

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

TSB-A-97(64)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970721A

On July 21, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Carl J. Lalena, c/o Always Available Claims Services, Inc., 200 Cow Neck Road, Port Washington, NY 11050.

The issue raised by Petitioner, Carl J. Lalena, is whether he must collect sales tax on receipts from fees charged to his clients for his services as an independent adjuster and/or his services as a private investigator as described below.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner's business activities consist of rendering services as both an independent insurance adjuster and as a private investigator. Petitioner is licensed as an independent adjuster pursuant to Article 21 of the Insurance Law and as a private investigator pursuant to Article 7 of the General Business Law.

Petitioner receives assignments from insurance companies concerning various personal injury, product liability, property damage and insurance fraud claims. The services provided by Petitioner include investigating the causes of accidents, property damage or injuries, verifying and obtaining information by interviewing claimants and insureds, evaluating and negotiating claim settlements on the insurer's behalf and, in insurance fraud cases, suspect video surveillance. Petitioner may be called upon to appear in court and testify as a witness concerning certain claims, and he questions whether this would have any effect on the taxability of his services.

Applicable Law and Regulations

Section 1105 of the Tax Law imposes sales tax, in part, upon:

(c) The receipts from every sale, except for resale, of the following services:

(8) Protective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature other than the performance of such services by a port watchman licensed by the waterfront commission of New York harbor, whether or not tangible personal property is transferred in conjunction therewith.

Section 1110(a)(C) of the Tax Law imposes compensating use tax on "any of the services described in paragraphs (1), (7) and (8) of subdivision (c) of section eleven hundred five."

Article 7 of the General Business Law states, in part:

§ 70. Licenses

1. The department of state shall have the power to issue separate licenses to private investigators and to watch, guard or patrol agencies

* * *

3. ... Nothing contained in this section shall be deemed to include the business of adjusters for insurance companies, nor public adjusters licensed by the superintendent of insurance under the insurance law of this state

§ 71. Definitions

1. "Private investigator" shall mean and include the business of private investigator and shall also mean and include, separately or collectively, the making for hire, reward or for any consideration whatsoever, of any investigation, or investigations for the purpose of obtaining information with reference to any of the following matters, notwithstanding the fact that other functions and services may also be performed for fee, hire or reward; ... the identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation or character of any person, group of persons, association, organization, society, other groups of persons, firm or corporation; the credibility of witnesses or other persons; the whereabouts of missing persons; the location or recovery of lost or stolen property; the causes and origin of, or responsibility for fires, or libels, or losses, or accidents, or damage or injuries to real or personal property; ... or with reference to the conduct, honesty, efficiency, loyalty or activities of employees, agents, contractors, and subcontractors; or the securing of evidence to be used before any authorized investigating committee, board of award, board of arbitration, or in the trial of civil or criminal cases. The foregoing shall not be deemed to include . . . persons engaged in the business of adjusters for insurance companies nor public adjusters licensed by the superintendent of insurance under the insurance law of this state.

Article 21 of the New York State Insurance Law states, in part:

§ 2101. Definitions

(g) In this article, "adjuster" means any "independent adjuster" or "public adjuster" as defined below:

(1) The term "independent adjuster" means any person, firm, association or corporation who, or which, for money, commission or any other thing of value, acts in this state on behalf of an insurer in the work of investigating and adjusting claims arising under insurance contracts issued by such insurer and who performs such duties required by such insurer as are incidental to such claims and also includes any person who for compensation or anything of value investigates and adjusts claims on behalf of any independent adjuster....

(2) "Public adjuster" means any person, firm, association or corporation who, or which, for money, commission or any other thing of value, acts or aids in any manner on behalf of an insured in negotiating for, or effecting, the settlement of a claim or claims for loss or damage caused by, or resulting from, fire occurring in this state, or who, or which, advertises for, or solicits employment as an adjuster of such claims, and shall also include any person who, for money, commission or any other thing of value, solicits, investigates, or adjusts such claims on behalf of any such public adjuster....

In Compass Adjusters and Investigators v. Commissioner of Taxation and Finance of the State of New York (197 AD2d 38, 41-42) the court concluded that:

. . . among the detective and protective services covered by Tax Law § 1105(c)(8) are those provided by detective agencies, but the Tax Law contains no definition of detective services or detective agency. . . . the Department equated the terms to investigative services and investigators, which we find appropriate. In so doing, the Department noted that the term investigator is broadly defined under New York statutes. That broad definition can be found in General Business Law article 7, which regulates private investigators and certain other agencies (see, General Business Law § 71[1]). Expressly excluded from the broad definition of private investigator, however, are persons engaged in the business of adjusters for insurance companies and public adjusters licensed under the Insurance Law (*ibid.*). Among those regulated by Insurance Law article 21 are adjusters. An adjuster is defined as any independent adjuster or public adjuster....

Based upon the foregoing statutory scheme . . . , we conclude that the term protective and detective services contained in Tax Law § 1105(c)(8) does not include those services which cannot be performed without the license required by Insurance Law § 2102(a)(1). (Emphasis added) . . . Plaintiffs are licensed private investigators and licensed independent adjusters. Their status at any given time depends entirely upon the nature of the activities they are performing at that time. When they are performing activities that require a license pursuant to the provisions of General Business Law article 7, plaintiffs are acting as private investigators for which no independent adjuster license

is required, and they concede that the fees they charge for those detective services are subject to the sales tax under Tax Law § 1105(c)(8). When plaintiffs are performing activities that require a license pursuant to the provisions of Insurance Law article 21, they are acting as independent adjusters, for which no private investigator's license is required, and the fees charged for those services are not subject to the sales tax.

Opinion

Petitioner may be hired to perform services as either an independent adjuster or as a private investigator. Based on the Appellate Division decision in Compass Adjusters and Investigators, for purposes of State and local sales and compensating use taxes, the services performed by Petitioner in these two capacities have different taxable treatment.

When Petitioner performs activities requiring an independent adjuster license issued under Article 21 of the Insurance Law, Petitioner's services are not subject to the taxes imposed under Sections 1105(c)(8) and 1110(a)(C) of the Tax Law. Such activities are described in Section 2101(g)(1) of the Insurance Law and consist, for example, of the work of investigating and adjusting claims on behalf of an insurance company arising from insurance contracts issued by such insurance company, and performing such duties required by the insurer as are incidental to such claims (see Compass Adjusters and Investigators, *supra*; Stephen J. Boyko, Inc., Adv Op Comm T&F, June 29, 1995, TSB-A-95(24)S; Robert M. Bridges, Adv Op Comm T&F, June 29, 1995, TSB-A-95(25)S).

When Petitioner performs activities requiring a private investigator's license issued under Article 7 of the General Business Law, Petitioner's services are subject to the taxes imposed under Sections 1105(c)(8) and 1110(a)(C) of the Tax Law, including when performed for an insurance company. Such services are described in Section 71(1) of the General Business Law and would include, for example, surveillance activities (see Marvin Rosenthal, Adv Op Comm T&F, January 24, 1997, TSB-A-97(2)S).

Although Petitioner may be called upon to provide testimony in court concerning its activities both as a claims adjuster and/or as a private investigator, such testimony is irrelevant for the purposes of determining the taxability of services under Sections 1105(c)(8) and 1110(a)(C) of the Tax Law.

DATED: November 4, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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