

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

TSB-A-98(89)S  
Sales Tax  
December 30, 1998

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980224D

On February 24, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Apollo Travel Services Partnership, 2550 W. Golf Road, Suite 900, Rolling Meadows, Illinois 60008. Petitioner, Apollo Travel Services Partnership, submitted additional information on June 15, 1998.

The issues raised by Petitioner are as follows:

(1) Whether Petitioner leases computer equipment to its subscribers and therefore may purchase the computer equipment exempt from tax for resale. Alternatively, whether Petitioner is the consumer of the computer equipment transferred to the subscribers as an incident to, and to facilitate, the performance and delivery of the travel reservation booking and ticketing services and, therefore, is subject to New York use tax on the purchase of the equipment.

(2) Whether Petitioner's subscribers are required to pay sales tax on the full amount, or any portion, of the fixed monthly charges appearing in their contract with Petitioner.

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

Petitioner is engaged in the business of providing computerized reservation and ticketing services to travel agencies ("subscribers") located throughout the United States. Several subscribers are located in the State of New York. Petitioner provides the reservation and ticketing services through a proprietary computer network (the "CRS"). Access to the CRS allows subscribers to efficiently process reservation and ticketing transactions. The information available to subscribers through the CRS includes, but is not limited to

- Airline flight departure and arrival times, seat availability and costs.
- Car rental availability and cost.
- Hotel availability and cost.

Subscribers access Petitioner's CRS to perform a variety of travel reservation and ticket issuance functions. Through the CRS, subscribers may book reservations with a variety of airlines, tour groups, cruises, hotels, car rental agencies and other travel related businesses. In addition, subscribers utilize the CRS to print passenger tickets, boarding passes and travel itineraries. In most instances, Petitioner provides the subscriber with the computer equipment used to access the CRS.

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Petitioner enters into a written "Subscriber Services Agreement" ("agreement") with its subscribers, usually under a "productivity pricing" subscriber model. Under the agreement, Petitioner provides the following:

- Access to the CRS and the reservations and ticketing services.
- Computer equipment and software necessary to access and deliver the travel reservation and ticketing services. Computer equipment includes: PC's, file servers, monitors, modems and printers.

The agreement also defines the nature and amount of payments to be made by the subscriber to Petitioner under the "productivity pricing" model. Under the productivity based pricing method, the only potential charges that Petitioner may collect from subscribers are "variable charges" and "shortfall" which are discussed in detail below. Although the agreement discusses a "monthly fixed charge" for the use of the computer equipment, under no circumstances (excluding the start up months), is this amount ever collected from subscribers. Typically, even the start-up months are free of charge. Under this pricing methodology, the monthly fixed charge discussed in the agreement has never been billed or collected from subscribers. In fact, according to the terms of the agreement, Petitioner never has the right to demand payment of the monthly fixed charge under these circumstances. According to the sample agreement submitted as part of the Petition, this result is effectuated by allowing subscribers a credit applicable to the monthly fixed charges for the use of the computer hardware and software. If the subscriber achieves a certain level of bookings the subscriber is allowed a credit equal to 100% of the monthly fixed charges.

Petitioner states that the discussion of the monthly fixed charges in the contract is merely a marketing device used by Petitioner to alert the subscriber to the fact that Petitioner is allowing the subscriber to use the computer equipment without charge. The monthly fixed charge is an amount used to determine the total value of the services provided by Petitioner to the subscriber and to determine the target booking level the subscriber agrees to achieve.

The variable charges for supplemental services are mainly per-transaction based fees for the various services that Petitioner provides. The supplemental services which subscribers may elect to purchase include, but are not limited to:

- The ability to print passenger tickets, boarding passes, travel itineraries and invoices.
- The use of certain print queues, preview demands and file creators.
- The ability to maintain and retrieve records and generate reports in various levels of detail.
- Support services outside the normal terms of the agreement.

