

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(15)C
Corporation Tax
September 6, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C991118A

On November 18, 1999, a Petition for Advisory Opinion was received from Insurance Services Office, Inc., 7 World Trade Center, 15th Floor, New York, New York 10048.

The issue raised by Petitioner, Insurance Services Office, Inc., is how to allocate receipts from the licensing of databases and from the electronic transmission of circulars, forms, manuals and reports in computing the receipts factor of the business allocation percentage under section 210.3(a)(2) of Article 9-A of the Tax Law.

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

Petitioner is one of the property and casualty insurance industry's leading suppliers of statistical, actuarial, underwriting and claims information. Petitioner collects information from customers, and compiles and aggregates this information. This information becomes a part of Petitioner's databases, and the information so compiled is in a format that is unique and different from the information supplied. Further, a customer cannot retrieve its individual information after it is submitted since the information has been integrated with data from other customers to form a unique product that is the property of Petitioner. At any one time, Petitioner's computers store more than 5.5 billion records. For commercial insurance lines, that represents 70 -75 percent of the entire industry's premium volume.

Petitioner's business focuses on statistics, underwriting and claims information, actuarial analyses, policy language, and consulting and technical services in connection with its 18 lines of property and casualty insurance, as well as information about specific properties. Petitioner's products can be broken out into the following related segments: Personal and Commercial Insurance, Form Development, Risk Securitization, and Field Property Surveys. A customer can also purchase certain other information provided by third parties through Petitioner, although the sale of third party information is a very small percentage of Petitioner's revenues.

Personal and Commercial Insurance

Petitioner offers information reports and database access for both personal and commercial lines of insurance. A typical information report addresses advisory prospective loss costs which are the expected losses from underwriting a particular risk or class of risks, validated by an actuarial analysis of historic losses on similar risks or risk classes. Petitioner, by compiling its customers' information, develops advisory prospective loss costs, projections of average future claim payments

and loss adjustment expenses, for various lines of insurance and classifications of policyholders. These estimates provide a sound basis for customers to develop their own independent rates. Petitioner also compiles the data it gathers from customers into aggregate insurance statistics, available not only to customers but also to state regulators. This helps customers comply with state requirements to report data and provides regulators with statistics in a common format. Petitioner also serves as a licensed statistical-reporting agent for various states, enabling customers to submit their required reports of premium and loss data to state regulators through Petitioner.

Form Development and Advisory Programs

Petitioner develops standardized policy forms and endorsements for underwriting many insurance lines and classes. Petitioner modifies such forms in response to legislative, judicial, regulatory, sociological, demographic and market place changes. Standardized forms permit the aggregation of comparable statistics for analysis, which allows customers to resolve claims, set fair rates, and share risks with re-insurers.

Petitioner has employed its policy-language expertise to help customers address a variety of issues associated with the year-2000 (Y2K). In 1998, Petitioner obtained approval for its Y2K endorsements in almost all jurisdictions for the major lines of insurance. These endorsements can better define and manage loss exposure by excluding coverage, specify that coverage applies only in certain circumstances, and providing limited coverage.

Petitioner's Market Segments Program helps customers penetrate potentially profitable market segments without incurring internal development costs. The program is a series of advisory programs designed to meet the specialized coverage needs of particular classes of insurance. As an example, Petitioner developed "Auto Service Risks". Through the use of "wrap-around" endorsements and simplified rating procedures, the Auto Services Risk Program contains the coverage needed to tailor a policy to the needs of auto repair shops, service stations and garages. Regulators in 35 jurisdictions have approved the Auto Service Risks Program. Market segments that Petitioner will address in the future include supermarkets, family-style restaurants, and bed-and-breakfast establishments.

Risk Securitization

Petitioner is establishing itself as a vital source of information and analysis in the emerging field of risk securitization. In 1998, Petitioner experts developed a methodology that determines for each customer, based on its unique characteristics, the most cost-effective mix of traditional catastrophe financing, including reinsurance, and securitization vehicles such as catastrophe bonds, contingent surplus notes, catastrophe options, and catastrophe equity puts.

