

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

TSB-A-90 (2)S
Sales Tax
December 28, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S880510A

On May 10, 1988, a Petition for Advisory Opinion was received from Peat, Marwick, Main & Co., 345 Park Avenue, New York, New York 10154.

The issues raised by Petitioner, Peat, Marwick, Main & Co. are:

(1) Whether Section 1212-A of the New York State Tax Law and Section 11-2040 of the New York Administrative Code apply to the Guard service, the Corporate Security service and the Litigation Support and Intelligence service provided by Petitioner's client, RST Corporation (hereinafter referred to as RST).

(2) (a) Whether Section 1212-A of the New York State Tax Law and Section 11-2040 of the New York Administrative Code apply to the use of private investigators by RST;

(b) If so, is RST considered to be the ultimate consumer of such services or is RST considered to be the provider of such services to its clients;

(c) If the services of private investigators are subject to sales tax, is the sales tax based on where the private investigation is located, where the client is located, or the location where delivery of the report occurs.

(3) Whether Section 1105(c) (1) of the New York State Tax Law and Section 527.3 of the Sales and Use Tax Regulations apply to the receipts from charges to RST's clients for oral or written reports resulting from RST's Due Diligence Analysis service, Contest for Corporate Control service or Corporate and Financial Crime service.

(4) Whether RST's delivery of an oral report to a client, by telephone or in person, is subject to the 4% New York City Tax in the following transactions:

a) RST delivers the oral report from its New York City office to a client located within New York City.

b) RST delivers the oral report from its New York City office to a client located outside New York City.

c) RST delivers the oral report from its office outside New York City to a client located within New York City.

d) RST delivers the oral report from its office in New York City to a client located outside New York City. Subsequently, the client requests RST to deliver the same report to its law firm located within New York City.

e) RST delivers the oral report from its New York City office to an individual located in Connecticut, subsequently billing a New York City based corporation for the services provided.

f) RST delivers an oral report from its New York City office to a law firm located within New York City, subsequently billing the client at a location outside New York City.

RST, a private investigator licensed pursuant to Sections 70 and 71 of the New York General Business Law, is headquartered in New York City and has offices in other cities in the United State and foreign countries.

RST performs various professional services for its clients. The processes used to provide such services and Petitioner's position concerning the application of sales tax to such services are as follows:

Guard Services - Guard services are provided on an hourly basis and include an annual administrative (retainer) fee.

Petitioner contends that the receipts from the Guard services which RST renders through the use of protective guards is subject to the 4% New York City tax while the annual administrative fee levied in regard to these services is not subject to the 4% New York City tax because the charges are separately stated and do not reflect charges for protective services.

Corporate Security - The Corporate Security service involves expert consultation in assisting clients with the safeguarding of assets. A security appraisal is performed by RST and often will include a detailed report with recommendations for specific effective measures designed to avert business security lapses. Each report is customized and unique to the specific requirements of the client.

Litigation Support and Intelligence - The Litigation Support and Intelligence service involves obtaining and supporting information relating to the preparation of corporate and commercial litigation for legal counsel by the identification of potential witnesses, interviewing such witnesses and analyzing evidence.

Petitioner contends that the services rendered by RST relating to litigation support and intelligence gathering are considered professional services which are personal and individual in nature and which may not be incorporated into reports furnished to others. Petitioner makes reference to Sales and Use Tax Regulation Section 527.3(b)(3).

Due Diligence Analysis - The Due Diligence Analysis service involves obtaining information relating to past and current business activities of corporations and individuals seeking financing. The information is obtained by researching newspapers, reviewing public records, conducting personal interviews and use of electronic storage retrieval services.

Contests for Corporate Control - The Contests for Corporate Control service requires the obtaining of information regarding the background and operations of a client's adversaries relating to hostile takeovers, proxy battles etc. This includes the analysis of securities filings, review of

litigation documents, and interviews with individuals. In addition, information is obtained from newspapers and use of electronic storage retrieval services.

Corporate and Financial Crimes - The Corporate and Financial Crimes service involves the investigation of crimes against clients and assisting such clients in discovering and curtailing criminal activities such as misappropriation of assets and the theft of trade secrets. A majority of this information is obtained by conducting personnel interviews and analyzing the client's financial documents.

