

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

TSB-A-99(18)S
Sales Tax
April 8, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980128B

On January 28, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Dignet, Inc. (f/k/a Graphnet, Inc.), 329 Alfred Avenue, Teaneck, NJ 07666.

The issue raised by Petitioner, Dignet, Inc., is whether the services it provides to New York customers are telephone or telegraph services subject to sales tax under Section 1105(b) of the Tax Law.

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

Petitioner, a Delaware corporation, maintains its principal office in New Jersey. Petitioner performs electronic services for its clients including data file conversion, data storage, and information merge, followed by the worldwide transmission of processed documents. Petitioner maintains its extensive network system and computer installation and data processing facility (the "Facility") in New Jersey.

Petitioner's customers, some of which have offices in New York State, access Petitioner's network by dialing into the nearest "node." The transmissions, some of which originate in New York State, are sent to the nearest "node" through the customer's local carrier, e.g., NYNEX, and the customer is invoiced by the carrier, not Petitioner, for such transmission. The transmission is then sent from the "node" to Petitioner's Facility in New Jersey, and the customer is billed by Petitioner for such transmission. All transmissions received at the Facility are "processed," as described below, and receive "value added" services through the Facility.

Petitioner's transmissions that originate in New York receive the "value added" services outside of New York, i.e., at Petitioner's New Jersey Facility, and a portion are subsequently retransmitted, or redelivered, via a second transmission or series of transmissions, to a destination in New York. Additionally, a substantial portion of the transmissions handled by Petitioner that originate in New York ultimately result in retransmissions to recipients, designated by the customer, who are located outside of New York.

The "value added" services provided by Petitioner are extensive. They include "automatic broadcast" of documents to a list of recipients that is stored and maintained on Petitioner's network using customized client software provided by Petitioner. The documents for broadcast are delivered from the database created and residing on Petitioner's network. All broadcast transmissions from

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the Facility are accomplished through time delayed re-transmissions. Accordingly, the receipt of the electronic data from the customer and the ultimate transmission to the customer's designated recipient(s) is not one continuous transmission, but a series of storage and processing functions followed by a separate and distinct transmission, or series of transmissions, of processed data to the ultimate destination or destinations by and through the Facility. Customized information such as the updated news for a periodic newsletter can be stored for seconds, hours or days until it is processed and retransmitted, while more general information such as an address list or the format of the newsletter are stored for long periods of time. A single message may be delivered by Petitioner to various destinations, including an electric mailbox (e-mail), a telex terminal, a fax machine, or may be delivered as a hard copy document.

Petitioner also provides an accumulation function for its customers, compiling the customer's information from the customer's various origination points and sources and merging such information from such sources into one document to be delivered to the ultimate destination or destinations.

In the "Telex" arena, Petitioner provides "store and forward" features, such as "alternate destinations," automatic redial on busy and other interruption signals and redelivery, delivery confirmations, telex mailboxes and automatic rerouting of otherwise undeliverable messages via fax, or transfer to a hard copy with delivery by mail.

In certain instances, Petitioner must convert the format of a particular electronic file as sent by the customer to allow the information to be sent to the destination and must offer a "bridge" between otherwise incompatible stations. This involves conversion of files from analog signals to digital signals for transmission over data network lines (Packet Switching) and then conversion back to analog for transmission over standard telephone lines. The "value added" feature of Petitioner's service means that the customer sends a very basic, or raw, data file to Petitioner for merger, conversion, processing and other services, and Petitioner's system then processes the data and converts the customer's file format to the appropriate format for delivery, be it facsimile, telex, e-mail or hard copy. This processing is extremely CPU (central processing unit) intensive, requiring the use of Petitioner's Facility.

A summary of certain of the unique features and services provided by Petitioner is as follows:

1. Electronic file or data storage for future retrieval, including remote electronic storage that is accessible at a later date. For example, the overall format of a newsletter and an address list of recipients are stored until a periodic update of the news information is ready to be disseminated. The newsletter is then assembled and formatted in Petitioner's system and when completed it is addressed and disseminated.

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2. Electronic storage of data files (electronic documents) that will be sent as required by the customer and/or at the most cost effective time to take advantage of reduced rate schedules.
3. Forwarding electronic data to Internet mailboxes.
4. Forwarding one originating communication, customized or otherwise, to multiple destinations (i.e., "broadcast" of documents).
5. Fax and Internet mailboxes, allowing a customer to dial into the Facility from any location in the world and "pick up" their electronic mail at their convenience and with a degree of confidentiality not afforded by standard fax transmissions. These mailboxes also allow the simultaneous uninterrupted receipt of fax transmissions from numerous sources.
6. "Form overlay" which allows a customer to send data to Petitioner for reconfiguration and generation of a standard form communication. For example, the customer may store and maintain a standard form invoice or statement on Petitioner's system. As required, the customer will send the necessary information to generate the specific, customized invoice or statement to Petitioner's Facility and an electronic invoice or statement is generated that is customized for, and forwarded to, each respective recipient.
7. "Mail merging" which allows a customer to combine specific information with general information, customizing a communication for the end user. For example, if a major brokerage company produces customized account reports for its clients, a file with information of general interest for all readers must be merged with files containing specific historic information for a particular customer's account.
8. Customized "packaging" allowing, for example, specialized cover pages for fax transmissions, including incorporation of customized logos and messages, or insertion into electronic documents of different components depending on the various destinations of a single originating transmission, allowing a single input to result in many customized deliveries.

Applicable Law and Regulations

Section 1105(b) of the Tax Law imposes a sales tax upon the receipts "from every sale, other than sales for resale, of . . . telephony and telegraphy and telephone and telegraph service of

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

Section 1105(c) of the Tax Law imposes tax upon the receipts from every sale, except for resale, of certain enumerated services.

