

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

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SalesTax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090616A

Petitioner [REDACTED] asks whether its fees for: (1) subscriptions for the use of its professional networking site; (2) sales of additional in-network e-mail services; (3) employer posting of job listings and conduct of on-line virtual job fairs; and (4) online surveys of its members are subject to State and local sales and use taxes.

We conclude that Petitioner's sales of subscriptions to its professional networking site are receipts from the sale of an information service subject to the taxes imposed pursuant to sections 1105(c)(1) or 1105(c)(9) of the Tax Law. Petitioner's in-network e-mail services are an integral part of Petitioner's information services and are subject to sales tax under sections 1105(c)(1) and 1105(c)(9). Its charges for advertising jobs and for employer participation in on-line virtual job fairs constitute receipts from the sale of advertising services excluded from sales tax pursuant to section 1105(c)(1) of the Tax Law. Some of Petitioner's receipts in conjunction with customer surveys of Petitioner's members constitute receipts from the sale of information that is personal or individual in nature and that is not or may not be substantially incorporated in reports furnished others, thus qualifying for the exclusion from the sales tax on information service under section 1105(c)(1) of the Tax Law. However, Petitioner's receipts from the use of its database information by employers, recruiters, investment professionals, etc. to provide targeted mailings to its members constitute receipts from sales of an information service which is subject to sales tax.

Facts

Petitioner owns and operates an Internet networking website ("the Website") for professionals, which enables members to find, be introduced to, and collaborate with other professionals who can help them accomplish their professional and business goals.

Website members manage their public profile, which can be viewed by other members. Members may use the website to find and be introduced to potential clients, service providers, and subject experts who are recommended by other members; create and collaborate on projects, gather data, and solve problems; search for business opportunities and find potential business partners; participate in discussions with professionals in private group settings; discover inside connections that can help with job searches and closing business deals; and post and distribute job listings.

On joining the Website, each member creates a professional profile that includes information about the member's education, work experience (such as job titles and length of service), and professional affiliations.

Members use the Website features and functionality to build their professional "network." These features include an electronic address book upload, where members create professional connections by uploading contacts from their address book software, such as [REDACTED], [REDACTED], and

██████████ and sending in-network email invitations to individuals who are not already in their professional network.

Members can actively search their professional network for individuals who match specific criteria and invite those individuals to join their network. If the invitee accepts, the two members will be directly connected on the network. Directly connected members can email each other by in-network email and will, depending on profile option preferences, be able to view each other's full profiles and first degree connections. Members can also send invitations to second degree connections, which are individuals who are in the network of a mutual member.

Members can connect to third degree connections, using a tool called an Introduction. Members who want to connect with an individual on the contact list of one of their direct connections can send an Introduction request to their direct connection asking to forward their request for Introduction. Members who are not paid subscribers can send up to five introductions per month.

Members can also expand their network by sending invitations to members found by a name search of Petitioner's Website. Petitioner will forward the invitation if the member can satisfy an automated request to verify that he or she knows the individual as a colleague, classmate, or business partner. If the member claims to be acquainted as a "friend "or "other," Petitioner requests the e-mail address of the invitee before forwarding the invitation. The recipient of the e-mail invitation has the option to accept, reject, or archive the request for a later decision.

A member may also allow his or her network to be expanded from outside Petitioner's Website via Internet search engines such as ██████████, which allows non-members to access a version of the member's "public" profile page. Members can adjust the privacy setting to limit or remove their public profile. The member's public profile does not list the member's connections.

Members have free access to a number of software application tools on Petitioner's Website to enhance their networking experience.

Premium Subscriptions

Over the past few years, Petitioner has expanded beyond its core no-charge services to offer premium services, which members can purchase to enjoy a more enhanced experience. Premium level subscribers include recruiters, investment professionals, management consultants, analysts, market researchers, and individuals who want to use the network to seek business opportunities, find a job, or look for job candidates. For a monthly subscription fee, premium service subscribers receive the following enhancements to the basic membership:

- Direct access to member profiles beyond the "second degree." Subscribers can perform searches of member profiles for specific attributes to build a unique list of connections or potential job candidates which the subscriber can contact via in-network email.
- Reference search capability. Premium subscribers can perform a search of member profiles to identify potential personal references for candidates.
- Ability to send a certain number of in-network email messages to any member, not just first degree connections.
- Increased amount of Introductions.
- Access to the Website's premium communication network, which is limited to subscribers and opens the subscriber's range of contacts beyond the first and second degree without using the

subscriber's Introductions. In contrast, members who are not paid subscribers can only contact and communicate via Company's email with their direct connections.

