

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

TSB-A-96 (53)S
Sales Tax
September 5, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S951121B

On November 21, 1995, a Petition for Advisory Opinion was received from David Zucker, 12 Cindy Lane, Highland Mills, New York 10930. Petitioner, David Zucker, submitted additional information pertaining to this petition on May 31, 1996.

Petitioner, David Zucker, raises the following issues:

1. Whether the annual fee paid by members of local buying groups to Petitioner to defray administrative costs is subject to sales and compensating use tax.
2. Whether commissions paid to Petitioner by suppliers are subject to sales and compensating use tax.
3. Whether charges by Petitioner to members for consulting services such as installation of hardware, advice on designing or configuring entire network systems, software training or maintaining or repairing equipment are subject to sales and compensating use tax.

Petitioner presents the following facts. The primary business activity of Petitioner's company consists of setting up local buying groups that, by combining their purchases of computers and related equipment, can take advantage of volume related discounts from selected suppliers. (Hereinafter, references to "Petitioner" shall include Petitioner's company.) Petitioner is the connection between the buying group and the suppliers. Members of the buying group pay an annual fee to defray Petitioner's administrative costs. As part of the service to the members of the local buying group, Petitioner may answer technical questions about the selection of a particular piece of equipment. This help is minimal in nature. Periodically, Petitioner will transmit consolidated orders of many small items with low individual dollar values to suppliers to maintain ordering efficiency. Membership in the buying group is open to any business without restriction. Petitioner does not have its own catalog, does not maintain a showroom or retail outlet and does not stock or store any merchandise for its membership.

Petitioner is not affiliated with any supplier of the equipment purchased by the members of the group. Petitioner does not take title to any equipment purchased by the group. Any sales taxes on equipment purchased is billed directly to the purchasing member by the supplier. Payment for the equipment purchased is made by the purchasing member directly to the supplier.

Petitioner earns a commission from the suppliers from which the members of the local buying group make purchases. A target threshold of volume is identified for the aggregate purchases made by the group as a whole. As that target threshold of volume is reached and exceeded,

commissions are paid to Petitioner based on the excess volume. The incentive to join the buying group is the opportunity to purchase "current model" computer hardware as differentiated from close out merchandise or items that are "dumped" at a substantial discount below full retail.

Petitioner offers consulting services to the members of the local buying group. Consulting fees are based on an estimate of the time needed to complete a job times a set rate per hour (\$75). Any out-of-pocket costs or subcontract labor costs if needed, are added to the base rate. The services usually consist of installation of hardware, advice on designing or configuring entire network systems, software training or maintaining or repairing equipment.

Section 1105(f)(2) of the Tax Law imposes sales tax upon the following:

(2) The dues paid to any social or athletic club in this state if the dues of an active annual member, exclusive of the initiation fee, are in excess of ten dollars per year

Section 1101(d)(13) of the Tax Law defines the term "social or athletic club" to mean "(a)ny club or organization of which a material purpose or activity is social or athletic."

Section 1105 of the Tax Law provides, in part:

Sec. 1105. 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.

* * *

(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, 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.

(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes

the tangible personal property, not purchased by him for resale, upon which such services are performed.

(3) Installing tangible personal property ... or maintaining, servicing or repairing tangible personal property ... not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith

Section 1115(o) of the Tax Law states:

Services otherwise taxable under subdivision (c) of section eleven hundred five or under section eleven hundred ten shall be exempt from tax under this article where performed on computer software of any nature; provided, however, that where such services are provided to a customer in conjunction with the sale of tangible personal property any charge for such services shall be exempt only when such charge is reasonable and separately stated on an invoice or other statement of the price given to the purchaser.

In this case, Petitioner's local buying group is not a "social or athletic club" and therefore, the annual membership fees are not subject to the imposition of sales tax under section 1105(f)(2) of the Tax Law. See Section 527.11(b)(6),(7) of the Sales and Use Tax Regulations. When Petitioner occasionally helps members by answering technical questions, which are de minimis in nature and provided for no charge, about the selection of particular pieces of equipment, Petitioner is not making a retail sale of an information service subject to tax. Unlike the persons who charged membership fees in Costco Wholesale Corporation, Adv. Op. Comm. Taxation and Finance, September 17, 1992, TSB-A-92(66)S and John Buono, Adv. Op. Comm. Taxation and Finance, March 17, 1994, TSB-A-94(10)S, Petitioner does not sell any merchandise to the purchaser or collect or remit payments from the purchaser. Petitioner is not affiliated with and does not formally represent any supplier of the equipment purchased by group members. Petitioner is not the purchaser or payor of record with respect to the equipment, and does not sell the equipment to group members. Therefore, Petitioner's annual membership fees do not constitute prepayments for merchandise and are not subject to tax under section 1105(a) of the Tax Law.

Commissions paid to Petitioner by suppliers are in the nature of agency fees and are not subject to sales and use taxes. See Edna Jacobs, Adv. Op. Comm. of Taxation and Finance, March 26, 1986, TSB-A-86(13)S and Mitchell Sorkin, Adv. Op. Comm. of Taxation and Finance, January 17, 1991, TSB-A-91(7)S.

Petitioner provides additional services to members of the buying group. These services usually consist of installation of hardware, advice on designing or configuring entire network systems, software training or maintaining or repairing equipment. Section 1105(c) of the Tax Law imposes sales tax on certain enumerated services. Since software training and system design services are not included within the services enumerated under section 1105(c) of the Tax Law, the receipts from charges to customers for these services are excluded from tax. The

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services of installing, maintaining and repairing tangible personal property are taxable under Section 1105(c)(3) of the Tax Law. Installation services, however, are not subject to tax if the property when installed constitutes a capital improvement to real property. See Sections 1101(b)(9) and 1105(c)(3)(iii) of the Tax Law. It should also be noted that installation, maintenance and repair services performed on computer software are exempt from tax if the charges for such services are reasonable and separately stated on the customer billing, as provided below. See Section 1115(o) of the Tax Law.

The total receipts Petitioner receives from the sale of these additional services, which include both taxable elements (i.e. installing, maintaining or repairing hardware) and nontaxable elements (i.e. training, designing or configuring entire network systems and servicing computer software) will be subject to the tax imposed under section 1105(c) of the Tax Law when the fees charged for these services are billed to the customer as a lump sum. However, if Petitioner reasonably and separately states the charges for the nontaxable elements and the charges for the taxable elements are separately billed on an invoice or other document of sale given to the customer, the receipts from the charges for the nontaxable elements will not be subject to the sales and use tax.

See Moore Business Forms, Inc., Adv. Op. Comm. of Taxation and Finance, February 15, 1995, TSB-A-95(6)S. (See also, STATE AND LOCAL SALES AND COMPENSATING USE TAXES IMPOSED ON CERTAIN SALES OF COMPUTER SOFTWARE, TSB-M-93(3)S, Sales Tax, March 1, 1993).

DATED: September 5, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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