

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(29)S
Sales Tax
July 2, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S100316A

The Petitioner, [REDACTED] asks whether its receipts from the sales of its call tracking services provided to car dealerships located in New York are subject to New York State and local sales tax.

We conclude that the receipts from the provision of Petitioner's call tracking services are not subject to New York State and local sales tax¹.

Facts

Petitioner provides a call tracking service to car dealerships. The service collects and analyzes certain information regarding prospective customers of the dealerships, measures advertising performance, and evaluates employee call handling skills. New York car dealerships are among Petitioner's customers.

While Petitioner is the party that contracts for the provision of the call tracking services with the dealerships, Petitioner has engaged a third party call measurement, monitoring, and tracking service provider as a subcontractor to provide the call tracking services on its behalf. The subcontractor is headquartered outside of New York and its call center is also located outside of New York.

To facilitate its call tracking service, the subcontractor arranges for one or more custom vanity phone numbers (1-8YY numbers which can be customized such as 1-800-RET-AILR) for use by the customer dealerships. The number of toll-free phone numbers to be contracted for use by a customer dealer is determined by the package purchased by the customer from Petitioner (various packages include the use of from one to ten toll-free numbers). Customers that want a customized toll-free number may request the use of the designated number, subject to its availability.

The toll-free numbers are used in advertisements on Petitioner's website (new car sales), Petitioner's affiliated website(s) (used auto sales), and on the customer's website. Although the dealers are not required to participate in advertising on Petitioner's website, if a dealer participates in advertising on Petitioner's website, the dealer must participate in one of Petitioner's call tracking services. The toll-free numbers can also be used in the customer's own newspaper, television, radio, or billboard advertising.

The toll-free numbers ring at the subcontractor's out-of-state call center. They do not ring into the customer's place of business, and other than for advertising purposes the customer may make no other use of the number (e.g., no outgoing calls, etc.).

¹ Petitioner also charges its customers for advertising their new and used cars on Petitioner's or its affiliates' Web Pages and charges for software used by those customers to upload listings of the customer's inventory directly to those advertisements. Petitioner's charges for software and advertising are separate and distinct from the charges for the service discussed herein and are not the subject of this Advisory Opinion. We make no determination about the imposition of New York taxes on those receipts.

The subcontractor purchases the toll-free numbers and maintains exclusive rights to those numbers beyond the terms of its agreements with Petitioner and the car dealers. When the agreements end, the car dealers are not given the option to purchase the numbers that were assigned to them for use in the call measurement service. Although a small percentage of the dealer customers have been permitted to use their own 800 phone numbers, the agreement with the subcontractor does not generally allow the dealer customers to use an 800 phone number other than those purchased by the subcontractor for its use in providing the call tracking service. The subcontractor is billed by its telecommunications providers for the toll-free numbers it uses in the performance of its call tracking. The subcontractor pays all applicable federal, state and local sales taxes applicable to the purchase of the phone numbers to the telecommunications providers, and it does not charge those taxes to Petitioner.

When a potential automobile purchaser dials one of the toll-free numbers assigned to one of the customer-dealers, the subcontractor's out-of-state server plays a "welcome" message and connects the caller with the car dealer. The contractor's server identifies the 800 phone number that was called (i.e., the 800 number related to the customer dealer's newspaper advertising) for purposes of tracking the response to the dealer's various forms of advertising. If caller ID lookup is available, the subcontractor's server identifies the name and location associated with the telephone number from which the call is made, and delivers the call to the customer dealer's "point to number." When the customer's salesperson answers the call, a recording is played that indicates who is on the line and where the prospective purchaser obtained the toll-free number, and asks if the salesperson wishes to take the call. If prompted, the server connects the call to the customer's salesperson. The subcontractor's servers remain connected to the call, recording the conversation between the prospective purchaser and the customer's salesperson. During the call, the salesperson has access to the customer's information residing on the subcontractor's servers through the Internet. At the end of the call, if the prospective purchaser agrees to participate in a survey, the call to the dealer's salesperson is terminated, and the purchaser remains connected to the server so that the subcontractor may conduct the exit survey. The exit survey rates the prospective purchaser's satisfaction with the salesperson's responsiveness to the prospective purchaser's inquiries. The call is terminated when the prospective purchaser hangs up.

Petitioner's customers have access through the Internet to the information obtained from each call, including the recording of the phone conversation and the exit surveys. The customer may also have the ability to create reports to determine the effectiveness of its advertising. The recorded conversation between the salesperson and prospective purchaser is used by the customer to monitor its sales staff to ascertain whether they were rude, engaged in hard selling or deceptive tactics (e.g., bait and switch), were responsive to the purchaser's questions and concerns, etc.

The "point to number" to which the purchaser's toll-free call is directed is the customer-dealer's own local phone number. The transfer from the subcontractor's servers to the customer-dealer's salesperson is transparent to the prospective purchaser. The customer is responsible for paying its telecommunications provider for its own telecommunications service, including all applicable taxes.

