

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

TSB-A-97(42)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960820A

On August 20, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Economic Cycle Research Institute, Inc., 666 Fifth Avenue, 24th Floor, New York, New York 10103. Petitioner, Economic Cycle Research Institute, Inc., provided additional information pertaining to the Petition on October 11, 1996.

Petitioner raised the following issues:

1. Whether two of its publications are exempt from New York State and local sales and compensating use taxes as periodicals under Section 1115(a)(5) of the Tax Law.
2. Whether Petitioner's consulting service is subject to State and local sales and use taxes.

Petitioner submitted the following facts as the basis for this Advisory Opinion and provided samples of the publications in question.

Petitioner was incorporated in April 1996. Petitioner specializes in researching, analyzing and forecasting business cycles using cyclical indicators and gauges. Petitioner issues three regular publications and offers a related consulting service.

The first of these publications, U.S. Cyclical Outlook, is issued monthly by fax or by mail to subscribers at \$5,000 per year. It provides in-depth cyclical analysis based on decades of experience with cyclical indicators. Articles draw conclusions about the likelihood of future turning points in economic, employment and inflation cycles in the United States. Initial issues of this publication each contained a single article of about 10 to 12 pages with two named authors. Later issues of this publication contain several articles, tables and charts. Petitioner's entire staff of nine contributes to the publication's preparation.

The second publication, International Cyclical Outlook, is in the same format as the U.S. Cyclical Outlook, but applies to international free-market economies. This publication is issued monthly to subscribers at \$5,000 per year.

The third publication is not at issue in this Advisory Opinion, but is available weekly to subscribers at \$5,000 per year.

A combined subscription to any two of Petitioner's publications is offered at \$8,000 per year.

The publications, individually or collectively, do not constitute a book or reference manual at year-end. The articles throughout the year are an ongoing commentary on inflation and economic cycles. They are opinions with high editorial content.

Petitioner's consulting service has several components. It includes access to Petitioner's staff for private attention to forecasting needs, which is usually done entirely by telephone. It also includes access to Petitioner's working papers relating to its latest research and access to proprietary data underlying the research. Petitioner has no database as such, but rather computed indexes that are available on-line or on disk. Petitioner's consulting service is, in effect, the right to call Petitioner for an explanation of and the underlying evidence used in its published articles. The consulting service is only offered to subscribers who purchase all three of Petitioner's publications. This service makes up \$5,000 of Petitioner's \$20,000 "All-Inclusive Service."

Anyone may subscribe to these publications and service. The normal customer base for business cycle research and forecasting consists of brokerage firms, banks, financial institutions, major industrial corporations and governmental agencies.

Applicable Law and Regulations

Section 1105(a) of the Tax Law imposes tax upon:

The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1115 of the Tax Law provides, in part:

(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 528.6 of the regulations states, in part:

(a) Exemption. The sale of newspapers and periodicals is exempt from sales and compensating use tax.

* * *

(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.

Opinion

In order to be considered a periodical for purposes of the exemption from State and local sales and compensating use taxes in Section 1115(a)(5) of the Tax Law, a publication must conform generally to each of the requirements enumerated in Section 528.6(c)(1) of the Sales and Use Tax Regulations. The term "generally" as used in this section of the regulations means that a publication may qualify as a periodical even if it does not satisfy one of the five requirements for a limited period of time. (See, Promenade Magazine, State Tax Comm, April 15, 1985, TSB-H-85(134)S.)

Petitioner's U.S. Cyclical Outlook and International Cyclical Outlook conform generally to all of the regulatory requirements of a periodical for purposes of the exemption from the sales and compensating use taxes. This is so provided these publications continue to contain a variety of articles by different authors or by Petitioner's staff of writers. These publications are published monthly in printed form and are available to the public by mail. They do not in any way constitute a book or books and have continuity as to their general nature and content. Accordingly, receipts from the sales of these two publications are not subject to State and local sales and use taxes.

Petitioner's consulting service is not included among the enumerated services that are subject to sales and compensating use taxes under the Tax Law. The consulting service is only offered to subscribers who purchase Petitioner's "All-Inclusive Service." Two of the publications included in this all-inclusive service are exempt from tax as previously described. It is assumed for purposes

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of this Opinion that the third publication does not qualify for such exemption. Each of these publications, however, may be purchased separately for \$5,000 and Petitioner has indicated that the consulting service makes up \$5,000 of the \$20,000 subscription fee for the all-inclusive service. Accordingly, receipts from the sale of Petitioner's consulting service are not subject to State and local sales and use taxes, provided that such receipts are reasonable and separately stated on any invoice or other statement of price given to the subscriber. If the allocable amount is not reasonable and separately stated, then the entire fee is subject to tax.

This rule concerning receipts also applies to receipts for Petitioner's U.S. Cyclical Outlook and International Cyclical Outlook when sold as parts of Petitioner's "All-Inclusive Service" or when either publication is sold as part of a combined subscription with Petitioner's third publication.

DATED: July 23, 1997

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

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