

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

TSB-A-09(8)C
Corporation Tax
June 16, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C070706A

On July 6, 2007, a Petition for Advisory Opinion was received from SmarTax LLC, 272 US Highway 206, Suite 203, Flanders, NJ 07836.

The issues raised by Petitioner, SmarTax LLC, are the following:

1. Whether receipts from monthly fees received from Web site advertising services are sourced to New York for purposes of the receipts factor of the business allocation percentage.
2. Whether receipts from fees from a risk participation program offered to customers are sourced to New York for purposes of the receipts factor of the business allocation percentage.

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

Petitioner's client, Company A, who is in a service industry, is currently located and doing business in New York State. Company A is also currently located and doing business in other states. Company A receives three types of revenue from divisional operations: revenue sharing from affiliates, revenue from Web site advertising, and revenue from a "risk participation program." Petitioner is not requesting a ruling regarding the sourcing of the receipts from revenue sharing from affiliates in this Advisory Opinion.

Company A has agreements in place whereby monthly fees are received from physicians located in various states for maintaining listings for the physicians on Company A's Web site. Company A maintains the Web site out of its New York State office. The Web site lists detailed information about who the physicians are, where they are located, and what services and activities they perform. A prospective end-user customer may access the Web site from any state and can select and be put into contact with any of the physicians (located in various states) listed on the Web site. Company A does not receive any commissions from such referrals.

Under the risk participation program, Company A also receives fees from customers for arranging for the provision of a medical service to be rendered by a third party physician. Many, but not all, of the physicians who participate in this program advertise on Company A's website. Company A charges its customers for the service at a higher rate than what would be charged to have the medical service performed once, but less than what would be charged to have the service performed several times.

The medical service is of a nature that it may need to be performed several times to achieve success. In the event the service provided does not produce a successful result on the first attempt, the customer may participate again at no extra cost to attempt to achieve success, or may receive a partial refund. The greater price is paid by the customer in exchange for “risk participation” which is similar to the sale of an insurance policy or a service guarantee or warranty to a customer, in that it represents a fee for a service and to assure a particular outcome, whether the service is performed once or several times.

Company A refers the customer to a physician to perform the medical service. Company A contracts with the physician to perform the service and pays the physician for the services performed. If a customer needs a medical service to be performed more than once, Company A pays the physician for each service that is subsequently performed.

Applicable law and regulations

Section 210.3(a) of the Tax Law, provides, in relevant part:

The portion of the entire net income of a taxpayer to be allocated within the state shall be determined as follows:

(a) multiply its business income by a business allocation percentage to be determined by....

* * *

(2) ascertaining the percentage which the receipts of the taxpayer, computed on the cash or accrual basis according to the method of accounting used in the computation of its entire net income, arising during such period from

(A) sales of its tangible personal property where shipments are made to points within this state,

(B) services performed within the state, provided, however, that (i) in the case of a taxpayer engaged in the business of publishing newspapers or periodicals, receipts arising from sales of advertising contained in such newspapers and periodicals shall be deemed to arise from services performed within the state to the extent that such newspapers and periodicals are delivered to points within the state,...

(C) rentals from property situated, and royalties from the use of patents or copyrights, within the state...and

(D) all other business receipts earned within the state, bear to the total amount of the taxpayer’s receipts, similarly computed, 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 the state;

* * *

(10)(A) Notwithstanding the foregoing provisions of this paragraph, other than subparagraphs seven and eight of this paragraph, the business allocation percentage shall be computed in the manner set forth in this subparagraph.

* * *

(ii) for taxable years beginning on or after January first, two thousand seven, the business allocation percentage shall be the percentage provided for in subparagraph two of this paragraph.

Section 4-4.3 of the Article 9-A Regulations provides, in part:

(a) The receipts from services performed in New York State are allocable to New York State. All receipts from such services are allocated to New York State, whether the services were performed by employees, agents, or subcontractors of the taxpayer, or by any other persons. It is immaterial where such receipts are payable or where they are actually received.

* * *

(f)(1) Where a lump sum is received by the taxpayer in payment of services performed within and without New York State, the portion of the sum attributable to services performed within New York State is determined on the basis of the relative values of, or amounts of time spent in performance of, such services within and without New York State, or by some other reasonable method. Full details must be submitted with the taxpayer's report.

