

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

TSB-A-12(11)S
Sales Tax
May 15, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110628A

The Department of Taxation and Finance received a Petition for Advisory Opinion from Petitioner, [REDACTED]. Petitioner asks whether the services it provides in relation to clinical medical trials are subject to sales and use tax. We conclude that (1) Petitioner's charges for site kits and for conducting direct mail campaigns are subject to sales and use tax to the extent that the tangible personal property involved is delivered to New York addresses; (2) its additional charge for translation services in connection with the written materials used in the site kits and the direct mail campaigns would be included in the taxable receipts for the kits and direct mail campaigns and thus taxable; however, (3) Petitioner's remaining charges are not taxable.

Facts

Petitioner performs global patient recruitment and retention services, specializing in patient outreach. Its clients are primarily medical drug companies and medical equipment supply companies that want to recruit qualified patients to participate in a drug study that they are administering to determine if the study medication or treatment is effective and to learn about any side effects. Petitioner conducts advertising campaigns using (1) mass media advertising, including television, radio, newspaper, direct mail and all forms of online advertising; and (2) caller outreach. For example, the advertisements may solicit people who are suffering from a disease or other medical condition.

The facts pertinent to specific questions raised in the Petition are set forth below.

Analysis

The Tax Law imposes sales and use tax on retail sales of tangible personal property and the sale, except for resale, of certain services (*see* Tax Law § 1105[a], [c]). Among the enumerated services subject to tax is 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. Excluded from that tax are advertising services and 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) (*see* Tax Law § 1105[c][1]; *see also* Tax Law § 1105[c][9]).

We apply these principles to determine the taxability of the products offered by Petitioner.

Product 1: Production and Distribution of TV/Radio Ads and Website Development and Hosting

Description: Petitioner professionally creates and outsources ads and websites on behalf of pharmaceutical companies or medical equipment providers for the purpose of recruiting patients for clinical trials. The ads and websites make consumers aware of the trial and encourage them to call a toll-free number to see if they qualify to participate. Petitioner may provide copywriting services, such as the preparation of scripts, or the client may provide the copywriting. Similarly, Petitioner may provide image selection, graphic design and voiceovers. These services do not involve the transfer of any tangible personal property. Petitioner also assists in the distribution of the advertisements to radio and television stations. It sends the ads electronically to stations. With regard to the production of websites, Petitioner, through a business partner, develops the website and maintains exclusive control over it, including performing all data encryption.

Analysis: In developing the ads, including performing copywriting, image selection, and graphic design services, Petitioner is not performing a taxable service (*see* Tax Law § 1105[c]). Because the ads are transferred to the customer or its designee electronically, the ad development part of this product does not involve the sale of tangible personal property. Accordingly, the ad development part of this product is not taxable. Developing and operating a website is not a taxable service. Moreover, because Petitioner maintains exclusive control over the website, the service of developing and operating the website also does not involve any transfer of prewritten computer software, and thus is not subject to sales or use tax.

Product 2: Development and Conduct of E-mail and Direct Mail Campaigns

Description: To perform e-mail campaigns, Petitioner hires a subcontractor, which e-mails messages directly to e-mail addresses on an e-mail list that the subcontractor owns or has obtained from a third-party. Petitioner sometimes obtains the content for the e-mail from the client and sometimes develops the content itself or through a subcontractor. Petitioner and its subcontractors assist in the formatting of the e-mail but leave the final decision to the client. With regard to direct mail campaigns, Petitioner develops the mechanicals and provides any necessary copywriting, image selection or graphic design services, sending any mechanicals of the correspondence to a subcontractor electronically. The subcontractor prepares the direct mail pieces and mails them to the client's designees.

Analysis: The conduct of the e-mail campaign is not taxable because it qualifies for Tax Law section 1105(c)(1)'s exclusion for advertising services. Petitioner's service of conducting a direct mail campaign is also exempt as an advertising service (Tax Law § 1105[c][1]; TSB-A-88(39)S). However, Petitioner's purchases of tangible personal property in conducting that campaign are taxable if the property is delivered to Petitioner in New York (Tax Law § 1105[a]; 20 NYCRR § 527.3[c][2])["All purchases of materials by an advertising agency for use in

performing its services are purchases at retail subject to sales tax.”)]. The promotional material exemptions in Tax Law section 1115(n) do not apply to Petitioner’s purchases of the direct mail items, because, among other reasons, those items are not being sent to Petitioner’s customers or prospective customers.

Product 3: Operation of Call Centers

Description: Petitioner offers, through a third-party contractor, full call center services. Petitioner’s call centers are staffed by nurses (registered nurses and licensed practical nurses) and other clinical-degreed professionals. The call centers screen potential study subjects using a script that has been approved by an Institutional Review Board (IRB).¹ Via fax or email, potentially qualified patients are referred to the nearest participating doctor’s office (“site”), where they can be examined to determine whether they qualify to participate in the trial. Sites are then responsible to follow up with the patient to schedule appointments. Petitioner provides each media outlet (e.g., a radio or television station or publication) in each advertising market a separate toll free number to identify where a caller encountered the advertisement. All call center activity is displayed in real-time for Petitioner to view and use as a guide for media management. Clients can log-in to Petitioner’s online reporting portal to review results in real-time. The sites communicate with Petitioner’s clients by telephone, as well as by sending and receiving e-mails.

