

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

TSB-A-99(57)S
Sales Tax
December 3, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S971126A

On November 26, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Poorman-Douglas Corporation, 10300 SW Allen Blvd., Beaverton, OR 97005. Petitioner, Poorman-Douglas Corporation, provided additional information pertaining to the petition on December 31, 1997.

The issue raised by Petitioner is whether certain services it provides are subject to state and local sales and use tax.

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

Petitioner is a wholly-owned subsidiary of Fleet National Bank and is incorporated in the state of Rhode Island. Petitioner's main office and production facility are located in Beaverton, Oregon. Petitioner has a sales office in New York City where sales personnel are authorized to solicit and procure orders for Petitioner's data processing services. The orders require acceptance at the Oregon office before becoming binding contracts. These contracts do not involve any local performance in New York other than occasional customer service. Petitioner has been collecting and remitting sales tax on its New York sales.

Petitioner acts as an administrative arm of the US Bankruptcy Court and provides services to class action legal firms as well. The court in New York appoints Petitioner to perform data processing services for a debtor (Petitioner's customer); or a legal firm contracts with Petitioner to administer claims in class action cases. Petitioner receives payment for its services from the customer, not the court.

The services provided by Petitioner, as detailed on the customer's invoice, are described below. All of the services except for occasional customer support are performed in Oregon.

1. *Master file set-up*: The customer provides Petitioner with information regarding its creditors/claimants on magnetic tape, disks or hard-copy. From the information supplied, Petitioner creates a master file on its computers, the first step necessary in providing its data processing service. Petitioner's one-time charge for the master file set-up includes the programming time required to set up the database as well as any time its technical staff spends accumulating and organizing the information from the customer. On occasion, Petitioner's customer service representative may visit the customer to advise on how to assemble its information in order to expedite the set-up process. The information is not returned to the customer. Petitioner does not sell any computer programs to its customers.

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2. *Notice printing and claims printing:* The customer provides Petitioner with the text of a legal notice. Petitioner formats the notice for processing on its computer. Personalized notices and claim forms are then printed (with each creditor's/claimant's name, address, etc., incorporated on the form) and mailed at the US Post Office in Oregon directly to the creditors/claimants. These notices and forms are sent all over the country, both within and outside New York State. Included in the charge for notice printing is the cost of paper and envelopes which are incidental to providing the printing and mailing services.

3. *File Update/Reports:* Petitioner compiles lists and reports of information from the claim forms returned to it by the creditors/claimants. Petitioner does not alter any information but is simply recording additional information to update the master file created and maintained on its computers. Petitioner does correct addresses on claims returned to it from the US Post Office for change of address.

4. *Claims processing:* This includes clerical, phone and technical services, which are performed entirely in Oregon. After the completed claim forms are received, Petitioner sends the information compiled above (in Item 3.) to the court, including notification if amounts claimed as owed have been verified by receipts. Based on a determination and guidelines provided by the court, Petitioner produces settlement checks and mails them to the designated recipients.

5. *Labels:* Petitioner prints labels for other mailings the customer may wish to do.

6. *Special services:* The customer is billed for program modifications Petitioner must make to its standard computer programs which are used to provide the data processing service. The customization of Petitioner's program is tailored to satisfy the specific needs of each customer. Customer support and technical services are also provided upon request, and include consulting and tax return preparation.

The programming and technical services are performed in Oregon. The customer service representative may go to the customer's location if necessary.

7. *Newspaper advertising/notice publication:* Legal notices are placed in publications such as the Wall Street Journal and the New York Times. The notices are placed through Petitioner's advertising subcontractors in Oregon.

8. *Document Management:* Petitioner manages the voluminous hard-copy documents it receives by copying, imaging (scanning to save data on a diskette) and storing of the documents (all are performed in Oregon). This is done as a means of providing good customer service so that information about a specific case is readily retrievable when a

customer calls. The courts eventually require all of the original documents back and ultimately all copies are destroyed by Petitioner.

Applicable Law and Regulations

Section 1101(b)(7) of the Tax Law defines the term “use” as:

The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time . . . or any consumption of such property. Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials.

Section 1101(b)(8)(i)(B) of the Tax Law defines the term “vendor” as:

A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article.

Section 1105 of the Tax Law imposes sales tax upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

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

* * *

(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed.

* * *

(4) Storing all tangible personal property not held for sale in the regular course of business and the rental of safe deposit boxes or similar space.

Section 1110(a) of the Tax Law provides, in part:

Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail, . . . (D) of any tangible personal property, however acquired, where not acquired for purposes of resale, upon which any of the services described in paragraphs (2), (3) and (7) of subdivision (c) of section eleven hundred five have been performed. . . .

Section 1115(d) of the Tax Law provides:

Services otherwise taxable under paragraph (1), (2), (3), (7) or (8) of subdivision (c) of section eleven hundred five shall be exempt from tax under this article if the tangible property upon which the services were performed is delivered to the purchaser outside this state for use outside this state.

