

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-89(37)S
Sales Tax
October 19, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S890104B

On January 4, 1989, a Petition for Advisory Opinion was received from National Demographics and Lifestyles, Inc., 1621 18th Street, Denver, Colorado 80202.

The issue raised is whether Petitioner, National Demographics and Lifestyles Inc.'s charges to its clients for its Consumer Analysis Report, its NDL F/O/C/U/S report, its Market Development Index report and annual subscription fees are subject to New York State and local sales tax pursuant to Section 1105(c) of the Tax Law as charges for information services that are not personal or individual in nature and which are not or may not be substantially incorporated in reports furnished to other persons.

Petitioner and certain manufacturers of consumer hard goods have entered into agreements whereby the manufacturers package a questionnaire with their products. Consumers of the products are requested to provide specific information when completing the questionnaire and upon completion to forward the questionnaire to Petitioner.

The questionnaire consists of three sections. The first section requests the name and address of the consumer as well as demographic information (Demographic Data) such as the consumer's income, age, marital status, etc. The second section requests information regarding the purchase of the product (Product Data), such information subsequently being intended exclusively for the manufacturer (except that portion used in aggregated research and modeling, in which the data cannot be identified as belonging to the client). The information requested in the second section varies depending upon the individual manufacturers. It may request the model number of the product, date of purchase, and whether the individual completing the questionnaire is the actual purchaser or a recipient of a gift. The third section is a list of certain lifestyle patterns (Lifestyle Data). The individual completing the questionnaire is requested to check those items which are descriptive of the individual's life-style. Some of the categories are hunting/shooting, foreign travel, devotional reading, crafts and tennis.

Petitioner maintains a separate data base for each manufacturer client and a "large" data base for use in generating mailing lists for the direct marketing industry. Petitioner accesses the data bases to obtain information for use in preparing reports for manufacturer clients.

Upon receipt of a completed questionnaire, Petitioner enters the Product Data information from the second section of the questionnaire into a data base maintained for the manufacturer to whom the information applies. Petitioner enters the information from the first and third sections of the questionnaires into Petitioner's "large" data base, which contains demographic and life-style information pertaining to more than 25,000,000 consumers. Petitioner contends that sales tax is

collected on all sales of the mailing lists, generated from the large data base, where delivery of such lists occurs within New York State.

The initial agreement between Petitioner and client provides that the client must pay an annual subscription fee to Petitioner, payment thereof entitling the client to receive a "test" Consumer Analysis Report (CAR) and thereafter semi-annual CAR's for the duration of the two year term of such initial agreement. The agreement is renewable for four consecutive periods of three years each, such renewal being automatic unless either party notifies the other, in writing, at least sixty (60) days prior to the lapse of the then effective term. In addition to the annual subscription fee, the client will be charged separate fees for any additional reports or services provided by Petitioner.

The agreement also provides that all CAR's and other analyses provided to the client and all Product Data (except in aggregated research and modeling, in which the Product Data cannot be identified as belonging to the client) shall become the sole property of the client.

Under the agreement, all names, addresses, Demographic Data and Lifestyle Data, and other information on or derived from the questionnaires at any time (excluding only Product Data as limited in the preceding paragraph), including any compilations, lists, derivations, extrapolations and excerpts thereof, shall become the sole property of Petitioner for use by Petitioner at its sole discretion. However, the client shall have the non-exclusive right to use the names and addresses and Product Data of its consumers for its own purposes. In no event shall Petitioner sell, rent or otherwise release to anyone other than the client, a complete or partial list of names identified by their purchase of a product or service of the client.

Petitioner prepares and delivers reports to the manufacturer clients. Such reports include the CAR's, the NDL F/O/C/U/S and the Market Development Index.

Petitioner submitted a sample copy of each report. The following is a synopsis of the sample reports submitted:

Consumer Analysis Report (sample report)

The sample Consumer Analysis Report submitted by Petitioner consists of information reflecting the results of consumer responses to questions posed on all three sections of the questionnaire enclosed with the client's product. The data providing the basis for computing the information in the CAR was entered into the data bases Petitioner maintains for this manufacturer and for the direct marketing industry ("large" data base). Petitioner subsequently retrieved data from those data bases for the purpose of computing the information shown in the CAR.