Petitioner states that it has appropriately billed, collected and remitted New York sales or use tax on all variable charges for supplemental services.

The "shortfall" is a fee assessed against subscribers who fail to meet their negotiated "target booking level." A subscriber's "target booking level" is the number of reservations a subscriber has agreed to book through the CRS. If the subscriber fails to meet its target booking level, the subscriber is required to pay a fee or "shortfall". This shortfall is calculated by multiplying an amount (\$2) by the difference between the subscriber's target booking level and the actual booking level achieved. Petitioner estimates that approximately 70-75 percent of subscribers consistently meet or exceed their target booking levels. Therefore, the shortfall fee is generally not billed. Petitioner states that it has appropriately billed, collected and remitted New York sales or use tax on the shortfall billings.

The sample Agreement submitted as part of the Petition, provides as follows:

WHEREAS, ATS [i.e., Petitioner] markets certain travel related services; and

WHEREAS, Subscriber desires to utilize one or more such services;

NOW, THEREFORE, in consideration of the premises and the mutual obligations hereinafter set forth, ATS and Subscriber hereby agree as follows:

\* \* \*

1. DEFINITIONS

\* \* \*

D. "Charges" means all amounts payable by Subscriber to ATS under this Agreement.

\* \* \*

G. "Hardware" means all equipment Leased or sold by ATS to Subscriber.

\* \* \*

L. "Services" means Hardware, Software, and other services provided by ATS to Subscriber.

\* \* \*

## 2. PROVISION OF SERVICES

A. ATS shall license the Software and Lease the Hardware set forth on each Attachment A, or other attachment, to Subscriber pursuant to the terms and conditions of this Agreement.

\* \* \*

## 13. CHARGES

A. Subscriber shall pay to ATS license, purchase, installation, and service fees; taxes; and other fees as set forth in this Agreement and in each Rider, Attachment A, and all other applicable attachments to this Agreement, without setoff or counterclaim. Monthly fees commence upon the Services being operational...

The sample Attachment A submitted as part of the Petition includes the "MONTHLY FIXED CHARGES" which is a total of various monthly charges for specific computer equipment that is provided by Petitioner to its customer.

The PRODUCTIVITY ATTACHMENT of the Agreement (Attachment C) provides in part, as follows:

The provisions of this Productivity Attachment shall apply only to the Monthly Fixed Charges specified on the Attachment A(s) clearly marked as "Productivity-Based Pricing". Pursuant to the following terms, Subscriber may be entitled to a credit applicable to the Monthly Fixed Charges on Subscriber's use of the Hardware and Software set forth on each such Attachment A to the Agreement or may be charged according to an alternative formula. Any term not defined herein shall have the meaning given such term elsewhere in the Agreement.

1. Commencing on the effective date of the Agreement and continuing for the number of months specified below, Subscriber's credit shall be equal to the percentage identified below as "Starting Discount".

2. Upon completion of the period for which a Starting Discount is provided, for each month thereafter, ATS shall calculate the average monthly Apollo Net Bookings Subscriber has made through Apollo Services during the previous twelve (12) month period ("Review Period"). The Charges for which Subscriber shall be responsible for that month shall be determined as follows.

A. If during a Review Period Subscriber achieves the level of monthly average Apollo Net Bookings specified below ("Target Bookings"), a credit of 100% shall be applied to Subscriber's Monthly Fixed Charges for the following month.

Petitioner also submitted a sample "DISTRIBUTOR SALES AND SERVICE AGREEMENT" between Petitioner and the company that supplies the CRS (hereinafter Company A). This agreement provides, in part, as follows:

1. Introduction: Company A generates Distribution Services for use by Subscribers and Vendors and has established a network of distributors that shall be responsible for the marketing of its Distribution Services and for the provision of ongoing maintenance and support services. This Agreement specifies the terms and conditions under which Distributor [i.e., Petitioner] will become a Company A distributor of Distribution Services and is not intended by the parties to affect any other relationship between the parties or their Affiliates.

