

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

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Sales Tax
July 29, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S910325C

On March 25, 1991 a Petition for an Advisory Opinion was received from Mark S. Klein, Hodgson, Russ, Andrews, Woods and Goodyear, 1800 One M & T Plaza, Buffalo, N.Y. 14203.

The issue raised by Petitioner, Mark S. Klein, is whether Petitioner's client's on-line news services are periodicals or newspapers which qualify for exemption from sales taxes under Section 1115(a)(5) of the Tax Law.

Petitioner's client is registered as an investment advisor with the Securities and Exchange Commission. It engages in consulting and investment advisory services, investment research and the publication of financial newsletters targeted to an audience of high-level, technically sophisticated financial management decision makers. Its publications consist of Newsletter A, Newsletter B, Newsletter C and Newsletter D.

Each of the four newsletters is designed to provide subscribers with almost instantaneous access to news and analysis regarding particular financial markets. These subscribers, many responsible for managing literally billions of dollars of investments, look to these newsletters to provide them with news of fast-breaking events and other information necessary to make informed investment decisions. In the world of financial markets such news must be available almost instantaneously and be offered in a format that maximizes the amount of useful information provided while minimizing the amount of time it takes to absorb that information. Speed and accessibility take clear precedence over the quality of the prose. Written for a knowledgeable audience, the news can sometimes be reported most succinctly with acronyms, abbreviations and numbers. A typical newsletter article might give an almost instantaneous summary of the testimony of the Chairman of the Federal Reserve Board before Congress combined with analysis of the impact of that testimony on various financial markets. Articles for each publication are prepared by a staff of correspondents.

All four newsletters are "on-line" publications available to subscribers in text form on computer screens located on the premises of subscribers. Subscribers can and many do convert the newsletter as a whole or particular articles to hard copy using printers wired to their computer terminal. The newsletters are delivered to subscribers via one of the three electronic networks: Telerate, Quotron and ADP. The newsletters are published each business day and appear on particular pages of these electronic news services.

The newsletters' offices are equipped with a noteworthy array and amount of communication equipment -- telephones, televisions, wire services, etc. Reporters are on the telephones constantly, securing new information, "checking out" leads, confirming rumors, and seeking comment on recent events. Television broadcasts and wire services are monitored for news as well. As news is gathered, reporters type their stories directly into a sophisticated computer system. When the initial daily

edition or new articles or updates throughout the day are ready for dissemination, the information is published at the "push of a button" via electronic network to the publications' subscribers. At the end of each business day, a hard copy of the newsletter is also produced for mailing to clients who do not have video display terminal access or capabilities.

The stories in all four publications change daily, and are in fact often updated throughout the day, much like the "early" and "final" editions of newspapers. Each new day starts with a new publication. Past publications are not available via electronic network, nor stored electronically for "retrieval", nor compiled in hard copy form for sale. While on-line, the newsletters are not subject to inquiries or work searches as a data base would be. The newsletters are publications containing financial news readable by subscribers in their entirety or article by article as any other multi-story news publication would be.

Newsletter A

Newsletter A is an on-line publication focusing on fast-breaking news developments in and analysis of the corporate securities market, including market facts, market "color" and market rumors. Its articles are written by a staff of five reporters who investigate, analyze and report the news. Organized into various sections, Newsletter A each day includes:

- up-to-the-minute reporting on news developments affecting corporate securities;
- analysis of economic trends and developments and their likely impact on future performance and opportunities in the corporate securities market;
- information on new filings, new issues, corporate rating changes, potential rating changes, current yields, etc.
- special topical reports on issues such as private placement activity, etc.

Newsletter B

Newsletter B focuses on United States money and capital markets. The newsletter is designed to provide continuously updated analysis of Federal Reserve Board policy and operation, economic indicators, fiscal policy and other factors that drive United States interest rates. The publication includes articles that provide:

- forecasts, analysis and comment on events critical to the bond market; for example, analysis of how markets should react to U.S. economic statistics appear within 15 minutes of the release of these statistics.
- in-depth examinations of particular factors affecting the capital market, e.g. Federal Reserve Board policy;

- money supply estimates, projected financing schedules, cash balances, actual and projected yield curves, spread data, etc.

- updates and forecasts of European and Asian market activity from London and Tokyo.

The contents of Newsletter B includes news of all kinds, the common link being a connection to the performance of the bond market. The news is coupled with analysis of what that performance is likely to be. The reporting is accomplished by taxpayer's staff of eight located in New York, London and Tokyo.

Newsletter C

Newsletter C is devoted to currency markets. Articles touch upon, among other topics:

- analysis of the factors affecting the foreign exchange market;
- briefings on the outlook for the dollar;
- key upcoming economic and political events;
- comments on data releases of foreign governments and banks;
- histories of key economic indicators;
- review of technical trends in the currency market;
- in-depth reports on issues affecting the foreign exchange market.