Data Management Services

Petitioner also offers various reports and database information providing financial analysis, actuarial information, special market analysis and actuarial consulting.

Field Property Surveys

Petitioner offers a variety of underwriting, classification, and loss cost information about individual locations. Petitioner's field staff surveys commercial and personal properties to support customers' underwriting. Its specific property products help customers evaluate the quality of a risk and identify ways to improve a risk. Petitioner's database contains underwriting information on more than 2.2 million commercial properties throughout the country. Petitioner also conducts on-site surveys of individual properties, develops prospective loss costs for specific large commercial properties, and reports on properties' risk characteristics.

Databases

Petitioner owns a number of databases, which provide information for both the personal and commercial lines of insurance. These databases are licensed to Petitioner's customers and are accessed either through the Internet or through direct access to Petitioner's servers. All information contained within these databases is copyrighted by Petitioner and may only be used under terms and conditions that clearly indicate the information is copyrighted by Petitioner. By using the databases, a customer consents that any information obtained is proprietary to Petitioner, unless stated otherwise.

As stated above, there are a number of databases available to customers of Petitioner. For purposes of this ruling, we will describe the principle databases. However, this discussion of the databases is not exhaustive, as there are numerous databases, and databases that are in development. All databases contain proprietary, copyrighted information.

Actuarial Database

Petitioner owns and licenses to its customers a database of information derived from actuarial review and analysis. This database, which is available for both commercial and personal lines of insurance, allows the customer to access Petitioner's actuarial data and extend or adapt the analyses or perform the customer's own original analyses on the data. This also allows a customer to access actuarial circulars. This database is available over the Internet.

Lines of Insurance Databases

Petitioner owns and licenses to its customers databases which provide statistical information for personal and commercial lines of insurance including but not limited to automobile, personal property, homeowners, earthquake, inland marine, and personal theft. These databases provide information relating to severity and frequency of incidents as well as pure premium information.

Underwriting Determinants Database

Petitioner and an unrelated third party jointly developed another database available to customers. This database allows the customer to enter a street address and the database provides all the key underwriting variables necessary to determine whether to write a particular risk and if so, what level of premium to charge. The customer will also be able to access detailed hazard information. This database provides information on public fire protection, auto, wind, crime, brush fire and earthquake risks.

Each of the databases is populated with information that is proprietary to and copyrighted by Petitioner. The license of the database to the customer gives the customer an intangible right to access the information.

Electronic Transmission of Forms, Circulars, Manuals

Petitioner produces standardized policy forms, endorsements, circulars, manuals and reports for many insurance lines and classes. Petitioner modifies such forms in response to legislative, judicial, regulatory, sociological, demographic, and market place changes. Standardized forms permit the aggregation of comparable statistics for analysis, which helps customers resolve claims, set fair rates, and share risks with reinsurers. A customer must be licensed for the relevant line of insurance in order to obtain such policy language or data.

These products are delivered to the customer in a variety of formats namely, Internet, direct access to Petitioner server, CD-ROM or hard copy. This request for Advisory Opinion does not apply to revenues derived from the delivery of these products via CD-ROM or hard copy.

License Agreement

All information, however obtained, including information obtained by electronic transmission or by the Internet, is copyrighted information. For example, the license agreement which applies to the access of the databases, forms, manuals, circulars and reports via the Internet specifically provides that all of the information is proprietary to Petitioner and copyrighted by Petitioner. The license agreement further provides that the reproduction of any materials by the customer must

include a statement that the information is copyrighted by Petitioner. All of the product names are registered trademarks or service marks of Petitioner.

