

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(18)S
Sales Tax
March 24, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S050920A

On September 20, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from Richard A. Leavy, Mayer Brown LLP, 1675 Broadway, New York, New York 10019.

The issues raised by Petitioner, Richard A. Leavy, on behalf of his client, Company, are as follows:

1. Whether the New York sales and use tax applies to the sale of oral consultation services on a subscription basis if a periodic payment entitles the subscriber to a limited number of oral consultations.
2. Whether the New York sales and use tax applies to the sale of oral consultation services on a subscription basis if a periodic payment entitles the subscriber to an unlimited number of oral consultations.
3. Whether the New York sales and use tax applies to the sale of services on a subscription basis if a periodic payment entitles the subscriber to commission a limited number of custom written research reports.
4. Whether the New York sales and use tax applies to the sale of admissions to meetings and seminars on a subscription basis if a periodic payment entitles the subscriber to participate in a limited number of events.

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

Company is a provider of specialized services on virtually any subject. Company uses highly trained and experienced individuals to consult with and educate its clients. Company provides services to deliver timely and specific insight on demand that is tailored to the client's needs. The information provided ranges from background education on a particular topic to an in-depth technical analysis of a discrete issue or subject.

The services provided by Company consist of delivering expert evaluations, advice, opinions, and insight to Company's clients on a wide variety of topics. This advice takes many forms including analyses of business operations, commentary on market strategies, market evaluations, comparison and contrast of new and existing technologies, and commentary on new and existing products.

Company provides its clients with expert insight, opinion, and knowledge from a variety of perspectives based on the first-hand experience of its consultants. All of Company's services are provided by experienced and learned professionals, consultants, and other authorities. These consultants, who are often medical doctors, research scientists, engineers, attorneys, architects, or professional business consultants, do not rely on any common database of information to provide advice to Company's clients. Company's general policy is that its consultants should not perform any research before responding to a client's inquiries. Company's consultants draw on their own knowledge and experience to consult with Company's clients. Information is not archived for later reuse.

Company engages consultants that have varied and diverse educational, industry, and professional backgrounds to provide advice from whatever perspective the client requests. Company's consultations are always put into context by providing the client with the consultant's (or consultants') educational background and work experience. Company encourages its clients to make several consultations on each topic raised so that they can construct a "mosaic" of information that delivers a complete picture of the current wisdom on the subject.

Every client of Company is assigned one or more research managers per practice area who are responsible for coordinating the delivery of Company's services to the client within that practice area. The research manager is generally conversant in both the general practice area and the client's business and is also experienced in the substantive area(s) of specialty selected by the client. The research manager works with the client to identify its information needs and consults and advises the client on the most expedient and efficient means of obtaining the information desired.

The research manager is, in all instances, an employee of Company. Because Company seeks consultants that are experts in their fields, the consultants are, in virtually all instances, independent contractors engaged by Company on an as-needed basis. Pursuant to Company's Usage Policies, Company's employees and independent consultants are required to treat clients' inquiries and any information provided in the course of their inquiry as confidential.

Company provides its services in the form of (i) oral consultations, (ii) custom written research reports, and (iii) industry and subject matter specific meetings and seminars. Some of the fields to which the services relate include medical devices, manufacturing processes, pharmaceutical research and development, computer software design and development, transportation and logistics, and retail marketing. Company's clients use the information provided by Company's consultants to further their core business operations or guide their proprietary investment decisions and strategies.

Oral consultations

The oral consultations provided by Company each consist of a one-on-one telephone consultation with the client to provide background information, topical updates, and/or answers

to specific questions. The telephone consultations may take the form of conversational dialogs, question and answer sessions, tutorials, or some combination of all three. For example:

- A client interested in the strength of a particular retail brand may contact Company to speak with merchandising and marketing experts to understand the reasons for the retail brand's recent success;
- A client researching a pharmaceutical company and the market for alternatives to that company's leading product may contact Company to speak with physicians or scientists to understand the function and effectiveness of those competing products; or

A client researching a specialty chemical manufacturer may contact Company to speak with leaders in the research, production, and marketing of flame retardant polymer materials to understand the potential applications of the products produced by the chemical manufacturer.

