

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-04(23)S
Sales Tax
September 22, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040227B

On February 27, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from the Bernstein Law Firm, PLLC, 1634 I Street N.W., Suite 805, Washington, DC 20006.

The issue raised by Petitioner, the Bernstein Law Firm, PLLC, on behalf of its client which is a self-regulatory organization (“SRO”), is whether the fees charged by SRO are subject to sales tax under the circumstances described below.

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

SRO is a self-regulatory organization charged with the responsibility of regulating the securities industry in accordance with federal legislation. As part of its oversight duties, SRO was mandated by its federal overseer to enhance the transparency and integrity of the corporate debt market. Specifically, SRO was asked to: (i) adopt rules to require that all transactions in U.S. corporate bonds be reported to SRO and develop systems to receive and distribute transaction prices on an immediate basis; (ii) create a database of transactions in corporate bonds to enable SRO, as well as other regulatory bodies, to take a proactive role in supervising the corporate debt market; and (iii) create a surveillance program to better detect misconduct and foster investor confidence in the corporate debt market.

In 2001, SRO’s federal overseer approved the organization’s proposed rules requiring SRO’s member firms to report over-the-counter secondary market transactions in eligible securities (those meeting the description of a debt security) to SRO. Moreover, the rules also required certain transaction reports to be disseminated in the form of market data. The vehicle developed by SRO to facilitate the mandatory reporting required by the rules is the Trade Reporting and Compliance Engine (“TRACE”).

SRO member firms that engage in trading of TRACE-eligible securities are obligated to submit a transaction report to SRO directly, or must enter into an arrangement with a third party (such as a service bureau or a clearing broker/dealer), which authorizes the third party to submit transaction reports on the member’s behalf.

In order for SRO to offset the costs associated with collecting, storing, and surveillance of these transactions, member firms are required to pay fees for TRACE usage. These reporting fees are categorized as System Fees and Transaction Reporting Fees. The System Fees are fees applicable to the methods by which the member accesses the TRACE system to report the required transaction information whereas Transaction Reporting Fees apply to the quantity and size of transactions reported (and corrections thereto).

The methods by which a member firm must report corporate bond transactions are: (i) a TRACE Web browser either over the Internet or a secure private data network; (ii) a Computer-to-Computer Interface (“CTCI”), either dedicated solely to TRACE or a multi-purpose line; or (iii) a third-party reporting intermediary. Different fees are charged based on the reporting methodology selected by the member.

If a member chooses to report data via Web browser access, there are two levels of access. Level I Browser Access allows the member to report and edit its transaction information via the TRACE Web site, and Level II Browser Access provides the same functionality as Level I but also allows access to TRACE market data that as such is allowed to be disseminated. Fees for Level II Browser Access are higher than Level I, reflecting the incremental charge or cost for disseminated information.

There is a stand-alone charge for CTCI access, and another different fee for reporting TRACE information through a third party. With respect to both CTCI and third-party reporting, members do not have the option to purchase access to the disseminated information from SRO.

The fees paid by members are applicable to each transaction reported to SRO. The fees assessed are: (A) Trading Reporting Fees, which are based on a sliding scale depending on the size of the reported transaction; (B) Cancel or Correct Trade Fees, which are assessed on a per canceled or corrected transaction; (C) “As of” Trade Late Fees, which are assessed on those transactions that are not timely reported as required by the rules; and (D) Browse and Query Fees, which are assessed on members who review their own previously reported transaction data. All of the foregoing fees are charged independently of any additional charges to a member firm for access to disseminated information from TRACE.

Market data fees apply to the dissemination of TRACE data. The dissemination of bond transaction data is subject to strict limitations, and only certain information deemed not to be confidential is available for dissemination. The dissemination of information is accomplished through the Bond Trade Dissemination Service (“BTDS”).

TRACE market data is offered through two different service types: (1) via Level II Browser Access or (2) through subscriptions to the BTDS data feed. Level II Browsers are charged a monthly fee per user ID whereas BTDS service is subject to a fee schedule depending on how the data is used. BTDS subscription charges fall into two types (Real-Time and Delayed-Time) across three usage categories: (a) desktop subscribers which are charged a monthly fee per desktop user; (b) Internal Usage Authorization, which carries a different fee, allows an organization to internally disseminate TRACE transaction data for any or a combination of the following activities: internal operation and processing systems, internal price validation, internal portfolio valuation services, internal analytical programs leading to purchase or sale or other trading decisions, and other related activities; and (c) BTDS External Usage Authorization, which carries a separate fee, and allows

TRACE transaction data to be used in repackaging of market data for delivery and dissemination outside the subscribing organization, such as for indices or other derivative products.