Petitioner contends that the services rendered by RST relating to Due Diligence Analysis, Contests for Corporation Control, and Corporate and Financial Crime Analysis are not subject to the 4% New York City Tax nor the statewide tax on information services because these services are not protective or detective in nature and are considered professional services of a confidential (personal and individual) nature.

While the primary means of transmitting the information to its clients is on an oral basis, RST may furnish the information to its clients in the form of a written report.

Occasionally, RST subcontracts work to private investigators, based both within and outside New York State. These investigators bill RST directly for the services performed. Subsequently, when RST bills its clients for those services at a marked-up value, the bill represents that the charges are for professional services rendered.

Petitioner contends that if the services of private investigators are subject to the 4% New York City tax, then RST should be the consumer of these services since the services rendered to clients are professional services which are considered personal and individual in nature.

Issue I

Section 1212-A(h)(2)(i)(B) of the Tax Law authorizes the imposition of sales tax upon the receipts from every sale, except for resale, of protective and detective services in cities of one million or more.

Section 11-2040 (a)(2) of the New York Administrative Code imposes a tax upon receipts from every sale, except for resale, of protective and detective services including guard, patrol and watchman services of every nature.

Section 11-2039(b)(2) of the New York Administrative Code defines "receipt" as the amount of the sale price of any property and the charge for any service taxable under this subchapter, without any deduction for expenses.

RST's Guard service, which is comprised of assigning security personnel to perform guard service at the client's location constitutes the providing of a protective service. Protection services are taxable where rendered. Accordingly, receipts from RST's charges to its clients for providing the protective service within New York City and the receipts from the annual administrative (retainer)

fee are subject to the 4% New York City tax under the provisions of Section 1212-A(h)(2)(i)(B) of the Tax Law and Section 11-2040 (a)(2) of the New York City Administrative code.

Petitioner's contention that the annual administrative fee is not subject to the 4% New York City tax as such fee represents a margin of profit plus costs incurred from accounting services and corporate overhead, and does not reflect charges for protective service is erroneous. The charges included in the annual administrative fee, even though billed annually and separately from the charges for the providing of security personnel, are actually expenses or costs incurred in providing a protective service and are considered to be part of the total receipts from the sale of such service. Therefore, in accordance with the provisions of Section 11-2039(b)(2) such expenses are not to be deducted from the sale receipts but are to be included in the total receipt for the purpose of computing the 4% New York City tax due.

RST's Corporate Security service includes consulting with a client concerning the safekeeping of the client's business assets, and subsequently performing a security appraisal generally followed by a detailed report recommending measures designed to avert business security lapses. Each report is customized and unique to the specific requirements of the client.

Whereas RST's Corporate Security service is a consulting service and is not of a protective or detective nature, the provisions of Section 1212-A of the Tax Law and Section 11-2040 of the New York Administrative Code do not apply to the receipts from RST's sales of such service. However, whenever RST follows such consultations with the issuance of a written report recommending certain measures to prevent business security lapses, RST is considered to be performing an information service.

Under the provisions of Section 1105(c)(1) of the Tax Law, the receipts from the sale of an information service are subject to state and local sales tax except when the information provided is of a personal or individual nature and is not or may not be substantially incorporated in reports furnished to other persons. In Matter of New York Life Ins. Co. v. v State Tax Commission, (80 AD2d 675, affd sub nom. Matter of Metropolitan Life Ins. Co. v State Tax Comm. 55 NY2d 758, confidential character reports containing highly personal information about individuals were held to be of the uniquely personal and individual nature contemplated by the Tax Law. Accordingly, as the information in RST's written reports is "uniquely" personal to each specific client and is not and may not be substantially incorporated into reports furnished to other clients, the provisions of Section 1105(c)(1) of the Tax Law do not apply to the receipts from RST's sales of such reports.

RST's Litigation Support and Intelligence service entails the identification of potential witnesses, the interviewing of such witnesses and the analyzing of evidence for the purpose of providing information for use in the preparation of corporate and commercial litigation for legal counsel.