The sample CAR is made up of 4 pages of information derived from Product Data, and 20 pages of information derived from Demographic and Lifestyle Data.

The CAR provides information, indicated by percentages of the total consumers responding, such as where the product was purchased, how the consumer became aware of the product, the primary reason for purchasing this product instead of another brand, other products of this brand previously purchased by the consumer, consumer gender, age, marital status, occupation of consumer and spouse, ages of all children living at home, annual family income, use of credit cards, primary residence, activities which consumer and spouse regularly participate in on a regular basis and a listing of states by census division indicating the percentage of consumers in each state.

NDL F/O/C/U/S (sample report)

The sample NDL F/O/C/U/S report submitted by Petitioner contains information which, although presented in a different format than that in the CAR, also reflects results of consumer responses to questions on the first and third sections of the questionnaire enclosed with the client's product. Petitioner accessed its "large" data base for information which was used to make comparisons of the client's consumers to the total consumers nationwide (per "large" data base) who purchased like products of different brands.

The sample NDL F/O/C/U/S is made up of 33 pages of information derived from Demographic and Lifestyle Data.

The sample report provided includes a demographic profile of the client's consumers. The information shown lists various categories and indicates the percentage of the client's total male and female respondents to whom each category applies. The report also provides a demographic comparison of the client's male and female respondents to the national "norm" for each category as determined by Petitioner through accessing the "large" data base. The categories used in both the demographic profile and comparison included such subjects as sex (gender), marital status, age, occupation, income, home ownership, children at home, credit cards, county type and census division.

Other information lists various activities and shows, by percentages, the client's total male and female respondents interested in each activity. Among the activities listed are gardening, watching tv sports, crafts, home workshop, fishing, golf, photography, personal computer, automotive work, tennis, electronics, etc.

The sample NDL F/O/C/U/S also provides a geographic analysis (map), by percent, indicating the highest to lowest concentration of the client's consumers, nationwide, by states and by direct marketing areas.

The sample report also includes a demographic comparison and an activity interest comparison of the client's consumers to the total applicable consumers in Petitioner's "large" data base. The results indicate how the client's consumers "score" in numerous categories when compared to the national consumer "norm". The client's consumers were "scored" by total group (including both male and female), by male group and by female group.

Geographic analysis (maps) based on highest to lowest "score" by states and by direct marketing areas are also provided in this report.

The sample NDLF/O/C/U/S presents additional demographic, activity interest, and state and direct marketing area analysis data which also reflects the results of consumer responses to questions posed on the first and third sections of the questionnaire enclosed with the client's product. Petitioner uses this data and data retrieved from the "large" data base or from other sources to determine how the client's consumers "score" when compared to the applicable national "norm".

Market Development Index (sample)

The Market Development Index (MDI) provides Petitioner's clients with a means to access the relative strengths and weaknesses of their product's in its retail markets.

Petitioner works with the client to design or model a Buying Power Index (BPI) which will best represent buyer potential for the product category in which the client's product competes.

The BPI chosen can be selected from a variety of available data sources. The CARs are used to identify the client's consumers by demographic, geographic and lifestyle characteristics. Other factors which best relate to the client's product are then reviewed. For example, homeowners might serve as the "standard benchmark" for a lawnmower manufacturer, or the hunter/shooting interest profile derived from the Lifestyle Census data base (Petitioner's "large" data base - 25,000,000 + consumers) may be a benchmark for a rifle manufacturer.

The client has the option of selecting which time frame the Market Development Index Report will include. The options offered are semi-annual (current year compared to prior year), annual (current year compared to prior year), year to date (current year compared to prior year), and custom periods (current period compared to benchmark period).

The reports may also use selected information from public or private research sources such as ADI - Area of Dominant Influence (Arbitron Ratings Company), DMA - Designated Market Area (A.C. Nielsen Company), MSA - Metropolitan Statistical Area (Department of Commerce), County - Counties within United States only (Department of Commerce), and Sales Territories - Client Company Definition (Client Company).

Other information may be obtained from Market Statistics, NDL's Lifestyle Census Database and from Client or Industrial Sources.

