

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

TSB-A-10(47)S
Sales Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080725B

A petition received July 25, 2008, requests an advisory opinion about whether the Company's sales of various service options to financial advisors are subject to sales tax. We conclude that all of the Company's service options are nontaxable information services, except Service Option 4, which constitutes a taxable sale of prewritten software.

Facts

The Company is a technology-based information service provider whose customers are Financial Institutions ("FIs") that provide wealth management services to the investing public through intermediaries who are commonly referred to as financial advisors ("FAs"). These intermediaries can be employees and/or independent, affiliated agents of the financial institution. The Company's customers are located both inside New York and across the United States. All of the Company's service offerings involve providing investor-level investment holdings and transaction information to FIs electronically. FIs, in turn, enable access to the investor level information to their affiliated FAs. The information is used by the FI and FA for various purposes, including portfolio management, investor reporting, back office support (e.g., compliance, fee billing, etc.), and interfacing with other desktop tools used by the FA (e.g., proposal generation, customer relationship management, etc.).

The following is a sample of the types of data the Company processes:

- Data that are personal to investors, including investor names, SSNs, investment positions and transactions ("portfolio information");
- Data that are personal to advisors, including names, SSNs, addresses, client lists, and fee arrangements with clients ("advisor information"); and
- Market data related to the investor's holdings, including pricing, benchmarking, and corporate actions data ("market data")

Background – The Information Gathering Process

The following is a description of how the information the Company provides to FIs is gathered and consolidated: Investor A retains the services of an FA to provide comprehensive financial advising services regarding Investor A's equity and debt securities. The FA is an independent affiliated agent of Financial Institution B. In order to provide up-to-date financial information for Investor A, the FA procures Investor A's permission to access personal information related to Investor A's securities holdings and transactions. Investor A's personal information may include information such as the amount of securities in Investor A's holdings and the results of daily trade activity for Investor A. Personal information related to Investor A's securities holdings and transactions resides at multiple locations, including Financial Institution B, Financial Institution C, Clearing and Settlement Service Provider D, Custodian E and Central Securities Depository F.

Financial Institution C is a brokerage house that administers the 401(k) plan provided by Investor A's employer. It maintains information pertaining to the current account balance of Investor A's 401(k)

investment portfolio. Clearing and Settlement Service Provider D, commonly referred to as a "clearing house," provides clearing and settlement services such as facilitating the transfer of funds for financial transactions. Clearing and Settlement Service Provider D retains current information on Investor A's purchases and sales of securities and debt instruments. Custodian E is a bank which holds on deposit a portion of Investor A's debt instruments and is responsible for collecting and providing information on the income from such assets for reporting purposes. Central Securities Depository F is responsible for retaining the actual physical certificates and post-settlement processing for Investor A's securities holdings.

Financial Institution B enters into a contract with the Company whereby the Company agrees to perform information retrieval and compilation services related to information for all of Financial Institution B's financial advisors and their investor clients, including the FA and Investor A. The Company gathers and compiles the information electronically from all of the previously mentioned parties. While Financial Institution B provides the information directly to the Company through electronic data transmissions in real-time, Financial Institution C requires the Company to establish a custom proprietary secure interface in order to retrieve the information from its servers electronically. Similarly, the Company develops secure electronic interfaces to retrieve the data from Clearing and Settlement Service Provider D, Custodian E, and Central Securities Depository F. Each of the data sources presents the data in unique formats, using different codes, fields, identifiers, etc. The Company also receives data from independent third parties for pricing, corporate actions, mutual fund data, etc. In addition to retrieving the data, the Company "normalizes" the data, a process that includes interpreting the differently formatted data and reconfiguring them in a uniform format. The Company then stores the normalized data in a database. The normalized data stored in the database are the basis for all services provided by the Company.

The Company's Services

The Company's service contracts are between the Company and FIs – the Company does not have a contractual relationship with FAs or investors, though each may be a user of the information the Company provides to the FI. Though the Company gathers investor-level holdings and transaction information for every FA affiliated with an FI, fees charged by the Company to the FI are typically based on the number of affiliated FAs who use the Company's services. In most cases, FIs charge a fee to their affiliated FAs who use the Company's services. The Company's Service Offerings are generally various methods of electronic transmission of the normalized information, plus add-on services that provide linkages to other investment and portfolio management tools for FAs.

The following are brief descriptions of the Company's primary Service Offerings:

Service Option 1 includes web-based access of the normalized information by FAs. For each FI client, the Company creates a unique, secure web portal, through which affiliated FAs may access information for their investor clients. The FA can access the data for portfolio management and reporting purposes, including consolidating the data in various formats (e.g., by investor, by family, by investment type, etc.) and may also provide the information to investor clients. Certain authorized personnel at the FI may also access the data, for example office managers, assistants to FAs, or back office and compliance personnel. Each web portal is secure, so FIs can only view information related to their FAs and each FA can only view information related to their own investor clients.