In-network e-mail

In addition to a certain amount of in-network e-mails included with both basic and premium membership, members can opt to purchase the ability to send additional in-network emails, for a separately stated fee. Free members, who are limited to sending 5 in-network e-mails per month, may purchase the ability to send additional in-network e-mails without having to upgrade to paid subscriber status. The in-network e-mail process allows members who are not directly related to directly contact other members.

Virtual job fairs

Petitioner charges a fee for recruiters to participate in or sponsor virtual job fairs on its Website. A virtual job fair is the electronic equivalent of a traditional job fair, where applicants can gather information about sponsoring companies, submit their resumes, and chat live with recruiters.

Job postings

Both free and premium members can see jobs posted on Petitioner's Website (which are identified in search results as "exclusive" job listings), and other jobs posted on the Internet. Regardless of the source of the job posting (Website or other Internet employment postings), Petitioner will display to the member persons within the member's network who have connections to the posting employer. Members can use their network to contact persons at the employer to obtain more information, answer questions, or introduce the member to the employer's hiring manager. Only Petitioner's members can respond to job postings on Petitioner's Website, but a member does not have to be a paid subscriber in order to respond. When a member applies for a job on the Website, the member's profile, along with other information provided by the member in the on-line job application, are forwarded to the employer. Petitioner's members are encouraged to forward job postings that they think might be of interest to one of their network connections.

Online surveys

Petitioner offers customized online business surveys that are targeted to members by job title, seniority, function, age, country, company size, and other variables. Petitioner offers these surveys to third-party customers who are not members of Petitioner's Website. Petitioner acts as the intermediary between its targeted members and the customer. The customer designs the survey and gives Petitioner a profile of the characteristics of members they are interested in contacting. Petitioner sends an e-mail to the targeted members with a link to the survey. If the member clicks on the link and successfully completes the survey, Petitioner pays the member a small fee (e.g., \$15), or donates the payment to a charity on behalf of the member.

Petitioner performs programming services related to preparing the survey, devises incentives to be offered to survey respondents, selects Website members to be surveyed, works with the customer to select the survey dates, manages the survey process, and provides the customer with the results. Fees for the provision of these services are separately stated to the customers. Petitioner does not share the customer's survey results with other customers. Its agreements with its customers do, however, provide that the survey results are also furnished to the participants. Petitioner does not prepare the survey questions. Reports of survey findings are delivered electronically. The customer pays Petitioner based upon the number of members who complete the survey.

Analysis

We conclude that Petitioner's receipts from sales of its premium memberships and subscriptions, charges for the use of its in network email by members/subscribers, and charges to customers for conducting surveys of Petitioner's members are subject to sales tax.

Petitioner's receipts for job postings by employers, recruiters, etc., charges for advertising or conducting virtual job fairs, and charges for developing surveys are not subject to sales tax.

Section 1105(c) of the Tax Law imposes sales tax on the receipts from every sale, except for resale, of the following services:

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons . . .

Under the provisions of section 1105(c)(9) of the Tax Law, the furnishing or provision of an information service (other than an information service subject to tax under section 1105(c)(1) of the Tax Law) that is furnished, provided or delivered by means of telephony or telegraphy or telephone or telegraph service (whether by intrastate or interstate means) is subject to sales tax if the information to be taxed under section 1105(c)(9) would otherwise be subject to tax under section 1105(c)(1) were the information furnished by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner.

Petitioner has created a database of the demographic information of its members, including the members' employment history (company, job title and description, expertise), education, schools and colleges attended, etc. Petitioner's members and customers use searches of this database information to locate persons who meet specific demographic criteria. For example, recruiters and employers might use the search to locate individuals having the particular education, employment background, and skills they are seeking to employ. If Petitioner locates individuals satisfying the specified criteria, Petitioner charges a fee to link the employers and recruiters with those persons by providing the employers and recruiters with the ability to contact the targeted persons through Petitioner's in-network email service. Sales of mailing lists consisting of collections of names and addresses (which listing might consist entirely of e-mail addresses) are considered the sale of information taxable under section 1105(c)(1) of the Tax Law. *See Alan Drey Company*, Dec St Tax Comm, January 27, 1978, TSB-H-78(3)S, affd 67 AD2d 1055. Thus, the sales of the mailing list of the targeted persons constitute receipts from the sale of a taxable information service. The fact that Petitioner does not provide the list directly to the customer (Petitioner itself performs the mailing to the target on behalf of the customer) does not change the fact that the customer has received the full use of the database information on members having the sought after education, employment, skills, etc.

