

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

TSB-A-98(26)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S971118B

On November 18, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Deloitte & Touche LLP, 60 South Market Street, San Jose, California 95113-2303. Petitioner, Deloitte & Touche LLP, provided additional information pertaining to the Petition on February 20, 1998.

The issues raised by Petitioner are whether the fees charged by its client for the services described in the three scenarios that follow are subject to New York State sales or compensating use taxes.

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

Petitioner's client is headquartered in California, where it maintains all of its facilities and computer equipment. The client has no business offices in New York State; however, marketing representatives make periodic visits into New York to solicit new customers. The client does not manufacture any products of its own nor does it inventory products for others. Occasionally, Petitioner's client sells third party prewritten software to its customers to assist them in communicating and placing orders as described herein. (Petitioner is aware of the imposition of New York State sales and compensating use taxes on *prewritten computer software*, as defined in Section 1101(b)(14) of the Tax Law. This matter is not an issue in this Advisory Opinion.)

Each of the chargeable activities described in the scenarios is invoiced as a separate line item. All data is currently transmitted over leased telecommunication lines that are provided by IBM Global Network (IGN).

Scenario 1

Petitioner's client enters into business arrangements whereby wholesalers post lists (i.e., catalogues) of goods available for sale on the client's computer node in California. The wholesalers transmit this data to the node from their computers located within and outside of New York State. The client monitors and maintains the data and provides an arena for the posting and reading of this information. It does not actively collect or disseminate the information, but it does dictate the format of the information for consistency purposes. Retailers located within and outside of New York State establish trading partnerships with these wholesalers by accessing the catalogues electronically and placing orders with the wholesalers. The retailers download the universal product codes (UPCs) of the products from the catalogues as the products are ordered. These codes are used by the retailers to accurately reference the products in their purchase orders, which are sent to the wholesalers either electronically or via the mail (see, for example, Scenario 2). The client stores the retailers' purchase activities on backup storage tapes.

The wholesalers and retailers are charged monthly based on the number of trading partnerships established, plus an incremental charge based on the number of UPCs downloaded. The incremental charges are basic fees charged by the client and are not considered commissions or other consideration for the products sold. Petitioner questions whether charges by its client to New York based wholesalers for posting to the California node, access charges to New York based retailers for browsing the postings on the California node and incremental item charges to New York wholesalers and retailers are subject to New York State sales or compensating use taxes.

Scenario 2

Petitioner's client uses the IGN network and messaging facility to electronically connect wholesalers and retailers via their own computers. Once connected, wholesalers and retailers are able to complete transactions by electronically exchanging all of the necessary business documentation (e.g., purchase orders, receiving documentation, sales invoices, delivery confirmations, etc.). These electronic business forms are industry standardized Electronic Data Interchange (EDI) formats. The client does not perform any services on the documents other than to provide a network to facilitate the exchange.

Wholesalers and retailers who have established trading partnerships are aware of each other's identities and contact each other directly through the exchange of business documents. Normally, when both parties are located in New York, the EDI transmission will originate and terminate within New York State through a direct path between the two parties. However, the EDI transmission may leave New York passing through one or more states prior to terminating in New York. The routing of the transmission is dependent on the availability of the IGN transmission lines. The client is unable to identify whether an intrastate transmission has left New York State in the routing process.

The wholesalers and retailers are charged based on the number and size of the documents transmitted. Petitioner questions whether the charges to New York based wholesalers and retailers for providing the service of electronically exchanging business documents are subject to New York State sales or compensating use taxes.

Scenario 3

Petitioner's client provides an inventory replenishment service for retailers. The service consists of analyzing daily sales information for each retailer location, forecasting future inventory requirements and generating purchase orders for transmission to wholesalers. The fees for this service are based on the number of locations serviced and the number of individual products ordered.

Petitioner questions whether these charges are subject to New York State sales or compensating use taxes if the wholesalers or retailers are located in New York State or have a presence in the State.

Applicable Law

Section 1105(b) of the Tax Law imposes sale tax, in part, upon:

The receipts ... from every sale, other than sales for resale, of telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service

Sections 1105(c) and 1110(a) of the Tax Law impose sales and compensating use taxes, respectively, on certain enumerated services.

Opinion

The electronic catalogue services provided by Petitioner's client and described in Scenario 1 are not included among the enumerated services that are taxable under Sections 1105(b), 1105(c) or 1110(a) of the Tax Law. Moreover, to the extent that any of these services are of an advertising nature, such services are specifically excluded from tax under Section 1105(c), provided the client does not sell or otherwise transfer any tangible personal property to its customers in conjunction with such services. (See, Mike Levy, Adv Op Comm T&F, August 14, 1995, TSB-A-95(33)S; Ski Soft, Inc., Adv Op Comm T&F, June 25, 1997, TSB-A-97(35)S.) Accordingly, the fees charged by Petitioner's client for these services are not subject to New York State sales or compensating use taxes. (Where Petitioner's client makes taxable sales of prewritten computer software to customers in New York State, the receipts from these sales must be reasonable and separately stated on any invoice or other statement of price given to the customers.)

The client's service of providing a network to facilitate the exchange of EDI documents, as described in Scenario 2, is considered "telephony and telegraphy" under Section 1105(b) of the Tax Law. Accordingly, the fees charged by Petitioner's client for the transmission of documents that both originate and terminate in New York State (regardless of the routing process) are subject to sales tax. Fees charged by the client for interstate or international transmissions of documents are specifically excluded from tax.

TSB-A-98(26)S
Sales Tax

The inventory replenishment service provided by Petitioner's client, as described in Scenario 3, is of a record keeping/management character and is not included among the taxable services enumerated in the previously mentioned sections of the Tax Law. (See, Mary B. Letter Shop, Adv Op St Tax Comm, July 17, 1981, TSB-A-81(3)S; Florafax International, Inc., St Tax Comm Decision, January 28, 1986, TSB-H-86(45)S.) Thus, the fees charged by the client for this service are not subject to New York State sales or compensating use taxes.

DATED: April 14, 1998

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

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