Petitioner also receives a report through the Internet summarizing its customer's phone referral reports and usage data for each toll-free number. However, Petitioner does not collect and compile the collective results of multiple customers or sell the information of any customer to other customers. For example, Petitioner does not tell other customers that John Doe inquired about purchasing an automobile from Customer A, nor does it tell Customer A that John Doe called another customer about its advertisements. Likewise, Petitioner does not inform other customers whether prospective purchasers were satisfied or dissatisfied with Customer A's salespersons, or were more or less satisfied with Customer A's salespersons than with Customer B's salespersons.

Analysis

Sales tax is imposed upon the receipts from every sale, other than a sale for resale, of telephone answering services pursuant to section 1105(b) of the Tax Law. A "telephone answering service" is any service that consists of taking messages by telephone and transmitting such messages to the purchaser of the service (or his or her designee), but not including such a service if it is merely an incidental element of a different service purchased by the customer. *See* Tax Law §1101(b)(13); *see also Telephone Answering Services Subject to Sales Tax Effective September 1, 1991*, Technical Services Bureau Memorandum, October 11, 1991, TSB-M-91(13)S.

The tax imposed by Section 1105(b) of the Tax Law on telephone answering services does not apply to Petitioner's call tracking service. Although Petitioner's call tracking service does include elements of a telephone answering service, the answering of the telephone is incidental to the services provided by Petitioner to its subscribers (i.e., measuring the effectiveness of the customer's advertising, recording conversations between prospective purchasers and salespersons, and performing exit surveys). *See also Alfred Farella*, *Adv Op Comm Tax & Fin*, October 7, 1998, TSB-A-98(70)S. Thus, Petitioner's call tracking service, as described above, is not subject to the sales tax imposed pursuant to section 1105(b) of the Tax Law on telephone answering services.

Section 1105(c)(1) of the Tax Law imposes sales tax on 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.

Petitioner, as part of its call tracking service, makes sales of information. However, the initial information Petitioner provides as part of its call tracking service relates only to determining the source of the customer's advertising that generated the telephone inquiry, and if available, the location of the prospective car purchaser. This information provided by Petitioner is personal and individual to the customer's advertising practices. This information is transmitted electronically by Petitioner's subcontractor through the Internet only to the customer and Petitioner, and is not incorporated into reports furnished to other persons. Accordingly, the call tracking service described above qualifies for the exclusion from tax under section 1105(c)(1) of the Tax Law for the provision of information which is personal or individual in nature and is not or may not be incorporated into reports furnished to others.

Sales tax is imposed upon information and entertainment services delivered by means of telephony and telegraphy or telephone and telegraph service under section 1105(c)(9) of the Tax Law. Information services delivered by telephony or telegraphy are not subject to tax unless the information service would be subject to the tax imposed by Tax Law section 1105(c)(1) if the information was delivered in written or printed format. Because, as previously noted, Petitioner's service is not subject to the tax imposed under Tax Law section 1105(c)(1), this service is not subject to the sales taxes imposed by section 1105(c)(9) of the Tax Law.

The results of the exit survey will likewise qualify for the exclusion from sales tax on information services as the provision of information that is personal or individual in nature, if neither Petitioner nor its subcontractor uses the survey information in reports furnished to persons other than the customer for whom the survey was performed. If the survey information is made available to customers other than the dealer for whom the survey was performed, the receipts from the sale of the exit survey results would be subject to tax.

In that case, moreover, if the exit survey results are not separately offered for sale and sold separate from Petitioner's call tracking service, then Petitioner's total charge to the customer would be subject to sales tax.

The recorded conversation between the dealer's salesperson and the prospective purchaser, to the extent that provision of the information contained in the recording might be considered an information service, will likewise qualify for the exclusion from sales tax for the purposes of the taxes imposed pursuant to sections 1105(c)(1) and 1105(c)(9) of the Tax Law for information that is personal or individual, if access to the recorded conversation is given only to the customer-dealer for whom the recording is made. However, section 1105(a) of the Tax Law imposes New York State sales tax upon receipts from every retail sale of tangible personal property. "Tangible personal property" means corporeal personal property of any nature. *See* Tax Law §1101(b)(6). Thus, additional charges for extra copies of the recorded conversations that are delivered to the customer in tangible format (tape, disc, flash drive, etc.) would be subject to the sales tax imposed pursuant to section 1105(a) of the Tax Law.

The advice provided in this opinion presumes that the sale of the call tracking service is a discrete separate transaction. If this service was sold as a constituent part of some other taxable service, regardless of whether the charges for the call tracking service were separately itemized, the charges for the otherwise nontaxable call tracking service would be included as expenses in the receipts for the taxable service and would be subject to sales tax.

DATED: July 2, 2010

/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.