Section 527.2(d) of the Sales and Use Tax Regulations provides, in part:

Telephony and telegraphy; telephone and telegraph service. (1) The provisions of section 1105(b) of the Tax Law with respect to telephony and telegraphy and telephone and telegraph service impose a tax on receipts from intrastate communication by means of devices employing the principles of telephony and telegraphy.

(2) The term *telephony and telegraphy* includes use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals.

* * *

Example 4: Facsimile transmission services are telegraph services subject to the tax imposed under section 1105(b) of the Tax Law.

* * *

(4) A service is not considered telegraphy or telephony if either of these services is merely an incidental element of a different or other service purchased by the consumer. (Emphasis added)

Example 6: A company offers its customers a protective service using a central station alarm system, which transmits signals telegraphically. The customer is purchasing a protective service.

Opinion

The provisions of Section 1105(b) of the Tax Law impose sales tax on receipts from intrastate communication only, by means of devices employing the principles of telephony and telegraphy. Facsimile transmission services are considered to be receipts from telephone and telegraph services and are subject to the tax imposed under Section 1105(b) of the Tax Law (see Pitney Bowes Management Services, Inc., Adv Op Comm T&F, January 25, 1993, TSB-A-93(10)S). However, it is apparent in the instant case that Petitioner provides services which make its overall

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service different from a fax service as contemplated in Pitney Bowes, supra. Customers utilize Petitioner's services when they want to assemble and send specialized documents to multiple recipients in different parts of the world. All such transmissions are processed, and receive "value added" services through Petitioner's New Jersey Facility.

Also, Petitioner offers a variety of customized messaging services to its customers including electronic mail, fax, telex, packet switching and hard copy document delivery. The customer sends the initial document over local telephone connections to Petitioner's computer and switching facilities where it is stored in Petitioner's vast electronic database for future retrieval when required. Storage periods may be seconds, hours or days for customized information such as periodic updates for a newsletter, or they may be longer for more general information such as recipient address lists and letter formats. Petitioner assembles and processes the customer supplied data for (worldwide) transmission, and converts the customer's file format to the appropriate format for delivery (facsimile, telex, e-mail or hard copy). Petitioner's "value added" services include such unique features as mail merging, form overlay, and automatic broadcast. These services result in enhanced, customized communications, which are very different from the original electronic data supplied by the customer, being sent to multiple destinations and recipients simultaneously. Once the documents are prepared, they are faxed or sent based upon the recipient list provided by the customer. The destinations include fax machines, electric mailboxes, telex terminals and hard copy document delivery.

In addition to these processes, Petitioner personalizes the documents for its customers by providing customized cover pages for fax transmissions, including incorporation of customized logos and messages. Petitioner also provides computer access and storage in the form of an electronic mailbox to its customers which allows the simultaneous uninterrupted receipt of fax transmissions from numerous sources. The mailbox may be used by the customer to access a file from any location in the world to obtain a message or document at their convenience.

In Holmes Electric Protective Company v. McGoldrick, 262 App Div 514, affd 288 NY 635, New York City sought to impose a retail sales tax on what was claimed to be the sale of telegraphic service. The company's business was the protection of its customers' premises against burglary and unlawful entry through the use of certain electrical signaling devices. The court held that the legislative intent of New York City's local sales tax on telegraph service was to tax telegraphic services as they are ordinarily understood, and the company was not selling telephone or telegraphic services as ordinarily understood. Instead, the company was engaged in the sale of protective services and the transmission of electronic signals was merely an incident to the protective services.

In determining whether a cable television company was engaged in the service of telephony, the court in New York State Cable Television Assn. v. State Tax Commn., 88 Misc 2d 601, affd 59 AD2d 81, focused on the nature of the service provided by the company and not whether as an

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incident of providing that service there was a telegraphic or telephonic transmission of a signal. The opinion stated in part, "While both telephony and telegraphy on the one hand, and cable television service on the other, involve dissemination by electronic means of communications as the latter term is used in its broadest sense, we do not believe it is commonly understood that the former includes the latter." The customers, it was held, were not purchasing telephone or telegraph service.

The services provided by Petitioner encompass several activities. The customer is paying Petitioner to provide clerical and electronic data processing functions, i.e., the compiling of customer information from various origination points and sources, the merging and formatting of the data provided by the customer and the simultaneous distribution of the data to multiple destinations and recipients based on distribution lists stored by Petitioner, as required by the customer. These services are not among the enumerated services upon which sales or compensating use tax is due. Petitioner is not a provider of telecommunication services because it is not furnishing or selling telecommunication services to its customers. Rather, the activities of Petitioner constitute nontaxable services which merely include the transmission of documents in Petitioner's efforts to provide the services that the customer has requested (see Matter of Sprint International Communications Corporation, Tax Appeals Tribunal, July 27, 1995, TSB-D-95(5)C; Ernst & Young LLP, Adv Op Comm T&F, August 6, 1997, TSB-A-97(19)C). Provided Petitioner's charges for the nontaxable services described above are all inclusive and Petitioner does not separately state charges for basic fax transmission on the invoice to its customers for such services, the transmission of documents by Petitioner will be considered an incidental activity to the overall nontaxable service Petitioner provides and the entire charge for Petitioner's service will not be subject to tax (Holmes Elec. Protective Co., *supra*; New York State Cable Tel. Assn., *supra*; Ernst & Young LLP, *supra*). Any sales by Petitioner to its customers of basic fax transmission service or fax mailbox service, which does not include the data processing functions described above, would be subject to tax under Section 1105(b) of the Tax Law unless the service was an interstate or international service.

DATED: April 8, 1999

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

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