

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-91 (60)S
Sales Tax
August 20, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S910412A

On April 12, 1991 a Petition for Advisory Opinion was received from Market News Service, Inc., 90 John Street, New York, NY 10038.

The issues raised by Petitioner, Market News Services, Inc., are:

1.a.) Whether Petitioner's news service constitutes a newspaper or periodical exempt from the imposition of sales tax under Section 1115(a)(5) of the Tax Law?

b.) Whether Petitioner's news service is taxable under the Tax Law?

2.a.) Whether Petitioner's providing of personal computer equipment and printers as a means for its customers to receive and print the news is exempt from the imposition of sales tax under the provisions of Section 1115(a)(5) of the Tax Law?

b.) Whether Petitioner's method of billing (e.g., lump sum versus separately stated charges) is determinative of the exempt status of such equipment or of the news service?

c.) Whether Petitioner's separate charges for the hookup of its system are exempt from the imposition of sales tax?

3.a.) Whether failure to classify Petitioner's news service as either a newspaper or periodical is unconstitutional?

Petitioner provides a 24-hour on-line international financial news service. The news service combines a blend of monetary and fiscal policy news and market reporting, plus comprehensive financial and economic data relating to world interest rate and currency markets. It provides stories and interviews with market and government officials written by its staff of reporters who are located in New York, Washington, D.C., London and Frankfurt. It also provides general news reports on politics and government from the perspective of the financial markets. Its subscribers include traders, portfolio managers, financial sales personnel, economists, newspapers, other wire services and television.

Petitioner is an internationally credentialed news organization. Petitioner is credentialed by the White House, the United States Treasury, the defense department and a number of embassies. Petitioner also has United States legislative credentials granted by the Senate press gallery which are needed to cover Congress and which grant advance access to embargoed press releases. The Senate press credentials are obtained through the process of obtaining approval from a board of

experts (typically newspaper editors) who rule on the appropriateness of the petitioning organization having access to sensitive information.

Petitioner's staff of writers are experienced journalists with specialization in the subject areas they cover, including: U.S. monetary policy, international exchange rate coordination, U.S. legislative and budget processes, etc. Its writers are news reporters who cover news events and conduct interviews to originally prepare articles, some of which are signed articles. The writers are full-time employees of Petitioner with the exception of an independent contractor in Frankfurt. There is no advertising and there are occasionally some editorial opinions by the writers.

Petitioner also includes in its news service reports which cover comments, opinions, advice and articles of individuals known in the areas of specialization reported by Petitioner. Petitioner neither renders advice nor provides consultation services. Its news service is much more than the mere compilation of raw financial statistics. Petitioner's news service is written daily and it is updated throughout the day through its 24-hour on-line system. The daily editions do not, either singly or when successively combined, constitute a book. Petitioner's news service is available to the general public through paid subscriptions. Some of Petitioner's direct competitors include Dow Jones, Knight Ridder and Reuters.

Petitioner's subscribers in New York receive the news service in one of the following two ways:

(1) Direct Distribution:

Subscribers purchase the news service which is provided either over telephone lines or FM radio transmissions. The subscription price is a monthly fee which is higher if Petitioner provides the personal computer to receive the transmission. The monthly fee also will vary depending on whether the subscriber pays for the printing feature and whether Petitioner provides the printer. There is also a separate monthly communication charge which depends on the method of transmission. Finally, there is a one-time installation charge which primarily represents the hookup of Petitioner's system to the dedicated equipment provided by the customer or by Petitioner to receive and print the news service. The prices charged to subscribers for the direct distribution are currently:

	<u>Monthly</u>
PC provided by subscriber	\$550
PC and Dedicated Printer provided by subscriber	600
PC provided by Petitioner	650
PC and Dedicated Printer provided by Petitioner	750
Generic Teleprinter provided by Petitioner	675
FM Communication charge, or	75
Data Line Communication charge	125

(2) Through Telerate:

Telerate is a separate company which itself provides various services. Telerate customers may subscribe to Petitioner's news service through their Telerate service. Telerate charges Petitioner a fee for sending its signal through Telerate's central system and it allocates certain amount of space for Petitioner's use. Petitioner is allocated pages 1400-1550 on Telerate for news stories and pages 34150-34299 for economic release information such as GNP and government information. Petitioner's news service provided over Telerate is the same as that provided to its direct distribution subscribers. The customer has no capability to store or retrieve the information transmitted through Telerate but it can be printed out. Telerate customers receiving Petitioner's news stores over pages 1400-1550 are billed directly by Petitioner \$290 per month and those receiving the entire news service over pages 1400-1550 and 34150-34299 are billed \$490 per month. A Telerate customer is unable to receive only pages 34150-34299. Petitioner does not provide any equipment in connection with the Telerate service.

Petitioner in the earlier years leased from third parties the personal computers and printers that it provided to its subscribers and paid New York state sales tax on lease receipts to its suppliers. Later, it acquired all the leased equipment and currently purchases any additional equipment and pays New York state sales tax. The personal computers provided by Petitioner to its subscribers cannot be used for other purposes while activated for Petitioner's news service. The information obtained through the direct distribution method can be accessed by a subscriber for up to five days which is indistinguishable from access to a stack of newspapers. Petitioner is informed that a subscriber receiving its news service through Telerate generally has no storage capability but could print out everything appearing on the screen.

Section 1101 of the Tax Law states in part:

Definitions.--

(b) When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article, valued in money, whether received in money or otherwise. . .

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose. . .

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise in any manner or by any means whatsoever for a consideration, or any agreement therefor. . .

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. -- . . .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. (emphasis added)

(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. . . .