SRO members may choose to receive market data by means of Level II Browser or BTDS; whereas non-members (including market data vendors and redistributors) may only access market data by BTDS. Professional and non-professional data users have separate fee schedules.

Applicable law and regulations

Section 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a 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:

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons. . . .

* * *

(9) (i) The furnishing or provision of an entertainment service or of an information service (but not an information service subject to tax under paragraph one of this subdivision), which is furnished, provided, or delivered by means of telephony or telegraphy or telephone or telegraph service (whether intrastate or interstate) of whatever nature, such as entertainment or information services provided through 800 or 900 numbers or mass announcement services or interactive information network services. Provided, however, that in no event (i) shall the furnishing or provision of an information service be taxed under this paragraph unless it would otherwise be subject to taxation under paragraph one of this subdivision if it were furnished by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner nor (ii) shall the provision of cable television service to customers be taxed under this paragraph.

Section 525.2 (a) of the Sales and Use Tax Regulations provides, in part:

(2) Except as specifically provided otherwise, the sales tax is a “transactions tax,” with the liability for the tax occurring at the time of the transaction. Generally, a taxed transaction is an act resulting in the receipt of consideration for the transfer of title to or possession (or both) of tangible personal property or for the rendition of an enumerated service. The time or method of payment is generally immaterial, since the tax becomes due at the time of transfer of title to or possession of (or both) the property or the rendition of such service. . . .

(3) Except as specifically provided otherwise, the sales tax is a “destination tax.” The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate.

Section 527.1(b) of the Sales and Use Tax Regulations provides, in part:

Taxable and exempt items sold as a single unit. 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.

Example: A vendor sells a package containing assorted cheeses, a cheese board and a knife for \$15. He is required to collect tax on \$15.

Section 527.3 of the Sales and Use Tax Regulations provides, in part:

(a) Imposition. (1) Section 1105(c)(1) of the Tax Law imposes a tax on the receipts from the service of furnishing information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any manner such as by tapes, discs, electronic readouts or displays.

(2) The collecting, compiling or analyzing information of any kind or nature and the furnishing reports thereof to other persons is an information service.

(3) Among the services which are information services are credit reports, tax or stock market advisory and analysis reports and product and marketing surveys.

* * *

(b) Exclusions. (1) Sales tax does not apply to receipts from sales of information services which are for resale as such.

(2) The sales tax does not apply to the receipts from the sale of information which is personal or individual in nature and which is not or may not be substantially incorporated into reports furnished to other persons by the person who has collected, compiled or analyzed such information.

Opinion

Petitioner's client, SRO, is a self-regulatory organization charged with the responsibility of regulating the securities industry in accordance with federal legislation. As part of its oversight duties, SRO was mandated by its federal overseer to develop systems to receive and distribute transaction prices on an immediate basis. The vehicle developed by SRO to facilitate the mandatory reporting is TRACE. SRO member firms that engage in trading of TRACE-eligible securities are obligated to submit a transaction report to SRO directly, or must have entered into an arrangement with a third party which authorizes the third party to submit transaction reports on the member's behalf.

Member firms are required to pay reporting fees for TRACE usage when submitting their federally mandated reports. Member firms can report corporate bond transactions via a TRACE Web browser over the Internet, a computer-to-computer interface or a third-party reporting intermediary. The related fees charged to members vary depending on the reporting methodology selected by the member, and on quantity and size, as well as the type, of each transaction reported to SRO. Such fees are generally charged independently of any additional charges to a member firm for access to disseminated information from TRACE. However, fees for Level II Browser Access, which are higher than Level I, reflect an incremental charge for disseminated information.

Market data fees apply to the dissemination of TRACE data which is deemed not to be confidential. The dissemination of information is accomplished through the Bond Trade Dissemination Service ("BTDS"). Market data fees vary depending on whether the data is relayed in real-time or delayed-time, whether the information will be disseminated internally within the member's firm for decision making purposes, or whether the information will be disseminated externally. SRO allows TRACE transaction data to be used in repackaging of market data for delivery and dissemination outside the subscribing organization. Members may choose to receive market data via the Level II Browser or the BTDS; whereas non-members (including market data vendors and redistributors) may only access market data via the BTDS. Professional and non-professional data users have separate fee schedules.

