

TIR 05-8: Taxation of Internet Access, Electronic Commerce and Telecommunications Services: Recent Federal Legislation

Sales and Use Tax

I. Introduction: This Technical Information Release (TIR) is being issued to explain the effect of recent federal legislation that extends the Internet Tax Freedom Act until November of 2007. The TIR also updates the lists of taxable telecommunications services and nontaxable services in TIR 99-2. This TIR revokes and replaces TIR 99-2 effective November 1, 2005.

II. History of the Federal Legislation: The Internet Tax Freedom Act (the Act), P.L.105-277, was initially passed by Congress and signed into law on October 21, 1998. The Act barred states and their political subdivisions from imposing taxes on Internet access charges, unless such tax was generally imposed and actually enforced prior to October 1, 1998, and barred multiple or discriminatory taxes on electronic commerce. The Act was initially in effect for three years, and subsequently extended another two years until November of 2003 by P.L. 107-75. The most recent legislation, P.L. 108-435, passed in December 2004, but effective November 1, 2003, extends the Act until November 1, 2007, with changes noted below. See 47 U.S.C. § 151, Ancillary Laws.

III. Definition of Internet Access: The term "Internet access service" is defined in the Act, as amended, as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include proprietary content, information, and other services as part of a package of services offered to consumers. The term "Internet access service" 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.*" Language in italics was added by the December, 2004 legislation.

IV. "Grandfather Provisions": State taxes on Internet access and telecommunications services purchased by Internet Service Providers (ISPs) are covered by various "grandfather provisions" in the Act. See § 1104 of the Act. Taxes that were generally imposed and actually enforced as of November 1, 2003, such as the imposition of the Massachusetts telecommunications services tax on telecommunications services purchased by Internet service providers, are not prohibited by the Act, as amended, until November 1, 2005.[\[1\]](#)

V. Multiple and Discriminatory Taxes on Electronic Commerce: The provisions prohibiting multiple and discriminatory taxes are unchanged. The Act defines "electronic commerce" as including transactions conducted over the Internet or through Internet access that comprise the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and including provision of Internet access.

A "discriminatory tax" tax is defined in the Act as a tax on electronic commerce which is not also "generally imposed and legally collectible" on similar products, services and goods sold by other means. The term also includes a tax on electronic commerce that is imposed at a different rate than other commerce or that imposes the duty to collect the tax on a different person. In addition, a tax will be considered discriminatory if it considers the ability to access a site on a remote seller's out-of-state computer server as a factor in determining nexus. Also, a tax will be considered discriminatory if it deems an Internet access provider to be the agent of an out-of-state vendor solely as a result of the service provider hosting the vendor's webpage and/or processing orders on behalf of the out-of-state vendor.

VI. Discussion: Historically, Massachusetts has not taxed Internet access. The Act, as amended, will prohibit Massachusetts from taxing telecommunications services purchased by Internet Service Providers to provide Internet access on and after November 1, 2005. The Massachusetts statutory definition of taxable telecommunication services is unchanged by the Act. Telecommunications services are "any transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiberoptics, laser, microwave, radio, satellite or similar facilities but not including cable television." G.L. c. 64H, § 1. An updated list of taxable telecommunications services and non-taxable services appear in the following section.

VII. Examples of Taxable Telecommunications and Non-Taxable and Exempt Services:

A. Taxable telecommunications services include, but are not limited to, the following:

1. Telecommunications services, such as telephone and telegraph services, that include transmission, conveyance, or routing of voice, data, or any other information or signals to a point, or between or among points. The term "telecommunications services" includes, without limitation, such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code or protocol of the content for purposes of transmission, conveyance or routing without regard to whether such service is referred to as voice over Internet protocol services or is classified by the Federal Communications Commission as enhanced or value added.
2. "800" service that allows a caller to dial a toll-free number without incurring a charge for the call. The service is typically marketed under the name "800", "855", "866", "877" and "888" toll-free calling, and any subsequent numbers designated by the Federal Communications Commission.
3. "900" service, which means an inbound toll telecommunications service purchased by a subscriber that allows the subscriber's customers to call in to the subscriber's prerecorded announcement or live service. "900 service" does not include the charge for: collection services provided by the seller of the telecommunications services to the subscriber, or service or product, such as an information service, sold by the subscriber to the subscriber's customer. The service is typically marketed under the name "900" service, and any subsequent numbers designated by the Federal Communications Commission.
4. Beeper, paging, and similar services, one-way or two-way.
5. Voice mail services that enable the customer to store, send or receive recorded messages.
6. Facsimile transmission services. See 830 CMR 64H.1.6(6).
7. Teleconferencing services, including a conference bridging service that links two or more participants of an audio or video conference call and may include the provision of a telephone number.
8. Vertical services that offer advanced calling features that allow customers to identify callers and to manage multiple calls and call connections, e.g., caller ID, call-forwarding and call-waiting services.
9. Mobile telecommunications services including activation and roaming charges. See 830 CMR 64H.1.6(4)(c).
10. Charges for the right to use any telecommunications service, whether or not the purchaser ultimately uses the service in a particular billing period. Such charges include, but are not limited to, fees structured as recurring monthly charges for telephone service, set-up or activation charges, access charges, and membership fees.
11. Charges for transmission of data, including encryption services, security authentication and data monitoring provided with data transmission services.
12. Prepaid calling cards and arrangements. See TIR 03-5.
13. Private communication services that entitle the customer to exclusive or priority use of a communications channel or group of channels between or among termination points, regardless of the manner in which the channel or channels are connected, and include switching capacity, extension lines, stations, and any other associated services that are provided in connection with the use of a channel or channels.

