internet Tax Nondiscrimination Act ("ITNA"), Public Law 108-435, amended 47 U.S.C. § 151 note to extend the moratorium on tax on Internet access as provided in the Act and previous amendments. The 2004 legislation also extended the protection of the Act to include certain telecommunications services. Sec. 1104(5) (current version at § 1105(5)) provides that

'Internet access' does not include telecommunications services, except to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access. (Emphasis added.)

This act also included a specific exclusion for E-911 services, added to the Act under Sec. 1107(b):

Nothing in this Act shall prevent the imposition or collection, on a service used for access to 911 or E-911 services, of any fee or charge specifically designated or presented as dedicated by a State or political subdivision thereof for the support of 911 or E-911 services if no portion of the revenue derived from such fee or charge

is obligated or expended for any purpose other than support of 911 or E-911 services.

Sec. 1108, added to the Act under ITNA, also clarified taxation of other telecommunication services, specifically,

Nothing in this Act shall be construed to affect the imposition of tax on a charge for voice or similar service utilizing Internet Protocol or any successor protocol. This section shall not apply to any services that are incidental to Internet access, such as voice-capable e-mail or instant messaging.

Internet Tax Freedom Act Amendments Act

Subsequently, on October 31, 2007, Public Law 110-108, The Internet Tax Freedom Act Amendments Act (“ITFAAA”) was enacted, amending 47 U.S.C. § 151 note to further extend the moratorium to November 1, 2014. The relevant portion of this act amended Section 1105, which had been redesignated from Section 1104 under ITNA, to provide that:

“(5) INTERNET ACCESS- The term “Internet access”--

“(A) means a service that enables users to connect to the Internet to access content, information, or other services offered over the Internet;

“(B) includes the purchase, use or sale of telecommunications by a provider of a service described in subparagraph (A) to the extent such telecommunications are purchased, used or sold--

“(i) to provide such service; or

“(ii) to otherwise enable users to access content, information or other services offered over the Internet;

“(C) includes services that are incidental to the provision of the service described in subparagraph (A) when furnished to users as part of such service, such as a home page, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity;

“(D) does not include voice, audio or video programming, or other products and services (except services described in subparagraph (A), (B), (C), or (E)) that utilize Internet protocol or any successor protocol and for which there is a charge, regardless of whether such charge is separately stated or aggregated with the charge for services described in subparagraph (A), (B), (C), or (E); and

“(E) includes a homepage, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and

personal electronic storage capacity, that are provided independently or not packaged with Internet access.'

Federal Preemption

The doctrine of preemption arises from the Supremacy Clause under the U.S. Constitution which gives federal law precedence over a conflicting state law. In addition, the Commerce Clause gives Congress the right to regulate interstate commerce.

State Sales and Use Tax

Utah Code Ann. §59-12-103(1)(b) provides for sales or use tax on “amounts paid” to a “telephone service provider” for “telecommunications service . . . that originates and terminates within the boundaries of this state.”

Municipal Taxes

In addition to state sales and use tax, municipalities have the authority to levy taxes on telecommunications under Utah Code Ann. §10-1-403.

Utah Code Ann. §10-1-405(1) provides for the Tax Commission to “enforce, and administer any municipal telecommunications license tax imposed under this part.”

Emergency Telephone Services

Utah Code Ann. §69-2-5 provides for a charge to pay for local 911 emergency telephone services. Sub-section (3)(d)(i)(D) adopts the definition of “telecommunications service” from Utah Code Ann. §§ 59-12-102 and 59-12-215, and subsection (3)(i)(i) provides for the Tax Commission to “enforce, and administer the charge imposed under this Subsection (3).” Utah Code Ann. §69-2-5.5 provides for a surcharge on each line of service to pay for poison control services. Utah Code Ann. §69-2-5.6 provides for an additional fee for statewide unified 911 emergency services.

H.B. 206

In the 2008 General Session, the Utah State Legislature passed a comprehensive sales tax bill. The major impact relevant to telecommunications was 1) change the term “telephone service” to “telecommunications service,” and 2) to expand the definition of telecommunications service. These changes will be effective beginning January 1, 2009.

Exemptions from Sales Tax

Utah Code Ann. §59-12-104(32) provides an exemption for “amounts paid for the purchase of telecommunications service for purposes of providing telecommunications service.”