\* \* \*

19. Payments: A. In consideration of the services provided by Distributor pursuant to this Agreement, Company A will pay to Distributor each month an amount equal to a portion of the fees that it receives from Vendors (immediately upon Company A's receipt thereof) in respect of bookings and other transactions made in the Company A System by Distributor's National Subscribers, such portion to be determined in accordance with the provision of Attachment D to this Agreement.

B. Distributor will pay to Company A a sum equal to the Cost to Company A of processing transactions in the Company A System arising out of the provision of Distribution Services on behalf of Non-Air Vendors (including Limited Air Charters) to National Subscribers in respect of National Products in the National System....

ANNEX I, of the "Distributor Sales and Service Agreement" provides, in part as follows:

Vendor. "Vendor" means a vendor of travel-related services, such as an airline, rail company, ferry operator, hotel, rental car company, tour, package, or cruise operator, or travel insurance company, that participates in Reservations Services.

Attachment D of the "Distributor Sales and Service Agreement" provides the arrangement whereby the revenue received by Company A is split between Company A and its distributors, such as Petitioner.

**Applicable Law and Regulations**

Section 1101(b) of the Tax Law defines the term "Receipt" in part, as follows:

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts, and also including any charges by the vendor to the purchaser for shipping or delivery regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery is provided by such vendor or a third party, but excluding any credit for tangible property accepted in part payment and intended for resale...

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax....

\* \* \*

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105(a) of the Tax Law imposes sales tax on, "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

**Opinion**  
**Issue #1**

Sections 1.G. and 2.A. of the Agreement submitted by Petitioner indicate that Petitioner is leasing the Hardware, which includes the computer equipment, to its subscribers/customers. The leasing of the computer equipment constitutes a "sale, selling or purchase" in accordance with Section 1101(b)(5) of the Tax Law. Therefore, when Petitioner purchases the computer equipment, it is considered a purchase for resale and does not constitute a retail sale of tangible personal property subject to sales tax as provided by Sections 1101(b)(4) and 1105(a) of the Tax Law.

**Issue #2**

Planetarium Travels, Inc., Adv Op Comm T&F, July 13, 1993, TSB-A-93(42)S, dealt with the taxability of purchases and offsetting credits involving a travel agency (Planetarium Travels) and a provider of services whose business and methods of operation are very similar to that of Petitioner. In Planetarium Travels, Inc. the travel agency was eligible for a credit if its number of bookings equaled a certain set amount. The Opinion stated, in part:

Petitioner's contract with American [the service provider] specifically provides that Petitioner is not eligible for a credit unless "SABRE Bookings equal ... the amount of Fixed Monthly Credit Booking level shown above....For the purpose of the Schedule A, SABRE Bookings means the number of airline, hotel or rental car segments (which obligates a participant to pay a booking fee to American)".

Accordingly, Petitioner is not receiving a true discount or a credit but is actually having a third party pay a part of its obligation to American on its behalf. Consequently, in accordance with Section 1101(b)(3) of the Tax Law the amount of the credit which Petitioner receives from American is not deductible when computing the sales tax.

As provided in Section 1101(b)(3) of the Tax Law, a taxable receipt includes the amount for which a credit is allowed by a vendor to a purchaser. It should be noted that the relevant credit at issue in this Advisory Opinion is not a credit against Petitioner's shortfall fee, but a credit against the Monthly Fixed Charges charged to Petitioner's subscribers. As in Planetarium Travels, Inc., supra, the credit allowed by Petitioner against the Monthly Fixed Charges is based on the number of bookings made by a subscriber through the CRS, and Petitioner receives payments from a third party, Company A, with respect to these bookings. Accordingly, based on Section 1101(b)(3) of the

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Tax Law and Planetarium Travels, Inc., supra, Petitioner must collect sales tax on the full amount of the "Monthly Fixed Charges" with respect to any customer/subscriber.

DATED: December 30, 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.