

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

TSB-A-93 (65) S
Sales Tax
December 27, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S931028A

On October 28, 1993, a Petition for Advisory Opinion was received from Mark S. Klein, c/o Hodgson, Russ, Andrews, Woods and Goodyear, 1800 One M & T Plaza, Buffalo, New York 14203.

The issues raised by Petitioner, Mark S. Klein, are:

1. Whether Petitioner's clients on-line services are subject to the additional five percent tax imposed under Section 1105(c)(9)(ii) of the Tax Law.
2. Whether Petitioner's clients consulting services provided by telephone are subject to the additional five percent tax imposed under Section 1105(c)(9)(ii) 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 a button" via electronic network to the publication's 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 word searches as a data base would be. The newsletters are publications containing financial news readable by subscribers in their entirety 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-minute reporting on news developments affecting corporate securities;
- analysis of economic trends and developments and their likely impact on future performance and opportunities on the corporate securities market;
- information on new filings, new issues, corporate rating changes, potential rating changes, current yields, etc; and
- 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 25 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.; and

-- 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;

-- comments on data releases of foreign governments and banks;

-- histories of key economic indicators;

-- review of technical trends in the currency market; and

-- 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-braking events, guidance on the meaning behind market prices and trends, and new ways to predict market behavior. Newsletter D represents the combined effort of a reporting staff of eight.

Individual subscribers, based on their particular circumstances, may feel the need to go beyond the information provided in these newsletters to explore one or more specific concerns in greater depth. Under these circumstances, subscribers can take advantage of Petitioner's client's telephone consulting services. Some subscribers call regularly; others less frequently. In total, Petitioner's client's staff spends approximately 35 hours per week providing consulting services over the telephone. When subscribers call, they have access to the authors of the newsletter to which they subscribe, highly skilled professionals in the field of financial market analysis.

Subscribers do not call these consultants to get the final closing price of stock, or the current movement of the yen versus the dollar. Subscribers are high level financial managers who have ready access elsewhere to such information. Neither do subscribers call for the information provided in the taxpayer's newsletter. All consulting subscribers are also newsletter customers, and have access to such information. Instead, subscribers call with highly individualized concerns based on their own particular circumstances and interests.

Consulting services can be purchased separately from newsletter subscriptions. However, this is an exception, and not the rule. Generally, subscribers purchase the consulting service as a package that also includes a subscription to one of Petitioner's clients financial newsletters. Charges for the consulting service are, however, separately stated from the charges for the newsletters on the subscriber's invoice.

Petitioner's client currently collects New York State and local sales taxes on receipts from the sale of on-line news services to its New York subscribers under the provisions of an information service taxable pursuant to Section 1105(c)(1) of the Tax Law.

Section 1105 of the Tax Law states, in part:

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 of 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.

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(9)(I) The furnishing or provision of an entertainment service or of an information service, which is furnished, provided, or delivered by means of telephony or telegraphy or telephone or telegraph service (whether intrastate or interstate) of whatever nature, such as entertainment or information services provided through 800 or 900 numbers or mass announcement services or interactive information network services. Provided, however, that in no event (i) shall the furnishing or provision of an information service be taxed under this paragraph unless it would otherwise be subject to taxation under paragraph one of this subdivision if it were furnished by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner nor (ii) shall the provision of cable television service to customers be taxed under this paragraph.

(II) Notwithstanding the rate and date set forth in the opening undesignated paragraph of this section and notwithstanding the opening undesignated paragraph of this subdivision, on and after September first, nineteen hundred ninety-three, in addition to any other tax imposed under this section, and in addition to any other tax or fee imposed under any other provision of law, there is hereby imposed and there shall be paid an additional tax at the rate of five percent upon the receipts which are subject to tax under subparagraph (I) of this paragraph. Such additional tax shall not be imposed by section eleven hundred seven, eleven hundred eight or eleven hundred nine of this article and shall not be included among the taxes authorized to be imposed pursuant to the authority of article twenty-nine of this chapter.

The tax imposed under Section 1105(c)(9)(I) and (II) of the Tax Law applies only to information and entertainment services which are provided, furnished or delivered by telephone and which the customer receives exclusively aurally. The additional five percent tax does not apply to information or entertainment services which involve a written component, such as those provided from computer to computer or computer to written format.

In Quotron systems, Inc., Adv Op Comm T&F, November 29, 1993, TSB-A-93(61)S, the Commissioner advised that while the high-speed delivery of current financial news and information services of various types via leased telephone lines linked to Petitioner's central computer facility where data was converted for use of its subscribers through Petitioner's communication network was an information service as described in Section 1105(c)(1) of the Tax Law and, therefore, subject to sales and use taxes, the receipts from the sale of such information was not subject to sales tax imposed under Section 1105(c)(9)(I) and (II) of the Tax Law since the services were not received aurally.

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In Hodgson, Russ, Andrews, Woods and Goodyear, Adv Op Comm T&F, April 2, 1992, TSB-A-92(31)S, the Commissioner held that Petitioner's client's consulting service provided by telephone was not an information service pursuant to Sections 1105(c)(1) and 1105(c)(9) of the Tax Law since the information, while provided orally, was personal and individual in nature and was not incorporated in reports furnished to subscribers. The Commissioner further held that while Petitioner's clients electronic news service was an information service subject to sales tax pursuant to Section 1105(c)(1) of the Tax Law, since Petitioner's clients consulting service could be purchased separately from their electronic news service and the charge for the consulting service was separately stated on invoices given to subscribers, that even if the consulting service was purchased as a package with the newsletter, the separately stated charge for the consulting service was not subject to sales tax.

With respect to issue "1", in accordance with Quotron Systems, Inc., *supra*, since Petitioner's client is selling an information service by way of its on-line news service which is not personal and individual in nature, the receipts from such information service is subject to sales tax pursuant to Section 1105(c)(1) of the Tax Law. However, since Petitioner's client's on line news service is not received aurally by Petitioner's client's subscribers, the receipts from the sale of such information are not subject to the sales tax imposed under Section 1105(c)(9) of the Tax Law.

As for issue "2", Petitioner's clients consulting service can be purchased separately from the on-line news service and the charges for such services are separately stated on invoices given to the subscribers. In addition, the information provided by way of the consulting service is personal and individual in nature and is not incorporated in reports furnished to subscribers. Accordingly, pursuant to Hodgson, Russ, Andrews, Woods and Goodyear, *supra*, Petitioner's clients consulting services are not subject to the taxes imposed by Sections 1105(c)(1) and 1105(c)(9) of the Tax Law.

DATED: December 27, 199

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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