(3) Installing tangible personal property, . . .or maintaining, servicing or repairing tangible personal property,. . .not held for sale in the regular course of business. . .

Section 1115 of the Tax Law provides, in part:

Exemptions from sales and use taxes. -- (a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

(5) Newspapers and periodicals.

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

Sale of information services. (Tax Law, 1105[c][1])

(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.

Section 528.6 of the Sales and Use Tax Regulations states, in part: Newspapers and periodicals (Tax Law, 1115[a][5]. (a) Exemption. The sale of newspapers and periodicals is exempt from sales and compensating use tax.

(b) Definition of newspaper. (1) In order to constitute a newspaper, a publication must conform generally to the following requirements:

(i) it must be published in printed or written form at stated short intervals, usually daily or weekly;

(ii) it must not, either singly or, when successive issues are put together, constitute a book;

(iii) it must be available for circulation to the public; and

(iv) it must contain matters of general interest and reports of current events.

(2) Notwithstanding the fact that a publication may be devoted primarily to matters of specialized interest, such as legal, mercantile, financial, theatrical, political, religious or sporting matters, nevertheless, if, in addition to the special interest it serves, the publication contains general news, it is entitled to the classification of a newspaper. . . .

(c) Definition of a periodical. (1) In order to constitute a periodical, a publication must conform generally to the following requirements:

- (i) it must be published in printed or written form at stated intervals, at least as frequently as four times a year;
- (ii) it must not, either singly or, when successive issues are put together, constitute a book;
- (iii) it must be available for circulation to the public;
- (iv) it must have continuity as to title and general nature of content from issue to issue; and
- (v) each issue must contain a variety of articles by different authors devoted to literature, the sciences or the arts, news, some special industry, profession, sport or other field of endeavor.

(2) A publication which may be known as or considered to be a newsletter may qualify as a periodical if it conforms to the above standards. Where a newsletter has no signed articles, but has a staff of writers who originally prepare articles, such publication will be considered to have articles by different authors. If a publication has been classified by the United States Postal Service as one which is entitled to second class mailing privileges, that fact will be considered in determining whether or not the publication is a periodical. . . .

In order to be considered a newspaper or periodical for sales tax purposes, a publication must meet the requirements enumerated in Section 528.6(b)(1) and (c)(1), respectively, of the Sales and Use Tax Regulations. One requirement for either classification is that the publication must be published at certain stated intervals in printed or written form.

Because Petitioner's on-line news service is made available to subscribers in the form of an electronic readout or display on a computer screen rather than being made available in a published printed or written form the on-line news service is not considered to be a newspaper or periodical for the purposes of the exemption contained in Section 1115(a) of the Tax Law. Additionally such services does not fall within the definition of a newspaper or a periodical as provided in Section 528.6 of the Sales and Use Tax Regulations since the service is not a publication in printed or written form. Mark S. Klein, Adv Op Comm T & F, July 29, 1991, TSB-A-91(53)S.

It is noted that the exemptions afforded under Section 1115 of the Tax Law are only applicable to receipts from sales of tangible personal property which would be subject to the tax imposed under Section 1105(a) of the Tax Law except for the provisions of Section 1115. Mark S. Klein, *supra*.

Because Petitioner's on-line news service is delivered to customers by means of an electronic readout or display rather than in printed, or written form, Petitioner is not considered to be selling tangible personal property. The use of dedicated systems, whether provided by the subscribers or by Petitioner, enabling subscribers to print-out the news received from Petitioner's service via an electronic readout or display does not effect the nature of the service provided by Petitioner and does not result in subscribers taking delivery of a newspaper or periodical which petitioner has published in printed or written form. Therefore, the receipts from sales of the on-line news service do not fall within the exemption provided under Section 1115(a)(5) of the Tax Law for newspapers and periodicals. Mark S. Klein, supra.

However, receipts from Petitioner's sales to its customers of the on-line news services are considered to be receipts from the sales of an information service and are subject to the tax imposed under Section 1105(c)(1) of the Tax Law and Section 527.3(a)(1) of the Sales and Use Tax Regulations. Murphy Heating Service, Inc. v Chu, 124 AD2d 907, Mark S. Klein, supra.

In instances where Petitioner provides dedicated equipment to a subscriber at an additional charge, Petitioner is considered to be renting tangible personal property to such subscriber. Because the rental of tangible personal property is defined as a sale under Section 1101(b)(5) of the Tax Law, the receipts from such rentals are considered to be the same as receipts from sales of tangible personal property and are subject to the tax imposed under Section 1105(a) of the Tax Law. Such receipts do not fall within the exemption provided under Section 1115(a)(5) of the Tax Law.

Petitioner's method of billing (e.g., lump sum versus separately stated charges) will not effect the sales tax status of the news service or the personal computer equipment as the application of sales tax will be determined by the nature of the service or equipment provided.

Petitioner's receipts from the separate charges for the hookup of a personal computer system provided by Petitioner are considered to be part of the charges for the rental of such equipment and are also subject to the tax imposed under Section 1105(a) of the Tax Law. Petitioner's charges to subscribers for the hookup of a personal computer system provided by the subscriber will be considered as charges for installing tangible personal property and the receipts from such charges will be subject to the tax imposed under Section 1105(c)(3) of the Tax Law.

The laws of New York State and the Regulations of the Commissioner of Taxation and Finance are presumed to be constitutional by the Commissioner. There is no jurisdiction at the advisory opinion level to declare such laws or regulations unconstitutional.

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Therefore, it must be presumed that the relevant sections of the law are constitutional to the extent that they relate to the imposition of the tax liability on Petitioner. Mark S. Klein, supra.

DATED: August 20, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.