

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

TSB-A-07(13)S
Sales Tax
May 17, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S021022A

On October 22, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from NetCreations, Inc., 379 West Broadway, New York, New York 10012.

The issues raised by Petitioner, NetCreations, Inc., are:

1. Whether Petitioner's charges to its clients for the services described below are subject to sales or compensating use tax.
2. Whether the fee paid by Petitioner to an ISP as described below is subject to sales or compensating use tax.
3. Whether Petitioner's purchase of databases for use in providing services to its clients is subject to sales or compensating use tax.

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

Petitioner maintains a database of approximately 45 million e-mail addresses of Internet users both within and outside the United States. In addition to an e-mail address, the database contains personal information about each user such as interests, hobbies, lifestyle, and demographic information. Petitioner obtains this information through a questionnaire placed in the opening screen of an Internet service provider (ISP). When the Internet user sees the ISP's opening screen, he or she is invited to complete Petitioner's pop-up questionnaire. Petitioner may pay the ISP at the time the Internet user completes the questionnaire or when an Internet user is selected by Petitioner to receive e-mail sent on behalf of Petitioner's clients as described below.

Petitioner's clients solicit business via messages individually sent over the Internet via e-mail (as distinguished from placing an advertisement on a Web page). Petitioner sends e-mails containing a client's offer to those Internet users who meet the client's selection criteria (based on information contained in Petitioner's database). The e-mail sent by Petitioner to those Internet users meeting the client's selection criteria contains a link to the client's Web site.

The fees charged by Petitioner to its clients are based either on the number of e-mails sent on behalf of the client or, in some cases, the number of Internet users who actually link to the client's Web site. Petitioner's e-mails can be sent throughout the world or to a select area, such as a particular state, county or city.

Petitioner does not maintain its clients' Web sites or perform any services other than those listed below. The list of e-mail addresses used is not given to the client. Only after an Internet user goes to a client's Web site and gives an e-mail address does the client obtain it.

Petitioner performs the following services for its clients (major corporations, advertising brokers, and advertising agencies):

1. Reviews the target audience,
2. Selects demographics,
3. Tests selected list,
4. Assists in creating the content of the e-mails,
5. Delivers the e-mails, and
6. Tracks the number of responses and the number of hits to the related link.

Applicable law and regulations

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. 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, and excluding the services of advertising or other agents, or other persons acting in a representative capacity

Section 526.6(c)(1) of the Sales and Use Tax Regulations provides, in part:

Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which

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purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

Section 527.3(c)(3) of the Sales and Use Tax Regulations provides:

The purchase of a service subject to tax under section 1105(c)(1) of the Tax Law by a vendor who will resell that service as such or as a part of a service also subject to tax under section 1105(c)(1) is not a purchase at retail and is exempt from the sales tax.

Opinion

Petitioner performs various services to assist its clients in conducting marketing campaigns via e-mails sent to Internet users who meet a client's selection criteria. Based on the facts described in this Opinion, Petitioner is considered to be performing marketing services that are not included among the enumerated services subject to sales tax under section 1105 of the Tax Law. See *Names in News/Direct Response Inc.*, Adv Op Comm T&F, August 8, 1988, TSB-A-88(39)S. Accordingly, Petitioner's charges to its clients for these services are not subject to sales tax.

It should be noted that if, in addition to the nontaxable services discussed above, Petitioner were to offer mailing lists for sale, charges for such mailing lists might be subject to sales tax. A mailing list is a collection of names and addresses (in this case the list might consist of e-mail addresses) accumulated to provide customers of the list owner with lists of persons to send information regarding the customers' products, services, or other items. Charges for the sale or use of a mailing list in New York are considered either charges for tangible personal property and taxable under section 1105(a) of the Tax Law or charges for information taxable under section 1105(c)(1). See *Alan Drey Company*, Dec St Tax Comm, January 27, 1978, TSB-H-78(3)S, affd 67 AD2d 1055.

Petitioner inquires whether the fee it pays to an ISP for the placement of a questionnaire on the ISP's Web site is subject to sales or use tax. The fee is not subject to tax under section 1105 of the Tax Law. 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.

Petitioner also inquires whether its purchases of databases that become part of the information used by Petitioner to perform its nontaxable marketing services described in this Opinion are subject to sales and use tax. Petitioner's database purchases in such circumstance are subject to sales tax under section 1105(c)(1) of the Tax Law. In such case Petitioner uses the

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databases in performing its marketing services. The databases in such case are not purchased for resale.

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/s/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.