Section 1131(4) of the Tax Law provides:

(4) "Property and services the use of which is subject to tax" shall include: (a) all property sold to a person within the state, whether or not the sale is made within the state, the use of which property is subject to tax under section eleven hundred ten or will become subject to tax when such property is received by or comes into the possession or control of such person within the state . . . (c) all services rendered to a person within the state, whether or not such services are performed within the state, upon tangible personal property the use of which is subject to tax under section eleven hundred ten or will become subject to tax when such property is received by or comes into possession or control of such person within the state. . . .

Sections 1131 and 1132 of the Tax Law require "vendors" of tangible personal property to collect sales tax from customers.

Section 525.2(a)(3) of the Sales and Use Tax Regulations provides:

The sales tax is a "destination tax," that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate.

Section 526.10(a)(2) of the Sales and Use Tax Regulations provides the following definition of "vendor," applicable herein:

(i) A person maintaining a place of business in the State making sales, whether at such place of business or elsewhere, to persons within the State of tangible personal property or services, the use of which is taxed, is a vendor.

(ii) A person shall be considered to be maintaining a place of business in the State if it, either directly or through a subsidiary, has a store, salesroom, sample room, showroom, distribution center, warehouse, service center, factory, credit and collection office, administrative office or research facility in the State.

Section 526.10(c)(1) of the Sales and Use Tax Regulations provides:

Interstate vendors. (1) A person outside this State making sales to persons within the State, who maintains a place of business in the State as described in paragraph (2) of subdivision (a) of this section . . . is required to collect the tax on any taxable property or services delivered in New York.

Section 527.4 of the Sales and Use Tax Regulations provides, in part:

(a) *Imposition.* (1) Section 1105(c)(2) of the Tax Law imposes a tax on the receipts from the services of producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the property.

* * *

(4) When such services are combined with the sale of property by the person performing the services, the entire transaction is subject to tax as a retail sale.

* * *

(e) *Printing and imprinting.* (1) The services of printing and imprinting tangible personal property furnished by or on behalf of a customer of the printer are taxable under section 1105(c)(2) of the Tax Law; the service of printing or imprinting tangible personal property which is sold by the person performing the service in conjunction with the sale is taxable as part of the sale under section 1105(a) of the Tax Law. (Emphasis added)

Publication 831 (3/97), entitled Collection and Reporting Instructions for Printers and Mailers, provides, in part:

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A mailer or printer-mailer is required to collect the statewide and appropriate local sales taxes on the printing, addressing, and other taxable charges for printed matter mailed to persons in New York State, whether mailed from within or outside the state. The mailer or printer-mailer must maintain records showing the destinations of all material sent to persons in New York State and the portion of the material mailed to persons outside New York State.

The statewide tax and local sales taxes, at the rate in effect where delivery is made, must be collected on the entire charge if printed matter is delivered to the customer in New York State. . . .

Opinion

Petitioner is authorized to do business in the State of New York and maintains an office for the sale of its products in New York City. Petitioner is a vendor within the meaning of Section 1101(b)(8)(i)(B) of the Tax Law with respect to its sales of tangible personal property and taxable services in New York, and is obligated under Sections 1131(1), 1132 and 1134 of the Tax Law to register as a vendor and collect sales or compensating use tax on its sales of taxable property or services in New York State. We note that Petitioner's appointment by a bankruptcy court would not invest Petitioner with any sales or compensating use tax exempt status. See California Board of Equalization v. Sierra Summit, 490 U.S. 844.

Petitioner is retained by various debtors and legal firms to provide data entry and processing services and to administer claims in bankruptcy and class action legal cases. The text of the legal notices/claim forms Petitioner produces is furnished to Petitioner by its customers on magnetic tape, disks or hard-copy. The information is not returned to the customer. Petitioner develops databases in accordance with the customer's specifications and formats the customer's data for processing on its own computer. Petitioner does not create new information in the master file set-up procedure. From the information furnished, Petitioner prints legal notices and claim forms and mails these items to the customer's designees (creditors/claimants) who are located both inside and outside New York State. After receiving the completed claim forms back from the creditors/claimants, Petitioner inputs details from such forms into its master file, electronically transfers this information to the courts, and ultimately prints creditor/claimant settlement checks based on the courts' decisions.