The sample Market Development Index report submitted by Petitioner compares the client's retail sales from the years 1986 and 1985. The report lists all of the client's retail market areas by order of potential sales from highest to lowest. The report compares actual sales to expected sales and indicates the level of achievement by percentage for each market area for both years. The report also shows the percentage of change from 1985 to 1986. Petitioner arrived at the potential sales or

demand by applying pertinent elements from the public or private research resources indicted above.

Section 1105 of the Tax Law states as follows:

Imposition of sales tax. ...there is hereby imposed and there shall be paid a tax ... upon:

* * *

(c) 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, ...

Section 527.3 of the Sales and Use Tax Regulations states:

Sales of information services. (Tax Law, §1105[c][1])

* * *

(a) Imposition. (1) Section 1105(c)(1) of the Tax Law imposes a tax on the receipts from the service of furnishing information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any manner such as by tapes, discs, electronic readouts or displays.

(2) The collecting, compiling or analyzing [of] information of any kind or nature and the furnishing [of] reports thereof to other persons is an information service.

(3) Among the services which are information services are credit reports, tax or stock market advisory and analysis reports and product and marketing surveys.

* * *

(b) Exclusions.

(2) The sales tax does not apply to the receipts from the sale of information which is personal or individual in nature and which is not or may not be substantially

into reports furnished to other persons by the person who has collected, compiled or analyzed such information.

The various reports Petitioner furnishes to clients consist of information which Petitioner has collected, compiled and analyzed. Accordingly, Petitioner is considered to be engaging in the furnishing of information and the sales of its reports constitute the sale of an information service within the meaning of the statutory provisions set forth above.

The first of the two criteria which must be met to qualify Petitioner's reports for exclusion from taxation is that the information supplied must be "personal or individual" in nature.

The second criteria of the exclusionary portion of the statute is that the information "is not or may not be substantially incorporated in reports furnished to other persons."

In the Matter of New York Life Insurance Co. v. State Tax Commission, 80 AD 2d 675, aff'd no op 55 NY 2d 760, confidential character reports prepared by licensed detective agencies were deemed to be personal or individual in nature by virtue of the fact that the interview phase of the investigations, the primary basis of the report, was tailored in each instance to the specifications of the client.

However, in the Matter of Twin Coast Newspapers, Inc., v. State Tax Commission, 101 AD 2d 977, the court held that information in reports compiled for specific subscribers was not exempt as information of a personal or individual nature merely because such reports contained selected statistics desired by such subscribers. The source of the information furnished was not limited to petitioner but was available to everyone and therefore such information was not of the uniquely personal nature contemplated by the exemption.

The requirement that the information furnished be of a uniquely personal nature also formed the basis for the determination of the State Tax Commission in the Matter of Towne-Oller & Associates, Inc., TSB-H-85(36)S; aff'd. 120 A.D. 2d 873, 502 NYS 2d 544 (1986). In that instance, Towne-Oller provided information reports to manufacturer's of health and beauty aids. Upon petitioner's appeal, the court found that to obtain information for its reports, petitioner purchased tapes from wholesalers and distributors which identified products they distributed and to what stores. All of petitioner's reports were created from that data base. Some of the reports were directed to meet the individual needs of a given customer. The reports were prepared at the request of a customer and included a product positioning study, a distribution opportunity study and a manufacturer's special report.

The court found that although there was some customizing of reports for individual customers by the petitioner, the service provided was not of a personal and individual character. The reports furnished contained general information, all of which was gleaned from one general source.

The court found the reports to be unlike those furnished by the taxpayer in Matter of New York Life Ins. Co. v. State Tax Comm., 80 A.D. 2d 675, 463 N.Y.S.2d 380, affd. sub nom. Matter of Metropolitan Life Ins. Co. v. State Tax Comm., 55 N.Y.2d 758, 477 N.Y.S.2d 245, 431 N.E.2d 970 and, therefore, held that petitioner's activities were an information service and not excludable from taxation.

In the Matter of Rich Products Corporation v. Roderick G. W. Chu et al., Constituting the Tax Commission of the State of New York (132 A.D.2d 175) petitioner purchased written reports from Selling Areas Marketing, Inc. (SAMI). Before issuing a report, SAMI's sales representatives worked with the individual client to create a program of marketing data retrieval to answer specific informational requests of the client concerning the sales performance of one or more of its products in comparison with that of one or more of its competitors.