Analysis

For each of the taxes at issue, Utah law provides for taxation to the extent not prohibited under ITFA, ITNA, and now ITFAAA (collectively, the “Acts”). For sales and use tax, the applicable Utah statutes specifically mention the Internet Tax Freedom Act. The Utah statutes governing municipal taxes provide for taxation only “to the extent [not] prohibited by federal law.” Utah Code Ann. § 10-1-410(2). Because all three of these Acts are federal law, Utah will not impose tax to the extent prohibited by these Acts. We observe that ITFAAA has no effect on the exclusion of E-911 services or Voice Over Internet Protocol (“VoIP”) provided in the previous amendment. With regard to the fees for emergency telephone service, for which the statutes at issue do not specifically look to federal law, the Tax Commission finds that the federal preemption that prevents taxation of services covered by ITFA as amended are specifically excluded from the moratorium.

Having concluded that Utah law allows taxation only to the extent allowed by the Acts, the Commission considers your questions in light of the Act and its amendments. Originally, the Act generally provided for a moratorium on taxes on Internet access. Although the Act did not allow taxes on Internet access, it made an exception for “telecommunication services,” which was excluded from the definition of “Internet access service.” § 1101(d)(3)(D).

The most recent amendment, in 2007 under ITFAAA, further defines Internet access to include “the purchase, use or sale of telecommunications by a provider of a service . . . to the extent such telecommunications are purchased, used or sold . . . to provide such service; or . . . to otherwise enable users to access content, information or other services offered over the Internet.” § 1105(5)(B) (emphasis added).

Furthermore Internet access includes telecommunications “services that are incidental to the provision of the service . . . when furnished to users as part of such service, such as a home page, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity.” § 1105(5)(C). Additional, similar or identical services include “a homepage, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity, that are provided independently or not packaged with Internet access.” § 1105(5)(E).

The new provisions allow telecommunications services to be included under Internet access only “to the extent” they enable “users to connect to the Internet to access content, information, or other services offered over the Internet . . .” § 1105(5)(A). We do not believe this to be a significant expansion of the earlier provision which excluded telecommunications from the definition of Internet access “except to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access.” § 1105(5) (as provided under ITNA).

Ruling

Before ruling, we will clarify a critical point. While we intend, for reasons explained below, to comply with the provisions of PL 110-108, we note that they may not be entirely relevant to your fact situation. As we understand, and so stated, your client sells telecommunications to ISP’s. To the extent those ISP’s are themselves selling telephone or telecommunications services to

their customers, such sales are already exempt under §59-12-104(32). Therefore, regardless of whether such sales constitute Internet access or not, they would already be exempt.

The Commission finds that the specific items relating to Internet access, as identified in the previous paragraphs, are not subject to state or local sales, gross receipts, or municipal fees under ITFAAA. An ISP that purchases such services, and then uses them to provide Internet access to its customers, is exempt. We find that the Acts, including PL 110-108 are applicable to your fact situation. Such services may also be exempt under §59-12-104(32), if they are purchased by the ISP's for the purpose of providing telecommunications service, even if that service is unrelated to Internet access.

The Acts appear to be a valid exercise of Congress' constitutional power to regulate interstate commerce. Accordingly, regardless of any specific statutory wording in the Utah statutes, the State's taxing power is preempted in the specific areas defined by the Acts under the Supremacy Clause of the U.S. Constitution.

We note that, the current act does nothing to alter the provision enacted under ITNA regarding the taxation of voice or similar service utilizing Internet Protocol, such as VoIP, nor does it alter the exclusion of E-911 services.

We must emphasize that we are only indicating our intent to comply with the provisions of ITFAAA, PL 110-108. We are not ruling that any of the specific services your client sells to ISP's will be exempt, other than to the extent such services meet the criteria set forth in ITFAAA. That is, should your client sell services to an ISP that are not used in conjunction with the provision of Internet access, they would not be covered under PL 110-108, and accordingly would not be exempt unless otherwise provided.

In addition, while PL 110-108 protects certain services that are packaged with Internet access, those same services may be subject to tax if they are de minimis or incidental to the primary transaction of providing Internet access. Accordingly, we read both amendments to the original Act to provide a condition that the federal preemption only applies "to the extent such telecommunications are purchased, used or sold . . . to provide such service; or . . . to otherwise enable users to access . . . the Internet." § 1105(5)(B). We believe that this condition may result in a partial exemption for telecommunications services if they are sold for more than one purpose. In such circumstances, we believe the burden would be on the provider to establish what part of the service was exempt under federal law. We reiterate that such a condition does not appear to be present under the conditions you have described.

In conclusion, the Tax Commission provides this opinion on the basis of the information you provided as well as any assumptions we have made. Our ruling is applicable only to the fact situation described in this letter, and should not be relied upon for other purposes.

For the Commission,

Marc B. Johnson

Commissioner

08-005