(2) The broadcasting of radio and television programs and commercial messages by way of radio or television antennae pursuant to a license granted by the Federal Communications Commission is deemed to be a service. When a lump sum is received for such service, that lump sum must be allocated to New York State and another state or states according to the number of listeners or viewers in each state.

(3) The publishing of advertising in newspapers and periodicals is deemed to be a service. Receipts derived from such service shall be allocated to New York State based on the ratio of the New York state circulation of the newspaper or periodical containing such advertising to the total circulation of such newspaper or periodical.

Opinion

Issue 1

Tax Law § 210.3(a)(2)(B) requires that taxpayers include in the numerator of their business allocation percentage their income from “services performed within the state,” and provides that, for publishers of newspapers and periodicals, “receipts arising from sales of advertising...shall be deemed to arise from services performed within the state to the extent that such newspapers and periodicals are delivered to points within the state.” A Tax Department regulation interprets this to mean that publishers’ New York receipts from sales of advertising should be “based on the ratio of the New York circulation of the newspaper or periodical containing such advertising to the total circulation of such newspaper or periodical.” 20 NYCRR 4-4.3(d)(3). The same regulation treats radio and television advertising similarly, mandating that a lump sum received for the service of broadcasting a commercial message “must be allocated to New York State and another state or states according to the number of listeners and viewers in each state.” 20 NYCRR 4-4.3(d)(2). Subsequent departmental guidance, issued in the absence of any statute or regulation governing the allocation to New York of revenue from advertising via cable programming, likewise concluded, by analogy to this regulation, that a cable television corporation “should base the allocation of advertising revenue on the ratio of its New York subscribers to the number of cable programming subscribers everywhere.” New York Guidance Memo NYT-G-07(1). See also *WTAS LLC*, Adv Op Comm T&F, March 9, 2009, TSB-A-09(5)C, that determined that a Web site owner/operator should base the allocation of Internet advertising revenues on the ratio of its New York subscribers to the number of subscribers everywhere.

The governing principle is to base the allocation, to the extent possible, on the number of people who view or read the advertisement in New York. Company A’s sales of advertising that appears on its Web site differ in no pertinent way from the sales of advertising by publishers, broadcasters, and cable providers. See *WTAS LLC*, *supra*. Accordingly, Company A should base the allocation of its Internet advertising revenue on the ratio of persons who view or read Company A’s advertisements in New York to the number of persons who view or read Company A’s advertisements everywhere. If Company A does not have any way of knowing where a prospective customer is when (s)he views or reads an advertisement on the Web site, Company A may use some reasonable method to estimate the ratio described in the preceding sentence, subject to the approval of the Tax Department.

Issue 2

Company A’s receipts from its “risk participation program” are receipts for services performed for its customers. While the goal of the performance of these services is that a successful medical outcome will eventually be achieved, the customers are entering into these arrangements with Company A to have a medical service performed. Company A is receiving payments for the performance of these services, regardless of the outcome.

Section 4-4.3(a) of the Article 9-A Regulations requires that receipts from services performed in New York State are allocated to New York State, whether the services are performed by employees, agents or subcontractors of the taxpayer, or any other persons, in New York State.

In *Christopher L. Doyle, Esq.*, Adv Op Comm T&F, July 26, 1995, TSB-A-95(11)C, the taxpayer provided diversified marketing services to its clients. The taxpayer developed a marketing program and if a customer accepted the program, the taxpayer would execute the program by overseeing and scheduling the various tasks required to be performed by subcontractors. The opinion held that the taxpayer's receipts from these marketing services are receipts for services performed for its clients and the taxpayer is required to include in the numerator of the receipts factor, the receipts for services performed in New York State by its employees, if any, and by the subcontractors the taxpayer contracts with to perform the services.

In this instance, Company A is not directly performing the medical service that the customers are receiving; Company A contracts with a third party physician to perform the service. Pursuant to section 4-4.3(a) of the Article 9-A Regulations and *Christopher L. Doyle, supra*, if an agent, contractor, or other person in New York State performs services for a taxpayer within New York State, the taxpayer must allocate the receipts from those services within New York State. Accordingly, Company A must include in the numerator of the receipts factor of the business allocation percentage the receipts from medical services performed by third party physicians for Company A pursuant to the risk participation program, when such services are performed within New York State.

DATED: June 16, 2009

/s/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.