B. Non-taxable and exempt services include, but are not limited to, the following:

1. Internet access services, as defined in the Act.
2. Data processing services, including services that provide the customer or subscriber with additional, different, or restructured information, e.g., charges for automated teller machine (ATM) terminal driving services, electronic funds transfer services, or credit card or check verification services. See 830 CMR 64H.1.3(9). Changes to the format, code or protocol of the subscriber's content or information solely for the purposes of transmission are not a data processing service for purposes of this TIR. Telecommunications consumed in the provision of data processing services are taxable as provided in Section VIII. B.
3. Database or similar electronic information services available to multiple subscribers (e.g., services providing access to current stock market quotes or a database of legal opinions and statutes.)
4. An exemption of \$30 per month is applicable to certain residential telephone services. G.L. c. 64H, § 6(i). Only one \$30 exemption may be claimed per month by a residential customer at a service address. The telecommunications vendor shall prorate the exemption where an initial or final billing for services eligible for the residential exemption covers a period of more or less than one month. See also 830 CMR 64H.1.6(5).
5. Cable television service. Charges for the transmission of audio and video programming to retail customers through a community antenna television system regulated under chapter 166A of the General Laws or charges for substantially similar services, including retail sales of direct broadcast television and audio and video programming services delivered by a mobile telecommunications services provider, are not telecommunications services subject to tax. Provision of telephone, messaging, or other non-programming services over cables or other facilities that also carry cable television programming is not "cable television" for purposes of chapters 64H, § 1, and 64I, § 1.
6. Alarm monitoring services.
7. Sales or uses of telecommunications services that are otherwise exempt, e.g., sales to government agencies or charitable organizations. See G.L. c. 64H, § 6, and 64I, § 7.
8. Digital products [\[2\]](#) delivered electronically, including but not limited to music, video, reading materials or ring tones.
9. Installation or maintenance of wiring or equipment on a customer's premises. Sales or use tax on tangible personal property may apply.
10. Advertising, including but not limited to directory advertising.
11. Billing and collection services provided to third parties.

VIII. Application of Resale Rules to Telecommunications Services:

A. Telecommunications services purchased by a telecommunications vendor in connection with the provision of services subject to tax under G.L. c. 64H or G.L. c. 64I are sales for resale and therefore are not subject to tax. See 830 CMR 64H.1.6(6) and TIR 91-1.

B. Telecommunications services purchased by a database or electronic information services vendor or a vendor of data processing services, described in section VII. B., *supra*, and consumed in the provision of services which are not subject to tax under G.L. c. 64H or G.L. c. 64I are not purchased for resale and, except as provided below, are taxable when they are sold in or purchased for use in Massachusetts. This rule applies whether or not such a vendor separately states telecommunications charges to its customer. Telecommunications services purchased, used or sold by an Internet Service Provider to provide Internet access on or after November 1, 2005 are exempt as the result of the federal Act.

[1] §1104(b) of the Act requires that for the “grandfather” provision in that section to apply, a state must have issued a “public rule or other public proclamation made by the appropriate administrative agency” that the tax applied and the state generally collected such taxes. Massachusetts met these requirements in TIR 99-2, which provided that “Telecommunications services purchased by an Internet or on-line service provider ... are not purchased for resale and are taxable” Also see 830 CMR 64H.1.6(7)(b), as amended 3/28/03.

[2] Pending legislation, if passed, will provide that “any transfer of standardized computer software, including but not limited to electronic, telephonic, or similar transfer, shall also be deemed a transfer of tangible personal property.” If this legislation is passed, software delivered electronically will be subject to the 5% sales/use tax. Upon the effective date of this legislation, Section VII, B., 8 is amended to read: “Digital products *other than software* that are delivered electronically, including but not limited to music, video, reading materials or ring tones.”