Analysis: The primary function of this service is the staffing and operation of a call center to screen subjects and refer appropriate candidates to doctors' offices, which is not one of the enumerated services that are subject to sales tax. While the service also provides reports to the client, because there is no separate charge for that aspect of the service and that aspect is incidental to the service’s primary function, the presence of those reports does not render the service taxable.

Product 4: Advertising Response Tracking System (“ARTS” or “the Service”)

Description: Sometimes clients opt to use their own or a third-party’s technology to track calls generated by an advertising campaign. ARTS is a program that allows the client to monitor the effectiveness of media campaigns. For each site, a separate toll free telephone number is assigned to each medium. The Service tracks the calls going in to each site, thus making sites accountable for the potential patients they receive from advertising. The Service also tracks the in-coming phone calls back to the advertising source. After the Service collects information, it electronically supplies the information to Petitioner’s clients. Petitioner provides toll-free or local area code numbers (provided by a third party vendor) to its clients to be included in all ad

¹ An IRB is a committee that has been formally designated to approve, monitor, and review biomedical and behavioral research involving humans with the aim to protect the rights and welfare of the research subjects. In the United States, IRBs are governed by Part 46 of Title 45 of the Code of Federal Regulations. IRBs are themselves regulated by the Office for Human Research Protections (OHRP) within the Department of Health and Human Services.

materials. Petitioner treats the information obtained through the Service as confidential and does not share it with anybody but the Client.

Analysis: This service constitutes an information service, but it is not taxable because it qualifies for the “personal or individual exclusion” in Tax Law § 1105(c)(1), since the information is not drawn from a common database, relates only to a particular client, and may not be furnished to anyone other than the customer to whom it relates.

Product 5: Site Kit Production

Description: Petitioner creates and produces site kit materials for its clients for use at the sites. Sites utilize these materials to recruit patients from their practice and retain them throughout the duration of the study. A site kit may include items such as posters, flyers, brochures, letters to patients, letters to colleagues, appointment reminders etc. For all materials, Petitioner provides the following: copywriting, selection, graphic design, printing, fulfillment, and shipping. In no case does Petitioner collect any fees from the operators of the sites. Petitioner prepares the mechanicals and other source materials and contracts with a subcontractor to have the materials printed, assembled, and mailed out.

Analysis: Because the kits are tangible personal property, sales and use tax would be due based on the number of kits delivered to sites with New York addresses. To the extent that the kits are delivered to sites outside the State, Petitioner’s charge for the kit is not subject to New York sales and use tax. Petitioner’s purchases of the tangible personal property to be included in the site kit materials from the subcontractor qualify for the resale exclusion if it timely provides the subcontractor with a resale certificate (Tax Law §§ 1101[b][3]; 1105[a]). To issue a resale certificate Petitioner must register as a vendor required to collect sales tax (*see* Tax Law § 1132[c][1]).

Product 6: Translation

Description: Petitioner offers translation services for all the printed materials included in the products discussed above. Petitioner can have materials translated into any language, while adjusting copy for cultural relevancy. Petitioner provides clients with a full translation certificate upon completion. The translations are always transferred electronically.

Analysis: While translation services are not among the enumerated services subject to tax (Tax Law § 1105[c]), an additional charge for translation services made in relation to any tangible personal property that Petitioner is selling to its clients, such as the site kits, is considered part of the charge for those items of tangible personal property and would be subject to sales and use tax (*see Matter of Penfold v. State Tax Commn.*, 114 AD2d 696 [1985]).

Product 7: SiteAssist™

Description: Petitioner works directly with sites to gather information regarding the success of their recruitment efforts, via telephone, fax, e-mail and text, and the use of customized questionnaires produced by Petitioner in-house. Petitioner sends weekly reports to the client electronically. Petitioner keeps the reports confidential and does not incorporate any part of the reports sent to one client into the reports going to any other client.

Analysis: This is an information service, but it is not taxable because it qualifies for the personal or individual exclusion in Tax Law § 1105(c)(1), since the information is not drawn from a common database, relates only to a particular client, and may not be furnished to anyone else.

Product 8: TrialText™

Description: Petitioner recruits and retains patients through cell phone text messaging in any language. It may provide the script for the message or the client may provide it with the script. Petitioner may purchase lists (all electronic) of opt-in potential patients for recruitment. As part of this service, Petitioner may also supply study patients with appointment or, “take medication” reminders.

Analysis: This service is not taxable, but Petitioner’s purchase of mailing lists would be subject to sales or use tax as an information service if the lists are delivered or used in New York (Tax Law § 1105[c]; 1110[a][C]; TSB-M-10(7)S, *Sales and Compensating Use Tax Treatment of Certain Information Services*).

DATED: May 15, 2012

/S/

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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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.