No written materials are provided to the client by Company in connection with the oral consultations. However, the name, biography, and contact information of the consultant(s) selected to work with the client are generally provided to the client by e-mail.

The research manager assigned to the client will address logistical and other issues, such as prescreening and scheduling, that arise in the provision of these services. Prior to the occurrence of any oral consultation, the client will contact the assigned research manager, or an alternate research manager, and describe the subject matter and nature of the information sought. This pre-consultation communication enables the research manager to identify the appropriate field of expertise needed for the consultation and identify several consultants that can deliver it to the client. The research manager typically inquires about the suitability of several consultants for the project. The research manager then sends the client the names and contact information for several consultants that are identified as appropriate for the requested oral consultation and have accepted Company's invitation to consult on the project.

Once the client and the research manager confirm the appropriate consultants for the project, the research manager provides the client's contact information to the consultants. The client will select one or more of these consultants to contact for an oral consultation. Each oral consultation provided by Company typically consists of a 15- to 45-minute substantive conversation between the client and the consultant.

Company offers oral consultations only on a subscription basis and offers two types of subscriptions for oral consultations, limited and unlimited. The limited subscription provides the client with a specified number of oral consultations that must be completed during the relevant subscription period (e.g., one year). If all of the consultations available under the limited subscription are not completed during the subscription period, no refund is provided (i.e., use it or lose it). The unlimited subscription provides the client with an unlimited number of oral consultations during the relevant subscription period.

Written research reports

Company's written research reports provide responses to a series of short questions and requests for information by the client; there may be as few as 10 or more than 50 questions and requests for information upon which a written research report is based. The questions are developed by the client alone or in conjunction with Company's research manager assigned to the client. For example:

- A client interested in the quick-service restaurant market may contact Company to obtain a written research report setting forth the opinions of restaurant owners and industry consultants on a new menu initiative by a quick-service restaurant chain;
- A client interested in a new antidepressant drug just released to the market may contact Company to obtain a written research report setting forth the opinions of practicing psychiatrists on the new drug; or
- client interested in the recent merger of two large technology companies may contact Company to obtain a written research report setting forth the opinions of computer equipment resellers, integrators, and industry consultants on the anticipated impact of the business combination.

In all instances, the questions forming the basis for the written research reports are unique to the client for whom the report is developed. The information obtained in response to the questions and requests for information is distilled into a research report by the research manager and delivered to the client electronically. Once prepared, the written research report is considered confidential to both Company and the client. Written research reports are neither resold by Company to other clients nor used as the basis for creating a report to be provided for another client. (In certain very limited instances, Company will edit and redact a written research report for use as a sample to aid in soliciting new business from new and existing clients.) Furthermore, the client is generally prohibited from disseminating written research reports to third parties.

Prior to the preparation of a written research report, the client will contact the assigned research manager (or an alternate) and describe the subject matter and nature of the knowledge or experience base sought for the written research report. This consultation enables the research manager to identify the appropriate field of expertise and the consultants who will provide the substantive content for the report.

The research manager either works with the client to prepare the questions and requests for information that will be sent to the consultants, or the research manager edits the questions and requests for information prepared by the client. The research manager will, on his or her own or, in some cases, with the client, determine the number and profile of the consultants to be

used in preparing the written research report. The profile factors of consultants include such factors as their education, experience, and specific field of expertise.

Once the questions and requests for information and the number and profile of the consultants are determined, the research manager will send the materials to the consultants who will respond to the research manager in writing. The responses will be collected, edited, and used by the research manager to prepare the written research report for the client. In virtually all instances, the written research report provided by Company is transmitted electronically to the client.

Company offers written research reports only on a limited subscription basis. The subscription provides the client with a limited number of written research reports that may be completed during the relevant subscription period (e.g., one year). No refund is provided to the client if the maximum number of written research reports allowed during the subscription period are not commissioned.