All sales of tangible personal property and certain sales of enumerated services are subject to sales tax. See sections 1105(a) and 1105(c) of the Tax Law. It appears that SRO sells taxable and nontaxable services.

SRO charges member firms various fees to perform the federally mandated reporting of information with SRO. Such reporting fees are similar to fees charged by other regulatory authorities for the filing or registering of documents and such fees are not for enumerated services subject to sales tax pursuant to section 1105(c) of the Tax Law. Members accessing the TRACE system to review their own previously reported transaction data are also assessed Browse and Query Fees. These charges which relate to the customer's viewing of its own information and a review of the accuracy of its mandatory regulatory submission to SRO are similarly not fees for a service subject to tax.

A portion of the individual information submitted by each member is ultimately collected, compiled, analyzed and assembled by SRO into various databases eligible for disclosure to the public. Where a common database is used to generate reports or otherwise disseminate information, the information sold is subject to sales tax under section 1105(c)(1) of the Tax Law despite the fact that the reports, screens or displays of such information may be customized to meet the specific needs of customers. See *Rich Products Corporation v. Chu*, 132 AD2d 175; *Towne-Oller & Assoc. v. State Tax Comm*, 120 AD2d 873; *Alan/Anthony, Inc.*, Adv Op Comm T&F, June 19, 1992, TSB-A-92(51)S. Therefore, the SRO databases derived from the individual personal transactions reported by member firms result in information sold to others which is not personal or individual in nature to such purchasers, and the information gleaned from the transactions reported by the members is substantially incorporated in reports furnished to other persons. Charges by SRO to members and non-members for access to the database constitute charges for information service subject to tax pursuant to section 1105(c)(1) or 1105(c)(9) of the Tax Law. Therefore, SRO's market data fees whether sold to members via the Level II Browser Access or the BTDS, or to non-members via the BTDS, are charges for information services subject to sales tax when delivered in New York.

Where sales of taxable and nontaxable items are bundled in a single transaction, the entire charge is subject to sales tax unless the charges for nontaxable items are separately stated on the vendor's bill, such charges are reasonable in relation to the total charges, and the nontaxable items may be purchased separately. See *Economic Cycle Research Institute, Inc.*, Adv Op Comm T & F, July 23, 1997, TSB-A-97(42)S; *Alan/Anthony, Inc.*, Adv Op Comm T&F, June 18, 1992, TSB-A-92(47)S; *Hodgson, Russ, Andrews, Woods and Goodyear*, Adv Op Comm T&F, April 2, 1992, TSB-A-92(31)S; *Alan/Anthony, Inc.*, Adv Op Comm T&F, January 31, 1992, TSB-A-92(6)S.

In this case, SRO offers the market data as a separate service through the BTDS service. Member firms (who comply with the mandatory filing requirements via Browser Access) may obtain the market data services by purchasing SRO's Level II Browser Access (which reflects an incremental charge for the information over the cost of the basic Level I Browser Access). Member firms complying with their mandatory regulatory transaction reporting via agreements with a third party to report on their behalf may likewise gain access to the market data via the BTDS service. Clearly SRO's taxable information services (market data services) are offered for sale and may be purchased separate from the fees associated with the mandatory regulatory transaction reporting.

The difference in the fees charged for Level I and Level II Browser Access represent an additional charge for the disseminated information. In order for a portion of the Level II Browser Access fee to be nontaxable, that differential amount must be separately stated and reasonable in relation to the fees charged for the mandatory transaction reporting Level I Browser Access and the fees for the market data as evidenced by SRO's separate charges for BTDS services. Sales tax must be imposed on the charges for the disseminated information and separately stated either on SRO's invoices or other contractual documents provided to member firms. If the charges for taxable market data services and nontaxable transaction reporting services purchased in a single transaction by members utilizing Browser Access service are not separately stated in any such documents, then

TSB-A-04(23)S
Sales Tax
September 22, 2004

SRO's entire monthly charge for the Level II Browser Access is subject to tax. See section 527.1(b) of the Sales and Use Tax Regulations.

Therefore, provided that SRO's charge to member firms for mandatory transaction reporting is reasonable in relation to the total charges and separately stated in SRO's contracts and/or billing documents, SRO is not required to collect sales tax on such charge. Market data fees for separately sold information services are subject to sales tax. Separate charges for information services are taxable.

DATED: September 22, 2004

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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