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Doc # 8721

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF REVENUE ADMINISTRATION

IN THE MATTER OF THE PETITION OF

AB, Inc.

FOR A DECLARATORY RULING

Pursuant to RSA 541-A:1, IV, and RSA 541-A:16, II(b) and administrative rule Rev 209.01 et seq., the Petitioner requests a declaratory ruling concerning New Hampshire's taxation of digital subscriber line technology and the applicability of the Internet Tax Nondiscrimination Act ("ITNA") (P.L. 108-435).

Pursuant to N.H. Code of Admin. Rules Rev 209.02, this declaratory ruling is issued to the Petitioner with respect to the particular circumstances and facts discussed herein and represents a holding of the department on those circumstances and facts for that petitioner only.

Facts Presented by the Petitioner

AB provides voice and data communications products and services to consumers and businesses at both the wholesale and retail end-user level. AB provides these services throughout the United States. AB is a regulated entity holding a regulatory license issued by the state commission charged with the responsibility of regulating the telecommunications industry.

AB's services include high-speed, or broadband, data communications, Internet access connectivity, voice over Internet protocol telephony, and a variety of related services. AB primarily uses DSL and DS-1, also referred to as T-1, technologies to deliver its services.

AB's DSL network utilizes existing 2-wire copper telephone wiring, DSL routing equipment, high-speed transmission circuits, and Internet encapsulation and routing protocols to provide its end-users with a high-speed connection to the Internet. By using these technologies, AB transmits a signal at 30 KHz to 100 KHZ. Since simple voice is transmitted at .3 KHz to 3.5 KHz, the two signals can occupy the same physical wire.

Internet routing equipment, such as Digital Subscriber Line Access Multi-Plexers and DSL access routers/bridges located at the end-user's location translate the signal and create a seamless connection to the Internet. AB purchases access to telecommunication lines and central office facilities from the traditional local telephone companies, which are often referred to as the incumbent local telephone companies, and then combines

these network elements with their own nationwide network facilities to provide its DSL services.

AB provides DSL services in two general forms. The first is referred to as DSL + IP or Broadband Internet Access. This service is a layer 3 data service that provides a DSL connection to the Internet at AB's point of presence. The DSL circuit connects to AB's point of presence. Layer 3 service allows the end user to connect directly to the Internet. The additional IP services include end-user authentication, authorization and accounting, IP address assignment and management, domain name service and IP routing and connectivity.

The second general category of service is DSL connectivity that AB provides to one of its wholesale partners. These partners are telecommunication carriers, ISP's, or other resellers. These resellers utilize AB's DSL and T-1 connections and add their own Internet access services.

Petitioner's Request

1. Will New Hampshire impose a telecommunications based transaction tax, such as a sales, use, excise, utility or gross receipts tax on the DSL services AB provides to its customers?
2. Will New Hampshire impose a telecommunications based transaction tax, such as a sales, use, excise, utility or gross receipts tax on the sale of Layer 2 communications services to a non-internet service provider who owns and operates its own point of presence ("pop") equipment?
3. Will New Hampshire impose a telecommunications based transaction tax, such as a sales, use, excise, utility or gross receipts tax on the services AB purchases in order to provide DSL services?

Revised Statutes Annotated (RSA) at Issue

The following New Hampshire statutes are relevant to the Petitioner's request for a declaratory ruling:

RSA 82-A:2

RSA 82-A:3

RSA 82-A:4

Federal Law at Issue

The following federal law is implicated in the Petitioner's request for a declaratory ruling:

Discussion

The State of New Hampshire imposes a seven percent Communications Services Tax (“CST”) on intrastate communications services and on interstate communications services and private communications services “furnished to a person in this state and purchased at retail from a retailer by such person” RSA 82-A:3 and RSA 82-A:4.¹

Communications services are defined as follows:

“Communications services” means services for transmitting, emitting, or receiving signs, signals, writing, images, sounds or intelligence of any nature by any electromagnetic system capable of 2-way communication and includes, without limitation, messages or information transmitted through use of local, toll and wide area telephone service; private line services and networks, whether leased, rented or owned; channel services; telegraph services; teletypewriter services; cable television; computer exchange services; mobile telecommunications services, facsimile services; specialized mobile radio; stationary 2-way radio; paging services; or any other transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite or similar facilities.

“Communications services” shall not include:

(a) Value added services in which computer processing applications are used to act on the form, content, code and protocol of the information for purposes other than transmission;

(b) Purchases of communications services by a communications services provider for use as a component part of the service provided by him to the ultimate retail consumer who originates or terminates the taxable end-to-end communications, including carrier access charges, right of access charges, charges for use of inter-company facilities, and all communications services resold in the subsequent provision of, used as a component of, or integrated into end-to-end communications services; or

(c) The one-way transmission of radio or television programming, by cable, broadcast, satellite, microwave or similar facility, which is made to available generally to any person able to receive such transmission, together with the interaction, if any, of such person required for the selection of such programming other than by use of the same facility by which such transmission was received.

¹ The State imposes a number of taxes which may affect an entity carrying on business activity in New Hampshire. See e.g., RSA 77-A (business profits tax); RSA 77-E (business enterprise tax); and RSA 78-B (real estate transfer tax), among others.

RSA 82-A:2, III (2006 Supp.)

The State has been collecting the CST since 1990 and falls under the grandfather provisions of the 1998 Internet Tax Freedom Act, as amended in 2001 and extended, modified and clarified by the Internet Tax Nondiscrimination Act (P.L. 108-435). The Department has adopted the following position with respect to the federal Internet Tax Nondiscrimination Act and its affect on New Hampshire:

The Act extended the moratorium for imposing tax on Internet Access originally put in place by the Internet Tax Freedom Act (P.L. 105-277, amended by P.L. 107-75), and also made clear that the definitions of Internet access and Internet access service include telecommunications services that are purchased, used or sold by a provider of Internet access to provide Internet access. The Internet Tax Nondiscrimination Act provided two grandfather provisions that allow states to continue to impose taxes up to November 1, 2005 or November 1, 2007, based on certain requirements. New Hampshire falls under the November 1, 2007 provision and will continue to impose communications services tax on telecommunications charges incurred by an Internet service provider to provide Internet access. The provision that grandfathers New Hampshire's taxation of telecommunications charges incurred by an Internet service provider to provide Internet access will expire on November 1, 2007.

TIR 2006-001, January 18, 2006 (attached).


Ruling

Based on the facts presented by the Petitioner and the statutory provisions and policies referenced above, the Department makes the following rulings:

1. The New Hampshire CST applies to DSL services AB provides to its end-user customers to the extent that those services meet the definition of "communications services" as defined in RSA 82-A:2, III.
2. Sales of Layer 2 communication services by AB to non-Internet service providers who own and operate their own point of presence equipment are not sales at retail subject to the CST. However, those service providers may have their own obligation under the CST. See, RSA 82-A:2, III, X, and XII.
3. The New Hampshire CST applies at the retail level. See, RSA 82-A:2, III (b). The purchase of communications services by a communications services provider for use as a component part of the services provided by the communication services provider to the ultimate retail consumer who originates or terminates the taxable end-to-end communication is not separately taxable. Therefore, purchases

by AB in order to provide DSL services are not taxable; except to the extent that AB is the end user. Id.

~~November 17, 2006~~


~~G. Philip Blatsos~~
Commissioner