Section 1212-A(h)(2)(i)(B) of the Tax Law and Section 11-2040(a)(2) of the New York Administrative Code are intended to apply to protective and detective services of every nature. Protective and detective services include but are not limited to personal or business protection; divorce work; suspect surveillance; the finding of missing persons or stolen funds; the investigation of actual or suspected thefts; the location of missing property; the handling of criminal cases and the performance of polygraph tests and electronic sweeps. Detective services also include investigations to obtain information regarding crimes; the identity, conduct, whereabouts, reputation, or character of persons; the credibility of witnesses; and other matters; or securing evidence to be used in trials or hearings. (see: 13 NY Jur 2d, Investigators, Private Detectives, and Watch, Guard, or Patrol Agencies §§ 284.)

Accordingly, the services of trial preparation investigating and the taking and preparing of various statements, affidavits, etc. by a detective agency constitute the performance of a detective service, the receipts from the charges therefore being subject to the 4% New York City tax, under the provisions of Section 1212-A(h)(2)(i)(B) of the Tax Law and Section 11-2040(a)(2) of the New York Administrative Code.

Petitioner infers that receipts from charges to RST's clients for the Litigation Support and Intelligence services are not subject to the sales tax imposed under Section 1105(c)(1) of the Tax Law and Section 527.3 of the Sales and Use Tax Regulations because such services result in the sale of information which is personal and individual in nature and which may not be incorporated into reports furnished to others. While Petitioner's inference is correct, RST's charges to its clients are not precluded from being subject to the 4% New York City tax inasmuch as the services are investigative in nature and fall within the provisions of Section 1212-A(h)(2)(i)(B) of the Tax Law and Section 11-2040(a)(2) of the New York City Administrative Code.

Issue 2

(a) When RST subcontracts investigative work to private investigators, Section 1212-A of the Tax Law and Section 11-2040 of the New York Administrative Code will apply to those transactions where delivery of the investigative report to RST or directly to RST's client occurs within New York City.

(b) When RST subcontracts the investigative work to a private investigator, RST will not be considered as the ultimate consumer of such services, but will be considered as the provider of such services to the client. Petitioner's contention that RST should be considered the consumer of these services because they are professional services which are personal and individual in nature is erroneous.

Because RST will be purchasing the subcontracted services for resale purposes, such purchases will not be subject to the 4% New York City tax, provided RST furnishes the subcontractor a properly completed Form ST-120, Resale Certificate no later than 90 days after the service was rendered.

(c) The determination of whether the services of private investigators are subject to the 4% New York City tax is based on delivery of the investigative report occurring within New York City and not according to where the services are rendered. When the investigative services are performed outside New York City but delivery of the investigative report to the client occurs within New York City, the charge to the client will be subject to the 4% New York City tax. When the investigative services are performed within New York City but delivery of the investigative report to the client occurs outside New York City, the charge to the client will not be subject to the 4% New York City tax.

Issue 3

Petitioner's contention that the investigative services rendered by RST relating to the Contests for Corporate Control service and the Corporate and Financial Crimes service are not protective or detective in nature but are professional services of a personal, individual and confidential nature and therefore not subject to the 4% New York City tax imposed under Section 11-2040 of the New York Administrative Code is erroneous.

The activities performed by RST in rendering the Contests for Corporate Control service and the Corporate and Financial Crimes service are activities which fall within the meaning of protective and detective services under Section 1212-A(h)(2)(i)(B) of the Tax Law and Section 11-2040(a)(2) of the New York Administrative Code. It is noted that the information contained in these reports is the work product of RST's investigations into various individuals and corporations and is not merely information supplied by an applicant and verified by a detective agency as was the case in Metropolitan Life Insurance Company; Mutual Life Insurance Company, Decision of the State Tax Commission, April 15, 1986, TSB-H-85(129)S. Accordingly, even though the reports delivered to the client by RST may be of a personal or individual nature, making the receipts from the charges for such services not subject to the tax imposed under Section 1105(c)(1) of the Tax Law, such receipts are subject to the 4% New York City tax imposed under Section 1212-A of the Tax Law and Section 11-2040 of the New York Administrative Code.

Petitioner's contention that the investigative services rendered by RST relating to the due Diligence Analysis Service are not protective or detective in nature is correct. However, Petitioner's contention that because the services rendered are of a personal, individual and confidential nature, such services are therefore not subject to the 4% New York City tax imposed under Section 11-2040 of the New York Administrative code is erroneous.