Meetings and seminars

The meetings and seminars provided by Company consist of a series of events focused on an industry or topical area. The meetings and seminars allow clients to learn about industry issues and developments on an ongoing basis. For example:

- Company may arrange a luncheon group of leading ophthalmologists to discuss macular degeneration with clients interested in creating tools for diagnosis and prevention of the disease;
- Company may arrange a seminar presented by aeronautical engineers for clients interested in the competition and innovations of aircraft manufacturers; or
- Company may arrange a seminar presented by travel industry executives for clients interested in recent trends in the travel industry.

The meetings and seminars allow Company's clients to meet in person with consultants, attend presentations by the consultants, and discuss substantive issues in a small group setting with other clients and the consultants. The meetings and seminars take place regularly at various locations throughout the country, including New York, and also in international locations. The meetings and seminars may be initiated by Company or clients. When a meeting or seminar is initiated by Company, attendance is by invitation. When a meeting or seminar is initiated by a client, that client may attend alone or have input into the identity of other attendees.

Attendance at the meetings and seminars is strictly limited to keep the groups small and thereby facilitate discussion among the participants and the consultants, with the goal of providing the greatest opportunity for learning and information exchange. Occasionally,

consultants provide written handout materials to participating clients to facilitate discussion or assist with the presentations at the meetings and seminars.

A research manager will receive and act on client requests for meetings and seminars. The research manager selects consultants to make presentations at meetings and seminars and also selects the specific presentation topic, format, and venue and identifies the client invitees.

Company offers meetings and seminars only on a limited subscription basis. The subscription provides the client with the ability to participate in a limited number of meetings and seminars during the subscription period (e.g., one year). No refund is provided to the client if the maximum number of meetings and seminars allowed during the subscription period are not attended.

Company has offices, clients, research managers, and consultants within and without the state of New York. In most instances, research managers are located in the same state as the clients they serve. In most instances, consultants are not located in the same state as the clients.

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 multi-graphed 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, and information services used by newspapers, radio broadcasters and television broadcasters in the collection and dissemination of news, and excluding meteorological services.

* * *

(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.

(ii) Notwithstanding the rate and date set forth in the opening undesignated paragraph of this section and notwithstanding the opening undesignated paragraph of this subdivision, on and after September first, nineteen hundred ninety-three, in addition to any other tax imposed under this section, and in addition to any other tax or fee imposed under any other provision of law, there is hereby imposed and there shall be paid an additional tax at the rate of five percent upon the receipts which are subject to tax under subparagraph (i) of this paragraph on the furnishing or provision of an entertainment or information service which is received by the customer exclusively in an aural manner. Such additional tax shall not be imposed by section eleven hundred seven, eleven hundred eight or eleven hundred nine of this article and shall not be included among the taxes authorized to be imposed pursuant to the authority of article twenty-nine of this chapter.

* * *

(f) (1) Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state, . . .

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

Sale of information services. (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.

* * *

(4) Charges for credit information services, other than those that are transmitted orally, are subject to tax. The following rules shall apply in determining taxability of services that include both oral and written reports:

(i) Any fee for a written report is taxable.

(ii) Any fee for an oral report is taxable if the oral report is preliminary to the written report.

(iii) An annual fee for subscribing to a service is taxable if it entitles the subscriber to a certain number of free reports, or to reduced charges on reports, unless the subscriber is entitled only to oral reports.

* * *

(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.

* * *

(3) Sales tax does not apply to receipts from sales of information services which are only furnished orally. See paragraph (4) of subdivision (a) of this section.

Opinion

Company's primary function is to provide its clients with the services of highly trained and experienced individuals that will consult with, inform and offer opinions to Company's clients. Such services deliver on-demand timely and specific insight that is tailored to the client's needs. The information provided ranges from background information on a particular topic to in-depth technical analysis of a discrete issue or subject.