The court was in agreement with the determination of the State Tax Commission in the Matter of Rich Products, Inc., TSB-H-86(126)S in that the fact that no two reports to different customers were likely to be the same and that such reports were customized in some respects to respond to the needs of the particular client was not dispositive of entitlement to the exclusion, particularly where the information contained therein was derived from a single data repository which itself was not confidential and was widely accessible. The court was of the view that evidence in the record supported the Tax Commission's inference that the information in the reports is or may be substantially incorporated in reports furnished to others. On the basis of the fact that a common data base was used for all reports, the Tax Commission could reasonably infer that the significant and ultimate information on comparative sales performances and of shares of the market of truly competing products in most major markets will substantially overlap in the reports furnished by SAMI to petitioner and its competitors. The court concluded that the purchased information's "substantial incorporation" in reports to others was alone sufficient to disqualify the sales in question for the exclusion and did not find a need to address whether the information was not personal or individual in nature.

In the instant case the questionnaires completed by the client's consumers and submitted to Petitioner are tailored to provide specific information desired by the client and by Petitioner, and to be compatible with Petitioner's computer software systems to allow computerization and analyses of such information.

Under the terms of the agreement between Petitioner and client, the Product Data (except for that portion used in aggregated research and modeling) is the sole property of the client. The Product Data section of the questionnaire is tailored to the client's specifications and a portion (approximately 1/4) of the information provided in the Consumer Analysis Report prepared by Petitioner reflects the results of the total responses to that section of the questionnaire by all participating consumers.

However, a substantial portion of the information furnished in the Consumer Analysis Report, the NDL F/O/C/U/S and in the Market Development Index report results from consumer responses to questions in the Demographic and Lifestyle Data sections of the questionnaire, the data from such consumer responses being entered into Petitioner's "large" data base. Under the terms of the agreement between Petitioner and client such data is the sole property of Petitioner for use by Petitioner at Petitioner's sole discretion. The NDL F/O/C/U/S and the Market Development Index report also contain data which reflects the results of comparing information from the Demographic and Lifestyle Data sections of the questionnaires to information obtained from other sources (purchased by Petitioner) or to information in Petitioner's "large" data base.

The statutory tests for excluding information services from sales tax are whether the information provided is "uniquely" personal or individual in nature and whether the information is not or may not be substantially incorporated in reports furnished to other persons.

Although the bulk of the information furnished in the Consumer Analysis Report results from total consumer responses to the Demographic and Lifestyle Data sections of the questionnaire developed for that particular client and although a lesser portion of the information provided in the report reflects the total consumer responses to the Product Data section of the questionnaire, such information does not meet the statutory test for exclusion from sales tax of being "uniquely" personal or individual in nature as were the confidential character reports prepared by detective agencies in New York Life Insurance Co. v. State Tax Commission, supra. Moreover, inasmuch as the information is also entered into Petitioner's "large" data base and inasmuch as Petitioner accesses such "large" data base when preparing reports for clients, the information furnished in the Consumer Analysis Report also fails to meet the statutory test that the information furnished is not or may not be substantially incorporated into reports furnished to other persons.

Likewise, as a majority of the information furnished in the NDL F/O/C/U/S and the Market Development Index reports also results from consumer responses in the Demographic and Lifestyle Data sections of the questionnaires, and as such reports also contain data reflecting the results from the comparison of information from the Demographic and Lifestyle Data to information obtained from other sources (purchased by Petitioner) or to information in Petitioner's "large" data base, such information also fails to meet the statutory tests for exclusion from sales tax referred to above, inasmuch as such information is not uniquely personal or individual in nature nor does it meet the requirement that it is not or may not be substantially incorporated into reports furnished to other persons.

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Accordingly, Petitioner is considered to be selling a taxable information service and Petitioner's total charges to clients for the annual subscription fee, the Consumer Analysis Report, the NDL F/O/C/U/S report and the Market Development Index report are subject to New York State and Local sales tax.

DATED: October 19, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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