

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

TSB-A-10(54)S
Sales Tax
November 1, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S100209A

On February 9, 2010 the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether it owes sales or use tax on products purchased from unrelated third party vendors.

We conclude that Petitioner owes sales tax as purchaser when it pays for the products that it uses and owes sales tax as vendor on its receipts for the sale of these products, which are taxable as information services.

Facts

Petitioner serves as the national office for the [REDACTED] (Association), an association of membership-based motor clubs serving different geographic areas throughout the United States and Canada. Motor clubs that are admitted to the Association are granted the right to use Association's [REDACTED] acronym in their name, as well as the Association's logo on marketing material. Club membership in the Association does not, however, create any form of shared ownership or shared liability. Petitioner is a separate entity from the member clubs for both legal and tax purposes. Petitioner has an office in New York State.

Due to its bargaining power, Petitioner often negotiates contracts on a national basis for the benefit of both itself and member clubs. In certain circumstances, these national contracts are set up such that Petitioner acts as a conduit between vendors and member clubs: vendors will issue one invoice to Petitioner for goods or services provided to both Petitioner and the member clubs. Petitioner in turn splits the total billed amount among itself and the member clubs that are parties to the contract in question. Petitioner's income statement records the amounts Petitioner pays X and Y for goods or services it consumes, but it does not record as income or expense the amounts Petitioner receives from club members or the amounts it pays X and Y for goods or services club members consume. The amounts billed to Petitioner for goods or services provided to member clubs are recorded in a balance sheet holding account until paid by the member clubs.

Petitioner has a written contract with Y, which sells geographic and demographic data that are used for direct marketing purposes. The written contract lists Petitioner as the client. Section 6.1 of the contract states that the license to use the data extends to Petitioner for use for and on behalf of member clubs. Section 6.4 of the contract prohibits Petitioner from reselling the information provided except as provided in section 6.1 of the contract. The contract acknowledges that member clubs may use the data furnished by Y: "Client agrees to uses its best efforts to provide [Y] with a copy of any direct mail solicitations, telephone scripts, ad copy or other communications to be used in connection with the [Y] data, from any Association club as available..."

The Y contract states that it covers all transactions in which Y provides any data or information services to Petitioner. The contract grants Petitioner a nonexclusive and non-transferable license to use Y data. The contract gives no indication that Y is providing Petitioner with a license to use software.

Petitioner has a written contract with X to provide mapping data that is used by Petitioner in various applications, and by member clubs in their radio assistance dispatch services centers. Section 2.1 of the contract states that "Subject to the restrictions set forth in Addendum A and elsewhere in this Agreement, ...[X] hereby grants [Petitioner] a non-exclusive, non-transferable, non-sublicensable...license to use the Data....." Section 2.4 states that Petitioner "shall cause each End-User to assent to end-user terms provided in ...[an agreement by X], or equivalent terms that are no less protective of ...[X] ('End User terms'), in such a manner that the End User Terms be enforceable against the End User." End User is defined in the contract as "any entity or person who receives or uses a copy of all or any portion of the Data or information contained therein or derived therefrom for personal use in an Application with no right to copy, sublicense or loan the same."

X delivers the mapping data to Petitioner in a computer readable medium.

Analysis

Tax Law section 1105(c)(1) imposes sales tax on the receipts for the service of furnishing information by printed matter, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons. 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 exempt from the sales tax. 20 NYCRR 527.3(c)(3).

X and Y are providing written information services to Petitioner. Petitioner is both the end user of information services and the vendor of information services to the member clubs. Petitioner is the end user of information services as to information it uses in its own business. If X and Y delivers to New York the information that Petitioner uses, Petitioner owes New York sales tax on the charges billed by X and Y for this information.

Petitioner is reselling information furnished by X or Y that is used by member clubs when the member clubs pay Petitioner for the information. A person may resell a product for purposes of sales tax even though a contract with a third party such as a supplier prohibits a resale of the product. This legal point is moot in regard to Petitioner's contracts with X or Y because these contracts explicitly contemplate that the information will be used by the member clubs and implicitly acknowledge that Petitioner will receive payments from member clubs for information furnished them. The contracts thus do not preclude a resale for sales tax purposes of the information services provided by X or Y.

Petitioner, which has an office in New York State, will, as a vendor, be required to collect sales tax from member clubs on the payments they make to Petitioner for the delivery in New York of X or Y information. When Petitioner does make a purchase from X and Y for resale, Petitioner's purchase of those

services will qualify for the resale exclusion even though club members furnish the monies used by Petitioner to pay the vendors for the resold services.

Petitioner can avoid being the reseller of the information services furnished by X or Y only if it is acting as purchasing agent for the member clubs or if it is the sole retail purchaser of the services. Nothing in Petitioner's contracts with X and Y indicates that Petitioner was acting as agent of the member clubs. If Petitioner were acting as undisclosed agent of the member clubs, it would still be required to pay sales tax on all taxable purchases because both an undisclosed agent and its principal are liable for sales tax in that scenario. See *Peat Marwick Main and Co.*, Adv Op Comm T&F, August 25, 2006, TSB-A-1989(1)S. And if Petitioner is not entitled to a payment or reimbursement from a member club for X or Y information used by the members, Petitioner would not be reselling the information service or acting as agent and would, as the retail purchaser of services, owe New York sales tax on payments it makes to X or Y on the information delivered in New York to the member club.

If Petitioner receives a bill from X or Y that does not break out the charges for services that Petitioner consumes from the charges for services that it resells, Petitioner will not be entitled to issue a resale certificate to X or Y for the information services it purchases from these vendors because its purchases are not exclusively for resale. Cf, *Board of Managers of the Time Warner Center Condominium and the Unit Owners*, Adv Op Comm T&F, August 25, 2006, TSB-A-2006(6)C, TSB-A-2006(23)S. It must pay sales tax on all purchases from X or Y, but will be entitled to a refund or credit for sales tax paid to these vendors on all transactions that result solely in resale, rather than Petitioner's own use, of the information services. If the bill from X or Y does break out separate and reasonable charges for services that Petitioner purchases exclusively for resale, Petitioner will be entitled to issue a resale certificate to the vendor and will not be required to pay sales tax on charges for the services that are purchased exclusively for resale.

DATED: November 1, 2010

/S/

DANIEL SMIRLOCK
Deputy Commissioner & 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.