Information that is personal or individual in nature and that is not or may not be substantially incorporated in reports furnished to other persons is excluded from the tax imposed under section 1105(c). However, mere customization of the information provided to meet the specific needs of a customer does not exclude the sale from the imposition of the tax.

The first criterion (the information sold is personal or individual in nature) is satisfied only by information that is uniquely personal or individual in nature. *Matter of Allstate Ins. Co. v. Tax Commn. of the State of New York*, 115 AD2d 831, 495 NYS2d 789, affd 67 NY2d 999, 502 NYS2d 1004. *Twin Coast Newspapers, Inc. v. State Tax Commission*, 101 AD2d 977. It is the source of the information which controls whether the report prepared will meet the criteria of "personal and individual." *Matter of ADP Automotive Claims Service Inc.*, Tax Appeals Tribunal, August 8, 1991. Information is not uniquely personal or individual in nature if it comes from a common source or a data repository that itself is not confidential. *See Matter of ADP Automotive Claims Service Inc. v Tax Appeals Tribunal*, 188 AD2d 245, leave to appeal denied 82 NY2d 655; *Rich Products Corporation v Chu*, 132 AD2d 175 (3d Dept 1987) lv denied 72 NY2d 802; *Towne-Oller & Assoc. v State Tax Comm*, 120 AD2d 873 (3d Dept 1986); *Alan/Anthony, Inc.*, Adv Op Comm T&F, June 19, 1992, TSB-A-92(51)S.

The information sold by Petitioner also fails to satisfy the second criterion of the exclusion. Though the information provided to purchasers is customized in some manner, if the customized information is substantially derived from a common data source maintained by the information service provider, the information service is still taxable. *Matter of Rich Products.*, *supra*; *Matter of Towne-Oller and Associates*, *supra*; *Economic Cycle Research Institute, Inc.*, Adv Op Comm T & F, July 23, 1997, TSB-A-97(42)S. All purchasers seeking to contact Petitioner's members with the targeted skills will be provided with similar overlapping results. Though one person's list of members possessing certain demographics may be slightly different than another's person's list, the information obtained by the one purchaser can be substantially incorporated in reports furnished to others. *See Matter of Rich Products.*, *supra*; *Twin Coast Newspapers*, *supra*.

Membership and subscriptions

Petitioner's basic membership (for which there is no charge) allows the members to create their professional profile. Members provide and manage information about their professional accomplishments in their field. Information in an individual's profile is available for view by other members. The individual's profile may be viewed by other members on Petitioner's network and if the member opts to allow it, the profile may be accessible for public view on the Internet. Petitioner provides members with privacy settings allowing the member to limit how the information the member has posted on Petitioner's network might be viewed on its network, and on the Internet at large, by persons who are not members of Petitioner's network. Members also have access to software application tools made available to them by Petitioner without charge for use by the members in enhancing their networking experiences.

Premium subscribers can perform searches of the members' profiles. The results of these searches may be used by subscribers to build their list of connections, solicit potential job candidates and to locate personal references for job candidates. The subscriber may then, using Petitioner's in-network e-mail, contact those individuals to request a connection, ask whether the individual would be willing to provide a reference for a job candidate, solicit a response/application for a job, etc. In essence, the search permits a premium subscriber to send an e-mail to persons identified via a targeted selection process. To the extent that there is no charge by Petitioner to members for their searches and use of the database, there are no receipts subject to sales tax. Petitioner's receipts from the use of its database, including charges to correspond with target search results (i.e., use of Petitioner's mailing lists), are subject to sales tax pursuant to the provisions of section 1105(c)(1) and 1105(c)(9) of the Tax Law. Thus Petitioner's charge for its *premium* subscription is subject to sales tax.

In network e-mail

Charges to send an e-mail to persons identified by searching Petitioner's member database for persons who have particular demographic attributes are charges for the use of Petitioner's database and constitute receipts from the sale of a taxable information service.

Employment solicitations (job postings, virtual job fairs, etc.)

Charges for advertising on Internet websites are generally considered to be receipts from the sale of a nontaxable service. (See *Matter of Jones Day*, Adv Op Comm Tx & Finance, September 24, 2009, TSB-A-09(44)S and TSB-A-09(52)S Adv Op Comm Tx & Finance, November 13, 2009.) Thus, fees received from customers for posting employment opportunities on Petitioner's Website are not subject to sales tax. Similarly, fees charged by Petitioner to prospective employers for the employer's participation in virtual (on-line) job fairs are a charge for an advertising service, the receipts from which are not subject to sales tax. See 20 NYCRR §527.3(b)(5).

