

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

TSB-A-13(6)S
Sales Tax
February 11, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S100831A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its receipts for wellness programs are subject to sales and use tax. We conclude that Petitioner is selling a service that is not subject to sales and use tax.

Facts

Petitioner provides wellness related services to companies, which in turn provide the service to their employees. Petitioner sells an international award winning employee wellness program. Petitioner's mission is to promote healthy lifestyles and encourage personal health management by providing comprehensive education, skill sets and tools to implement healthy habits on a daily basis.

Petitioner's service has two components: an online element through a webportal and annual in-person visits with the companies' employees. The web portal provides participants with nutrition, exercise and general wellness information. The participants can track personal information and interact with the system by establishing an individual personal portal to record information such as logs of physical activity, eating habits, weight.

Petitioner also provides annual biometric health assessments, which consist of a questionnaire and general blood lipid panel performed by licensed medical personnel. The personal results are reported back to the individual through the web portal. (Client companies may utilize this wellness service to provide incentive rewards to employees that achieve certain benchmarks.)

The personal wellness information that Petitioner provides to clients is protected by the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA provides the following protection for employee participants:

1. The employer can only receive aggregate reporting on all aspects of the program.
2. Wellness participation and personal health information cannot be available in personnel records.
3. Employees cannot be compelled to participate in the program.
4. Wellness participation cannot affect performance reviews, job continuance, demotions or promotions.

Analysis

The fees charged by Petitioner for the service of wellness programs are not subject to the New York City tax imposed upon the use of, and services provided by, a weight control salon or health salon, or similar establishment authorized by Tax Law section 1212-A(a)(2) and imposed pursuant to section 11-2002(a) of the New York City Administrative Code. Petitioner does not operate a physical establishment, nor is it affiliated with, any weight control salon or health salon or other establishment described in Tax Law section 1212-A(a)(2) or section 11-2002(a) of the Administrative Code. Therefore, Petitioner's charges to its clients do not constitute the sale of services by a weight control salon or health salon, or similar establishments. *See* TSB-A-2010(46)S.

In addition, Petitioner is not providing an information service subject to sales tax under Tax Law sections 1105(c)(1) or 1105(c)(9). One component of Petitioner's wellness program is the provision of instructional material on healthy lifestyles, which is a means to the end of improving the health of employees. The provision of this instructional material is not an information service because it is an integral component of a broader service. Petitioner is not a mere passive distributor of information. Rather, its objective is to change behavior by imparting knowledge. Petitioner has designed and structured the material to assist people in learning how to improve their health; thus, the material accessed is educational. Educational services, whether or not provided in an interactive format over the Internet, are not among the services enumerated as taxable under Section 1105(c) of the Tax Law. *Deloitte & Touche*, Adv Op Comm T&F, December 3, 1999, TSB-A-1999(58)S; see also *Tower Innovative Learning Solutions, Inc.*, Adv Op Comm T&F, February 2, 2006, TSB-A-2006(5)S. The other component of Petitioner's wellness program is the dispensing of personal advice on achieving and maintaining good health. This advice does not constitute an information service.

In sum, Petitioner is providing an unenumerated service that is not subject to sales and use tax.

DATED: February 11, 2013

/S/

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