Additional Information

Through telephone calls on January 7, 2000, and April 18, 2000, Petitioner's representative provided the following additional information. Petitioner's receipts from its customers consist of an annual fixed fee and a variable usage based fee that is based on the number of times a database is accessed and the number of items that are electronically transmitted (downloaded). When Petitioner licenses a customer, the customer has access only to the databases and other material related to the type of insurance that the customer is licensed to write. The customer has access through a user name and identification number. Petitioner's customer may allow an independent agent of the customer to access the databases and other material using the Petitioner's access user name and identification number. The Petitioner has a mailing address for each customer, but does not know where the customer actually accesses the databases or downloads material, or whether an agent of the customer is the person accessing the databases and other material. With respect to the forms, circulars, manuals etc., a customer would download each item once. For instance, a customer would download into its computer system a model policy form. The customer could use the form as downloaded to write its policies, or the customer could customize the form for its own needs and use the customized version to write its policies.

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 such receipts are attributable to such transmission received or exhibited within New York;
- (D) all other business receipts earned within New York.

TSB-A-00(15)C
Corporation Tax
September 6, 2000

In New York Mercantile Exchange, Adv Op Comm T&F, April 7, 1999, TSB-A-99(16)C (NYMEX), the petitioner's Market Data was its exclusive property, and petitioner entered into license agreements with Vendors, DEAVs and IEAVs, for worldwide distribution of the Market Data. The Vendors generally did not use the Market Data other than to provide it to Subscribers via electronic transmission. The Subscribers were only permitted to use the Market Data internally and could not distribute it to any third parties. The petitioner was responsible for the telecommunications link between its network and a DEAV, and it provided modems and other transmission equipment to the DEAV, at the DEAV's place of business, for its physical connection with the petitioner's network. At all times such modems and other transmission equipment remained the property of the petitioner. The IEAVs obtained access to the Market data through a DEAV. A Vendor paid the petitioner a monthly subscription fee based on the number of terminals at Subscriber locations that provided access to the petitioner's Market Data. The advisory opinion held that the monthly subscription fees that the petitioner received from the Vendors constituted "other business receipts" and were earned at the location where the petitioner delivered the Market Data to the Vendors. That is, they were earned at the location of the modems and other transmission equipment that the Vendor used to draw upon the Market Data obtained under the license arrangement with the petitioner. Accordingly, the petitioner's monthly subscription fees from a Vendor were earned in New York when the location of the modems and other transmission equipment that the Vendor used to draw upon the Market Data was in New York State.

In this case, the information contained in the databases and licensed to customers of Petitioner is all copyrighted material. Customers that subscribe to the databases are paying Petitioner for the intangible right to access and obtain copyrighted data. The information in the databases is proprietary to Petitioner and bears the Petitioner's copyright. In addition, the circulars, forms, manuals and reports that are transmitted electronically to the customers of Petitioner are also copyrighted by Petitioner. The license agreement signed by customers of Petitioner's Internet service clearly states that all information belongs to Petitioner, is proprietary to Petitioner, is copyrighted by Petitioner and any reproductions must acknowledge the copyright by Petitioner.

Although not dictating the conclusion, NYMEX is instructive. Similar to the subscription fees in NYMEX, the revenues for the access to Petitioner's copyrighted material constitute "other business receipts" for purposes of the receipts factor of the business allocation percentage under section 210.3(a)(2) of the Tax Law. 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 concluded that the annual fee, and the variable fee based on the number of times that a database is accessed and the number of items electronically transmitted that Petitioner receives from its customers for access to the copyrighted databases and the copyrighted forms, circulars, manuals and reports are properly sourced within and without New York on the basis of the location of modems and other transmission equipment that the customer uses to draw upon the

TSB-A-00(15)C
Corporation Tax
September 6, 2000

material obtained under the licensing agreement with Petitioner. That is, Petitioner's fees from a customer under the licensing agreement are earned in New York when the location of the modems and other transmission equipment that the customer or its agent uses to draw upon Petitioner's copyrighted databases and the copyrighted forms, circulars, manuals and reports is in New York State. In instances where information is not available to determine the location of the modems and other transmission equipment that the customer uses to draw upon Petitioner's databases and other material under the licensing arrangement with Petitioner, such location may be presumed to be at the customer's mailing address in the records of Petitioner.

DATED: September 6, 2000

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

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