A compilation of job listings constitutes an information service subject to the sales taxes under section 1105(c)(1) or section 1105(c)(9) of the Tax Law. However, both free members and paid subscribers may view Petitioner's database of job offerings. If Petitioner allows all members to view all job postings listed by Petitioner (whether the posting is from Petitioner's exclusive job listings or culled by Petitioner from other venues) there would not appear to be a receipt which would be subject to sales tax. Though only members can submit a response to a job posting, both free members and paid subscribers are eligible to respond to a job posting. Because there is no charge to access, view and respond to a job posting on Petitioner's Website, there is no receipt subject to tax.

The fees charged by Petitioner to someone who has an employment opportunity and wants Petitioner to send its solicitation for a job application to members having the attributes selected or targeted by the customer are receipts from the sale of an information service subject to sales tax.

Charges by Petitioner to a member for sending e-mail introductions, based upon the results of the member's targeted search of Petitioner's database, are, as previously noted, receipts from the sale of a taxable information service.

We note that Petitioner's sales of its database information are different than those found not subject to tax by the Tax Appeals Tribunal in *SSOV '81 Ltd. d/b/a Peoples Resources*, (DTA Nos. 810966, 810967, decision dated January 19, 1995). In *SSOV '81 Ltd.*, the Tribunal found that the petitioner's services involved more than merely selling its members' contact information. The petitioner engaged in other significant activities, such as assisting the members in the development of their profiles and advising members about how best to present themselves in video presentations. In this case, Petitioner is not engaged in other activities, nor do its membership charges include any significant services other than access to its database.

Surveys

Payment by the survey customer to Petitioner for successful completion of a survey by one of Petitioner's members is a receipt from the customer's use of Petitioner's member database and, as such, constitutes a receipt from the sale of a taxable information service. The payment by the survey customer of a small fee to the targeted member for that member's participation in the survey (or the donation by the survey customer to a charity designated by the participating member) does not constitute the purchase by the survey customer of property or services subject to sales tax imposed pursuant to section 1105 of the Tax Law.

It appears that in providing the survey results to its customers, Petitioner collects, compiles, and analyzes the survey responses and furnishes this information to the customer. The report to the customer of the survey responses thus constitutes an information service. However, as the information is derived solely from the response to the customer's question rather than from a common data source, and the information is not provided to other customers or compiled for later use by Petitioner in providing information to other customers, this information is considered personal or individual in nature and is not incorporated into reports furnished to others by Petitioner. Accordingly, the survey results are excluded from the information services tax under section 1105(c)(1) of the Tax Law. *See also Alan/Anthony*, Adv Op Comm Tx & Fin, January 31, 1992, TSB-A-92(6)S and *Alan/Anthony*, Adv Op Comm Tx & Fin, June 19, 1992, TSB-A-92(51)S. Charges for the survey results are not subject to sales tax presuming this service is sold separately and distinct from Petitioner's charges for the customer's use of Petitioner's member database in conducting the survey.

If Petitioner is providing information collected and compiled from its customer surveys in reports Petitioner sells to other persons, Petitioner's receipts from collecting, compiling, and furnishing survey information would constitute receipts from the sale of a taxable information service, for both the initial and subsequent sales.

The separate charges for other services provided by Petitioner in conjunction with the customers' surveys (programming services, designing incentives, etc.), other than the use of Petitioner's database, do not constitute sales of information or other services subject to sales tax under section 1105(c)(1) or 1105(c)(9) of the Tax Law. Such charges are thus not subject to tax presuming those services are sold separately and distinct from Petitioner's charges for the customer's use of Petitioner's member database in conducting the survey.

We note that the advice provided in this Opinion is based upon the descriptions of Petitioner's service(s) for the purpose of this Opinion. Changes to the subscription plan provisions or additions of new service offerings by Petitioner might result in different tax consequences than discussed herein.

These conclusions represent the current position of the Department. To the extent *NetCreations, Inc.*, Adv Op Comm T&F, May 17, 2007, TSB-A-07(13)S, or any other advice from the Department suggests a contrary conclusion, it does not represent current policy.

DATED: September 15, 2010

/S/

Jonathan Pessen
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Office of Counsel

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