Newsletter C is the product of a staff of ten individuals, each contributing unsigned articles that together comprise the publication's text.

Newsletter D

Newsletter D is devoted to articles on fixed income cash and futures markets. Articles touch upon, among other topics:

- updates, observations, comments and trading recommendations;
- forecasts of market price changes;
- market yields and values;
- analysis of related markets; and
- technical studies.

The Newsletter provides 24 hour a day analysis and forecasts of the bond markets in over 10 countries and utilizes several levels of technical analysis to provide forecasts of market behavior. Newsletter D is the most technical of the four newsletters and the most difficult for a "lay reader" to understand. Nonetheless, for subscribers well-versed in the language of the industry Newsletter D is an invaluable source of news, offering insight into the importance of fast-breaking events, guidance on the meaning behind market pries and trends, and new ways to predict market behavior. Newsletter D represents the combined effort of a reporting staff of eight.

Section 1105 of the Tax Law provides, in part:

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

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article. (Emphasis added)

(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. . . .

Section 1115 of the Tax Law provides,, in part:

Exemptions from sales and use taxes... -- (a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

(5) Newspapers and periodicals.

Section 527.3 of the Sales and Use Tax Regulations states, in part:

Sale 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.

Section 528.6 of the Sales and Use Tax Regulations states, in part:

Newspapers and periodicals (Tax Law, 1115[a][5]. (a) Exemption. The sale of newspapers and periodicals is exempt from sales and compensating use tax.

(b) Definition of newspaper. (1) In order to constitute a newspaper, a publication must conform generally to the following requirements:

(i) it must be published in printed or written form at stated short intervals, usually daily or weekly;

(ii) it must not, either singly or, when successive issues are put together, constitute a book;

(iii) it must be available for circulation to the public; and

(iv) it must contain matters of general interest and reports of current events.

(2) Notwithstanding the fact that a publication may be devoted primarily to matters of specialized interest, such as legal, mercantile, financial, theatrical, political, religious or sporting matters, nevertheless, if, in addition to the special interest it serves, the publication contains general news, it is entitled to the classification of a newspaper. . . .

(c) Definition of a periodical. (1) In order to constitute a periodical, a publication must conform generally to the following requirements:

(i) it must be published in printed or written form at stated intervals, at least as frequently as four times a year;

(ii) it must not, either singly or, when successive issues are put together, constitute a book;

(iii) it must be available for circulation to the public;

(iv) it must have continuity as to title and general nature of content from issue to issue; and

(v) each issue must contain a variety of articles by different authors devoted to literature, the sciences or the arts, news, some special industry, profession, sport or other field of endeavor.

(2) A publication which may be known as or considered to be a newsletter may qualify as a periodical if it conforms to the above standards. Where a newsletter has no signed articles, but has a staff of writers who originally prepare articles, such publication will be considered to have articles by different authors. If a publication has been classified by the United States Postal Service as one which is entitled to second class mailing privileges, that fact will be considered in determining whether or not the publication is a periodical. . . .

In order to be considered a newspaper or periodical for sales tax purposes, a publication must meet the requirements enumerated in Section 528.6(b)(1) and (c)(1), respectively, of the Sales and Use Tax Regulations. One requirement for either classification is that the publication must be published at certain stated intervals in printed or written form.

To the extent that Petitioner's publications are made available to their subscribers as an electronic readout or display on a computer screen, they are not newspapers or periodicals for the purposes of the exemption contained in Section 1115(a) of the Tax Law since they do not meet the definition of a newspaper or a periodical contained in Section 528.6 of the Sales and Use Tax Regulations in that they are not published in printed or written form.

It is also noted that the exemptions afforded under Section 1115 of the Tax law are only applicable to receipts from sales of tangible personal property which would be subject to the tax imposed under Section 1105(a) of the Tax Law except for the provisions of Section 1115.

Because Petitioner's client's on-line news service is delivered to customers by means of an electronic readout or display rather than in printed, or written form, Petitioner's client is not considered to be selling tangible personal property. Therefore, the receipts from sales of the on-line news service do not fall within the exemption provided under Section 1115(a)(5) of the Tax Law for newspapers and periodicals.

However, receipts from Petitioner's client's sales of the on-line news services are considered to be receipts from the sales of an information service and are subject to the tax imposed under Section 1105(c)(1) of the Tax Law and Section 527.3(a)(1) of the Sales and Use Tax Regulations. Murphy Heating Service, Inc. v Chu, 124 AD2d 907.

The laws of New York State and the Regulations of the Commissioner of Taxation and Finance are presumed to be constitutional by the Commissioner. There is no jurisdiction at the advisory opinion level to declare such laws or regulations unconstitutional. Therefore, it must be presumed that the relevant sections of the law are constitutional to the extent that they relate to the imposition of the tax liability on Petitioner's client.

DATED: July 29, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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