

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

TSB-A-02(3)C  
Corporation Tax  
April 18, 2002

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C010110A

On January 10, 2001, a Petition for Advisory Opinion was received from Deloitte & Touche LLP, 1633 Broadway, 38<sup>th</sup> Floor, New York, New York 10019.

The issue raised by Petitioner, Deloitte & Touche LLP, is how to determine the source of receipts from Internet sales of Merchant Certificates, Taxpayer X Certificates, and Gift Checks for purposes of determining the numerator of the receipts factor of the business allocation percentage computed 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.

Taxpayer X is an online marketer and transaction processor of gift certificates, gift cards and other related products. Taxpayer X markets products over the Internet. Taxpayer X's product line includes various types of proprietary gift certificates ("Taxpayer X Certificates"), gift certificates of unrelated retailers, restaurants and providers of travel related services ("Merchant Certificates"), and Gift Checks issued by a certain financial services institution. Gift certificates may be either physical, represented by a physical certificate or card, or digital, where value is presented solely by a digital code that is delivered electronically via Taxpayer X's Web site, an online service that is open 24 hours a day, seven days a week.

The core of Taxpayer X's business involves the sale of Merchant Certificates. Taxpayer X purchases these certificates from participating merchants at a discount. An inventory sufficient to meet two to three weeks' worth of sales is maintained by Taxpayer X. In a typical transaction involving these certificates, a customer accesses Taxpayer X's Web site to place an order for a Merchant Certificate. The Merchant Certificate is then shipped via common carrier or other expedited courier service to the destination selected by the customer. The Merchant Certificate is attractively packaged and is usually sent with a personalized card and message. For an additional fee, the Merchant Certificate may be packaged with an elegant box and a satin ribbon. The Merchant Certificate is then presented by the recipient, who is usually a person other than Taxpayer X's customer, to the merchant for redemption.

Where a physical Merchant Certificate is purchased and physically shipped, Taxpayer X has a record of the credit card information, including the address, for the purchaser. All transactions subsequent to the shipping of the Certificate are between the merchant and the recipient. Taxpayer X has no control over the redemption policies, refunds and exchanges of Merchant Certificates. In short, once purchased, the Merchant Certificates generally cannot be returned to Taxpayer X for exchange or refund.

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Taxpayer X's merchant product line also includes digital (e-mailable) Merchant Certificates ("Digital Merchant Certificates") that are redeemable at the merchant's Web site and/or the merchant's brick and mortar retail location. Taxpayer X maintains an inventory of digital codes purchased from the merchant which represent Digital Merchant Certificates. When an order for a digital certificate is received, Taxpayer X sends, via e-mail, a digital code representing the gift certificate to the recipient. Taxpayer X has a record of the purchaser's e-mail address, street address and credit card information, and the e-mail address of the recipient (if different from the purchaser).

Taxpayer X also sells its own Taxpayer X Certificates that may be either physical or digital and may only be redeemed at Taxpayer X's Web site, or by phone, for the Merchant Certificates described above. As with Merchant Certificates, physical Taxpayer X Certificates are attractively packaged and usually include a personalized card and message. Each physical and digital certificate is controlled and tracked by an identifying code that is unique for each certificate and contains all the relevant information relative to that particular certificate.

To date, physical gift certificates, both Merchant Certificates and Taxpayer X Certificates, comprise the majority of Taxpayer X's sales.

In addition to the above, Taxpayer X sells Gift Checks of a certain financial services institution. Taxpayer X purchases and maintains an inventory of Gift Checks, then resells the Gift Checks on its Web site. As with Merchant Certificates, Taxpayer X has no control over the contractual terms of Gift Checks.

Petitioner states that Taxpayer X has a record of the credit card billing address of all customers.

## **Discussion**

Section 208.11 of the Tax Law provides that the term "tangible personal property" means corporeal personal property, such as machinery, tools, implements, goods, wares and merchandise, and does not mean money, deposits in banks, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt."

The term "gift certificate" means a certified statement entitling the recipient to select merchandise in the amount stated thereon. (Webster's Third New International Dictionary 956 (unabridged 1961)). In this case, the underlying value of a Merchant Certificate, Taxpayer X Certificate or Gift Check represents the intangible right to redeem it for property or services at some future time. As such, a Merchant Certificate, Taxpayer X Certificate or Gift Check is not considered to be tangible personal property under section 208.11 of the Tax Law.