If a customer buys Service Option 1, it may also buy Service Option 2, 3, or 4. Option 2 involves the electronic transmission of normalized information to the FI, typically by delivering it to a secure site via File Transfer Protocol (FTP). In Service Option 2, the information is not accessed by FAs, but is used by the FI to populate other systems used by either the FI, FA, or both. For example, the FI receiving the electronic

transmission may use it to populate separate systems for compliance reporting, fee billing, proposal generation, or customer relationship management.

Under Service Option 3, the Company allows on-line access so that the FA may log onto the unique web portal provided by the Company to view Investor A's data. Once logged into the web portal, the FA may export its investors' data from the Company's web portal directly onto its own computer hard drive. This will allow the FA to import its investors' data onto third-party software applications accessed via the third-party's web portal. FIs may purchase Service Options 1 or 2 independently from one another, but Service Option 3 is an add-on to Service Option 1. The information gathered, normalized, and provided is the same for any of the three service offerings.

Under Service Option 4, the Company allows on-line access so that the FA may log onto the unique web portal provided by the Company to view Investor A's data. Once logged into the web portal, the FA will have access to additional analytical tools within the web portal. Each tool is automatically populated with its investors' data and allows the FA to further analyze its investors' financial portfolios, providing information such as investment strategies specific to its investors, or answering questions that uniquely pertain to its investors' financial situations. The price of Service Option 4 is based on the number of FAs utilizing this service. The FI in turn charges the FAs separately for their access to the service.

Information gathered and normalized by the Company is provided only to FI customers and their affiliated FAs. FAs may only access information pertaining to their own investor clients – individual FAs cannot view information related to the investor clients of other FAs, even within the same FI. The Company does not provide any data to third parties, and the Company is prohibited by its contracts from marketing or re-distributing the normalized information in any form (i.e., mailing lists, etc.).

Analysis

Under its Service Option 1, the Company aggregates information relating to an investor from various institutions with which the investor does business, normalizes that information, and then presents it on a webpage, which the FI client and its associated FAs can access for viewing and to run customized reports for the investor. By providing its customers with the right to customize reports by using software on its website, the Company's sales transfer the right to use prewritten software. However, Service Option 1 also involves the transfer of information to a customer. Under this circumstance, Service Option 1 constitutes an information service, rather the sale of prewritten software (*Matter of DZ Bank*, Tax Appeals Tribunal, May 11, 2009).

Tax Law section 1105(c)(1) imposes sales and use tax on the service of “[t]he 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.” That section excludes from tax the sale 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” (hereafter, “the personal or individual exclusion”). The investor portfolio information and advisor information that the Company aggregates and then makes available to the FA qualifies for the personal or individual exclusion because it relates only to that investor and the Company is barred from reselling it to others (*Matter of New York Life Ins. Co. v. State Tax Comm'n*, 80 A.D.2d 675, *aff'd sub nom. Matter of Metropolitan Life Inc. Co. v. State Tax Comm'n*, 55 N.Y.2d 758 [1981]). Service Option 1 (as well as the other service options) also includes market data about the pricing of the assets held by the investor and related bench-marking information. This market information, if provided alone, would constitute a taxable information service (*Allstate Ins. Co. v. Tax Commn. of State of*

N.Y., 115 A.D.2d 831, *affd.*, 67 N.Y.2d 999 [1986]). On balance, of the two types of information the Company is selling, the portfolio information seems to predominate in importance over the market information. Thus, Service Option 1 as a whole qualifies for the personal or individual exclusion and is thus not taxable (*Matter of Automatic Data Processing*, State Tax Commission, May 8, 1985). The above analysis also applies to Service Options 2 and 3. Thus, those options also qualify for the personal or individual exclusion and are not taxable.

In addition to the nontaxable information service, Service Option 4 also gives the FI access to prewritten software on the Company's website, which the FI can then use to further analyze the investor's financial information. Being optional, this software is not integral to the Company's information service, and thus its taxability must be separately determined. A sale of prewritten software is taxable as the sale of tangible personal property "regardless of the medium by means of which [it] is conveyed" (Tax Law sections 1101[b][6]; 1105[a]). "Sale" is defined as "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including with respect to computer software, merely the right to reproduce) or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor" (Tax Law § 1101[b][5]). Sales Tax Regulation section 526.7(e) provides that, in general, "a sale is taxable at the place where the tangible personal property or service is delivered or the point at which possession is transferred by the vendor to the purchaser or his designee." Sales Tax Regulation section 526.7(e)(4) further provides that, with respect to a "license to use," a transfer of possession has occurred if there is actual or constructive possession, or if there has been a transfer of "the right to use, or control, or direct the use of tangible personal property." "[C]onstructive possession" of software or "the right to use or control" software for purposes of Regulation section 526.7(e)(4) is determined based on the location where the software is used and not on the location of the code embodying the software (*Adobe Systems, Inc.*, TSB-A-08[62]S, November 24, 2008).

DATED: September 29, 2010

/S/

DANIEL SMIRLOCK
Deputy Commissioner and Counsel

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.