

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-99(16)C
Corporation Tax
April 7, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C980825A

On August 25, 1998, a Petition for Advisory Opinion was received from New York Mercantile Exchange, One North End Avenue, New York, New York 10282.

The issue raised by Petitioner, New York Mercantile Exchange ("NYMEX"), is how to source its monthly subscription fees in determining its receipts factor for purposes of the business allocation percentage under Article 9-A of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

NYMEX is a commodity futures exchange which offers trading in futures and options for energy products (oil, gas, etc.), precious metals (gold, silver, etc.) and an index of European stocks. Due to the significant role that it plays in commodities trading, there is a significant demand for real-time access to its market data ("Market Data"). The Market Data is the exclusive property of NYMEX (in effect, Market Data constitutes trade secrets of NYMEX), though it is not property that is covered by either a patent or copyright. NYMEX will enter into license agreements with various Market Data vendors ("Vendors") for worldwide distribution of the Market Data.

The Vendors distribute the Market Data to various third party end users ("Subscribers"). Alternatively, a Vendor may employ an Agent/Distributor to sell the Market Data on the Vendor's behalf. The Vendors and Agent/Distributors must be licensed by NYMEX to sell, market, and/or disseminate the Market Data. The Vendors generally do not use the Market Data other than to provide it to Subscribers. In contrast, the Subscribers are only permitted to use the Market Data internally and may not distribute the Market Data to any third parties. The Vendors and Subscribers are located within and without New York State.

The preamble of the NYMEX/Vendor license agreement states the following:

WHEREAS, Vendor desires to obtain NYMEX's Market Data for the purpose of disseminating such Market Data to certain of its subscribers;

WHEREAS, NYMEX has the right and is willing to provide a limited, non-exclusive, nontransferable license to [Market Data] on the terms and conditions hereinafter set forth.

Section 2 of the licensing agreement states the following:

2. LICENSE OF [NYMEX] MARKET DATA

2.1 NYMEX hereby grants to Vendor a limited, worldwide, non-exclusive license to NYMEX's Market Data. NYMEX warrants and Vendor expressly agrees and acknowledges that NYMEX has exclusive valuable property rights in and to NYMEX's Market Data and that NYMEX's Market Data constitutes trade secrets of NYMEX that are not within the public domain.

The Vendors fall into two categories, (1) direct exchange access vendors ("DEAV"), and (2) indirect exchange access vendors ("IEAV"). A DEAV is one that has access to the Market Data through a direct physical connection to NYMEX's network. The DEAVs tend to be large information service providers, such as Reuters and Dow Jones, that offer Market Data along with other information packages. An IEAV is a vendor that obtains access to the Market Data through a DEAV. IEAVs, in comparison to the DEAVs, are typically smaller companies that provide specialized information access services (such as services focused exclusively on providing commodities data). The DEAVs and IEAVs usually transmit the Market Data to the Subscribers via electronic transmission.

The DEAV's physical connection with NYMEX's network is accomplished by NYMEX providing modems and other transmission equipment to the Vendor at the Vendor's place of business. The modems and transmission equipment at all times remain the property of NYMEX. The continued use of those items are conditioned upon the Vendor continuing to function as such with respect to NYMEX. In addition, NYMEX is responsible for the telecommunications link between its network and the DEAVs.

Each Vendor (whether it is a DEAV or an IEAV) remits a monthly subscription fee to NYMEX based on the number of terminals at Subscriber locations that provide access to NYMEX's Market Data. In addition to these charges, all Vendors are charged a monthly vendor administration fee. The DEAVs are also charged a network fee. NYMEX states that the additional charges are insignificant in comparison to the monthly subscription charges.

Discussion

Section 210.3(a)(2) of the Tax Law provides that, for purposes of computing the receipts factor of the business allocation percentage, receipts allocable to New York State include:

(A) sales of tangible personal property where shipments are made to points within New York;

(B) services performed within New York;

(C) rentals from property situated, and royalties from the use of patents or copyrights, within New York, and receipts from sales of rights for closed-circuit and cable television transmissions of an event taking place within the state as a result of the rendition of services by employees of the corporation, but only to the extent that

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such receipts are attributable to such transmission received or exhibited within New York;

(D) all other business receipts earned within New York.

In this case, Market Data is the exclusive property of NYMEX. NYMEX will enter into license agreements with the Vendors, DEAVs and IEAVs, for worldwide distribution of the Market Data. The Vendors generally do not use the Market Data other than to provide it to Subscribers via electronic transmission. The Subscribers are only permitted to use the Market Data internally and may not distribute it to any third parties. NYMEX is responsible for the telecommunications link between its network and a DEAV, and it provides modems and other transmission equipment to the DEAV, at the DEAV's place of business, for its physical connection with NYMEX's network. At all times such modems and other transmission equipment remain the property of NYMEX. The IEAVs obtain access to the Market data through a DEAV. A Vendor pays NYMEX a monthly subscription fee based on the number of terminals at Subscriber locations that provide access to NYMEX's Market Data.

For purposes of the receipts factor of the business allocation percentage under section 210.3(a)(2) of the Tax Law, the monthly subscription fees that NYMEX receives from the Vendors constitute "other business receipts". Such receipts are considered New York receipts to the extent that they are earned in New York. Neither Article 9-A of the Tax Law nor the Business Corporation Franchise Tax Regulations provide specific guidance on where receipts of the type at issue in this case are "earned". It is determined that NYMEX's receipts constituting the monthly subscription fees received from a Vendor are earned at the location where NYMEX delivers the Market Data to the Vendors. That is, the location of the modems and other transmission equipment that the Vendor uses to draw upon the Market Data obtained under the license arrangement with NYMEX.

Accordingly, the subscription fees paid by the Vendors, the DEAVs and the IEAVs, to NYMEX are properly sourced within and without New York on the basis of the location of modems and other transmission equipment that the Vendors use that draw upon the data obtained under a licensing agreement with NYMEX. That is, NYMEX's monthly subscription fees from a Vendor are earned in New York when the location of the modems and other transmission equipment that the Vendor uses to draw upon the Market Data is in New York State.

DATED: April 7, 1999

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.