Section 527.3 of the Sales and Use Tax Regulations states:

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

(a) Imposition

(4) Charges for credit information services, other than those that are transmitted orally, are subject to tax. The following rules shall apply in determining taxability of services that include both oral and written reports:

(i) Any fee for a written report is taxable

- (ii) Any fee for an oral report is taxable if the oral report is preliminary to the written report.

* * *

- (b) Exclusions

- (1) Sales tax does not apply to receipts from sales of information services which are for resale as such.
- (2) The sales tax does not apply to the receipts from the sales of information which is personal or individual in nature and which is not or may not be substantially incorporated into reports furnished to other persons by the person who has collected, compiled or analyzed such information.

Section 1212-A(h)(2)(i)(A) of the Tax Law authorizes the imposition of sales tax upon:

[T]he receipts from every sale, except for resale, of credit rating, credit reporting ... services, including, but not limited to those services provided by mercantile and consumer credit rating or reporting bureaus or agencies and credit adjustment or collection bureaus or agencies, whether rendered in written or oral form or in any other matter, except to the extent otherwise taxable under article twenty-eight of this chapter...

Section 11-2040(a)(1) of the New York Administrative Code imposes tax on:

[c]redit rating and credit reporting services, including, but not limited to, those services provided by mercantile and consumer credit rating or reporting bureaus or agencies, whether rendered in written or oral form or in any other manner, except to the extent otherwise taxable under article twenty-eight of the tax law.

Accordingly, the activities performed by RST in rendering the Due Diligence Analysis service fall within the category of credit information services and are subject to the New York City tax imposed under Section 1212-A of the Tax Law and Section 11-2040 of the New York Administrative Code, as well as the Statewide tax imposed under Section 1105(c)(1) of the Tax Law. However, in those instances where the report is rendered only in oral form or where the report rendered can be shown to be of a personal and individual nature, such report will be exempt from the tax imposed under Section 1105(c)(1) of the Tax Law.

When RST performs investigative services for a client and presents the client the results of such investigation in the form of an oral report by either telephone or in person, the sales tax status

of the receipts from such service will be determined by the location at which the client takes delivery of such report.

Whereas Section 1212-A(h)(2)(i)(B) of the Tax Law and Section 11-2040(a)(2) of the New York Administrative Code are intended to apply to protective and detective services of every nature, receipts from investigative services which result in an oral report being delivered to a client at a location within New York City will be subject to the 4% New York City tax. Accordingly, the receipts from RST's investigative service will be subject to the 4% New York City tax in the following transactions enumerated above:

(a) RST delivers the oral report from its New York City office to a client located within New York City.

(c) RST delivers the oral report from its office outside New York City to a client located within New York City.

(f) RST delivers an oral report from its New York City office to a law firm located within New York City, subsequently billing the client at a location outside New York City. In the instant transaction, the law firm is considered to be acting as agent or representative of the client and delivery of the oral report to the law firm constitutes delivery to the client within New York City.

The provisions of Section 1212-A(h)(2)(i)(B) and Section 11-2040(a)(2) do not apply to receipts from investigative services which result in an oral report being delivered to a client at a location outside New York City. Therefore, the receipts from RST's investigative service will not be subject to the 4% New York City tax in the following transactions enumerated above:

(b) RST delivers the oral report from its New York City office to a client located outside New York City.

(e) RST delivers the oral report from its office in New York City to an individual located in Connecticut, subsequently billing a New York City based corporation for the services provided. In the instant transaction delivery of the report occurs outside New York City, thereby excluding the transaction from the provisions of Section 1212-A(h)(2)(i)(B) of the Tax Law and Section 11-2040(a)(2) of the New York Administrative Code. The rendering of the bill to a New York City based Corporation does not effect the tax status of the transaction.

In transaction d) enumerated above, the provisions of Section 1212-A(h)(2)(i)(B) and Section 11-2040(a)(2) will not apply to the transaction in which the oral report is delivered to a client outside New York City provided that this portion of the transaction is shown separately on the billing rendered to the client. However, such provisions will apply to the receipts derived from the portion of the transaction in which the same report is delivered to the client's law firm located within New

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York City. If the bill rendered to the client does not separately state the charges for the additional report delivered within New York City, the entire charge to the client will be subject to the 4% New York City tax.

DATED: December 28, 1989

s/FRANK J. PUCCIA
Director
Technical Services

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