Petitioner's computers store and rearrange the information Petitioner receives from its customers for purposes of providing Petitioner's services. Petitioner produces and prints legal notices and claim forms from this accumulation of data. Petitioner also prints labels for other mailings the customer may wish to do. Since these printed items are then mailed by Petitioner to its customers or their designees, Petitioner's charges for services listed as items (2) and (5) are subject to tax according to the rules for printers and mailers set forth in Department of Taxation and Finance Publications 842 (12/93) entitled New York State and Local Sales Tax Information for Printers , and

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831 (3/97) entitled Collection and Reporting Instructions for Printers and Mailers (see Northeastern Computer Services, Inc., Adv Op Comm T&F, June 24, 1988, TSB-A-88(33)S). In accordance with the instructions contained in Publication 831, Petitioner, as a mailer or printer-mailer, is required to collect the statewide and appropriate local sales taxes on the printing, addressing, and other taxable charges for printed matter mailed to persons in New York State, whether mailed from within or outside the state.

Among the taxable tangible personal property and services listed in Publication 842 are computer services of printing letters, labels, etc., printing of envelopes, printing of address labels and printing of stationery. Petitioner contends that its sales of such property and services should be excluded from tax since the services are performed in Oregon with the tangible items being printed and mailed directly from the US Post Office in Oregon. However, a sale is taxable at the place where the tangible personal property is delivered, or at the location where possession is transferred by the vendor to the purchaser or the purchaser's designee. See Section 525.2(a)(3) of the Sales and Use Tax Regulations. The point of delivery of goods to a common carrier by an out-of-state vendor has no effect upon the tax consequences where the goods are ultimately delivered to the purchaser's designees in New York (see Touche Ross & Co., State Tax Commission Advisory Opinion, January 9, 1986, TSB-A-86(3)S). Therefore, printed material mailed by Petitioner to its customers or their designees is considered to be used at the point to which it is mailed, and Petitioner is required to collect tax on its charges for notices, claim forms and labels mailed to addresses in New York State (see Morton L. Coren, P.C., Adv Op Comm T&F, March 6, 1997, TSB-A-97(12)S). Since Petitioner provides the paper and envelopes for printing and addressing, its sales of printed notices, claim forms and labels delivered to customers in New York State constitute sales of tangible personal property subject to tax under Section 1105(a) of the Tax Law (see MGI Output Technologies, Inc., Adv Op Comm T&F, December 13, 1996, TSB-A-96(77)S; Werthan Industries, Inc., Adv Op Comm T&F, December 4, 1997, TSB-A-97(73)S). However, a separately stated charge to the customer for the outside mailing envelopes and address labels used by Petitioner to mail printed matter would not be subject to New York State sales or use tax (even though the contents are subject to tax based on mailing destination), since their use occurs in Oregon, the location from which they are mailed (see Morton L. Coren, supra; Werthan Industries, supra).

With respect to the services listed as items (1), (3) and (4), Petitioner's charges for setting up a master file on its computers, inputting details from completed claim forms to update such master file and electronically transferring information to the courts constitute charges for services that are not within the specified services subject to tax under Section 1105(c) of the Tax Law. Nor do such charges represent the sale of tangible personal property under the Tax Law. Since Petitioner's primary purpose for printing settlement checks is to provide claims processing services for its customers, the tangible personal property produced is incidental to the service provided. Accordingly, charges for the services described in items (1), (3) and (4) are not subject to sales or compensating use tax (see Elaine K. Hoiska, CPA, Adv Op Comm T&F, August 25, 1997, TSB-A-97(53)S).

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Regarding items (6) and (8), charges for consulting and tax return preparation are also charges for services that do not fall within the enumerated services subject to tax under Section 1105(c) of the Tax Law. Thus, such charges are not subject to sales or compensating use tax. Petitioner describes the document copying, imaging and storage functions it performs as an internal means of providing quality customer service by good case management. All copies of documents are ultimately destroyed by Petitioner. It appears from Petitioner's description that charges to its customers for the performance of such functions, as well as for program modifications, are all elements of cost for the nontaxable services provided by Petitioner and are therefore not subject to tax. However, if Petitioner contracts with a customer to produce paper copies of documents which are delivered in New York, the charge for such copies may be subject to sales and compensating use tax as a charge for the sale of tangible personal property. Likewise, Petitioner's charge to store physical records may be subject to sales tax if the storage service is provided in New York.

With respect to item (7), when engaged by its customers to place legal notices with the media, Petitioner is not considered to be performing an enumerated service under Section 1105(c) of the Tax Law; and receipts from Petitioner's charges for "newspaper advertising/notice publication" are not subject to sales or use tax.

It is noted that Section 527.1(b) of the Sales and Use Tax Regulations provides that when tangible personal property composed of taxable and exempt items is sold as a single unit, the tax shall be collected on the total price, unless the charges for taxable and non-taxable items or services are reasonable and separately stated. In accordance with this regulation, provided Petitioner bills its nontaxable services and outside mailing envelopes/labels separately from its sales of printed notices, claim forms and address labels for other customers mailings, only that portion of the bill that represents the charges for the taxable property and services would be subject to tax (Morton L. Coren, P.C., supra; Werthan Industries, Inc., supra).

DATED: December 3, 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.