Company's services consist of (i) oral consultations, (ii) custom written research reports, and (iii) industry and subject matter specific meetings and seminars. Company generally offers these services on a limited subscription basis, which provides the client a specified number of oral consultations, written research reports, or meetings and seminars during the subscription period. No refund is provided if the client does not use the maximum number of consultations,

reports, meetings or seminars allowed during the subscription period. Company also offers a subscription for an unlimited number of oral consultations.

Section 1105(c)(1) of the Tax Law imposes a sales tax on receipts from the service of furnishing 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. Section 1105(c)(9) imposes a sales tax on receipts from the service of furnishing information by means of telephony or telegraphy or telephone or telegraph service. Information services which are personal or individual in nature and which are not or may not be substantially incorporated in reports furnished to other persons are excluded from the sales tax imposed by section 1105(c)(1) or 1105(c)(9). Charges for information which is solely transmitted orally and in person are also excluded from sales tax. See section 527.3(b)(3) of the Sales and Use Tax Regulations.

Based on the description of Company's services in this Opinion, and assuming that Company's written research reports are not culled or derived from information from any common databases by either Company or its consultants, Company's services of collecting and analyzing clients' requests and providing oral consultations by telephone, or written research reports do not constitute the sale of taxable services. The oral consultation and written reports furnished to Company's clients appear to be more akin to nontaxable consulting services as discussed in *Hodgson, Russ, Andrews, Woods and Goodyear*, Adv Op Comm T&F, April 2, 1992, TSB-A-92(31)S; *PricewaterhouseCoopers LLP*, Adv Op Comm T&F, March 25, 2003, TSB-A-03(11)S, and not like the reports derived from public records or common databases that were deemed to constitute the provision of taxable information services in *Hooper Holmes, Inc. v Wetzler*, 152 AD2d 871, *lv denied* 75 NY2d 706; *Rich Products Corporation v Chu*, 132 AD2d 175; *Towne-Oller & Assoc. v State Tax Comm.*, 120 AD2d 873. Therefore, Company's subscription charges for oral consultations and written reports are not subject to sales tax under section 1105(c)(1) or 1105(c)(9) of the Tax Law. However, charges for written reports that were derived from a common database or the files of previous written reports, and that consisted of information which is or may be substantially incorporated into reports furnished to others by Company or its consultants, would be subject to tax under section 1105(c)(1) if delivered to a client in New York. Moreover, where the oral consultations are furnished by telephony or telegraphy, and the information provided through the consultation would be subject to tax under section 1105(c)(1) of the Tax Law if furnished in printed form, Company's charges for oral consultations will be subject to tax pursuant to section 1105(c)(9) of the Tax Law if delivered to a customer in New York. See *PricewaterhouseCoopers LLP*, *supra*.

Since the information furnished to clients at Company's meetings and seminars is provided for a separate subscription charge and the information is transmitted orally rather than in written reports and in person rather than by telephony or telegraphy, Company's subscription charges for such meetings and seminars are not subject to sales or use tax under section 1105(c) of the Tax Law. See section 527.3(b)(3) of the Sales and Use Tax Regulations. Petitioner's charges for seminars are not charges for an admission to a place of amusement and are not

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subject to sales tax under section 1105(f)(1) of the Tax Law. See *PricewaterhouseCoopers LLP, supra; Underground Facilities Protective Organization, Inc.*, Adv Op Comm T&F, December 20, 1993, TSB-A-93(63)S.

Charges for performing nontaxable services will not be subject to sales tax provided that the services are not sold in conjunction with any taxable services and are not performed for a customer in conjunction with the sale of tangible personal property. See *Virtual Systems Group, LLC.*, Adv Op Comm T&F, October 9, 1998, TSB-A-98(71)S; *Arteffects, Inc.*, Adv Op Comm T&F, February 21, 1996, TSB-A-96 (10)S; *Alan/Anthony, Inc.* Adv Op Comm T&F, June 19, 1992, TSB-A-92(51)S.

DATED: March 24, 2008

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

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.