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Section 210.3(a)(2) of the Tax Law provides that the receipts factor of the business allocation percentage is determined by ascertaining the percentage which the receipts of the taxpayer, arising during such period from sales of its tangible personal property where shipments are made to points within New York State, services performed within New York State, rentals from property situated, and royalties from the use of patents or copyrights, within New York State, receipts from the sales of rights for closed-circuit and cable television transmissions of an event taking place within New York State as a result of the rendition of services by employees of the corporation, as athletes, entertainers or performing artists, and all other business receipts earned within New York State, bear to the total amount of the taxpayer's receipts, arising during such period from all sales of its tangible personal property, services, rentals, royalties, receipts from the sales of rights for closed-circuit and cable television transmissions and all other business transactions, whether within or without New York State.

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 direct and indirect Vendors 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 placed its own modems and other transmission equipment at a direct Vendor's place of business for the Vendor's telecommunications link with the petitioner's network. At all times, such equipment remained the property of the petitioner. The indirect Vendors obtained access to the Market data through a direct Vendor. 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" for purposes of the receipts factor, 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. When the location of such modems and other transmission equipment was in New York State the subscription fees were earned in New York.

The conclusion in NYMEX, supra was instructive, in reaching the conclusion in Insurance Services Office, Inc., Adv Op Comm T&F, September 6, 2000, TSB-A-00(15)C. In Insurance Services, the petitioner's customers subscribed to its Internet service to access petitioner's databases. The customers were paying the petitioner for the intangible right to access and obtain copyrighted data. Customers that subscribed to the databases signed a license agreement to that effect. Similar to NYMEX, supra it was held that the revenues for access to the petitioner's copyrighted material constituted "other business receipts" for purposes of the receipts factor. It was concluded that the fees that the petitioner received from its customers for access to the copyrighted databases were properly sourced within and without New York on the basis of the location of modems and other transmission equipment that the customer used to draw upon the material obtained under the

licensing agreement with the petitioner. That is, the petitioner's fees from a customer under the licensing agreement were earned in New York when the location of the modems and other transmission equipment that the customer or its agent used to draw upon the petitioner's copyrighted databases was in New York State. In instances where information was not available to determine the location of the modems and other transmission equipment that the customer used to draw upon the petitioner's databases, such location was presumed to be at the customer's mailing address, as indicated in the records of the petitioner.

In this case, Taxpayer X's sale of the Merchant Certificates, Taxpayer X Certificates and the Gift Checks, whether delivered physically or electronically, does not constitute the sale of tangible personal property. The underlying value of a Merchant Certificate, Taxpayer X Certificate or Gift Check represents the intangible right to redeem it for property or services at some future time. Further, the receipts from such sales do not represent receipts from services, rentals, royalties, sales of rights for closed-circuit and cable television transmissions. Therefore, the receipts from Taxpayer X's sale of the gift certificates and Gift Checks are characterized as "other business receipts" under section 210.3(a)(2) of the Tax Law.

Pursuant to section 210.3(a)(2) of the Tax Law and section 4-4.6 of the Business Corporation Franchise Tax Regulations (Article 9-A Regulations) all business receipts earned by the taxpayer in New York State are allocated to New York State. Section 4-4.6 of the Article 9-A Regulations provides that "[r]eceipts from the sale of intangible personal property included in business capital, held by the taxpayer as a dealer for sale to customers in the regular course of its business, are business receipts and are allocated to New York State if the sales were made in New York State or through a New York office of the taxpayer."

The term "dealer" means, in a popular sense, one who buys to sell; not one who buys to keep, or makes to sell. (Black's Law Dictionary 359, (5<sup>th</sup> Edition 1978))

In this case, Taxpayer X's sale of Merchant Certificates, Taxpayer X Certificates and Gift Checks are made through its Web site on the Internet. Such sales are not made through a New York office of Taxpayer X. Therefore, pursuant to section 210.3(a)(2) of the Tax Law and section 4-4.6 of the Article 9-A Regulations, the receipts from such sales are earned in New York State when the sales are made in New York State.

Taxpayer X's business activities are substantially similar to NYMEX, supra, and Insurance Services, supra, in that the receipts from the sale of the Merchant Certificates, Taxpayer X Certificates and Gift Checks are derived from the activity of the customer that accesses the Internet to purchase Taxpayer X's products from its Web site.

Accordingly, for purposes of determining the numerator of the receipts factor, Taxpayer X's sales of such gift certificates and Gift Checks are made in New York State when the location where

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the customer accesses Taxpayer X's Web site is located in New York State. However, from the facts submitted, it appears that Taxpayer X may not always know where its customers access the Web site. In those instances where information is not available for Taxpayer X to determine the location where the customer accesses the Web site, such location may be presumed to be at the customer's billing address, as indicated in the records of Taxpayer X.

Note, this Advisory Opinion does not address the treatment of Taxpayer X's receipts representing the additional fees paid by customers for special packaging of Merchant Certificates, Taxpayer X Certificates and Gift Checks that are physically shipped.

DATED: April 18, 2002

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