

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

TSB-A-98(32)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S971126B

On November 26, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Coopers & Lybrand L.L.P., One Canterbury Green, P.O. Box 10108, Stamford, Ct. 06904-2108.

The issues raised by Petitioner, Coopers & Lybrand L.L.P., are:

(1) Whether an advance payment for services to be rendered (the "advance payment") is subject to sales and compensating use tax at the time the advance payment is made.

(2) If the advance payment is subject to sales and compensating use tax at the time of receipt of payment, whether the service provider is required to remit tax on the advance payment at the time of receipt.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Corporation X, a corporation registered as a vendor in New York State, is in the business of selling information services, and other services such as business marketing, collections and accounts receivable management, to its customers worldwide. In connection with its information services business, Corporation X currently maintains data on numerous U.S. and international companies. It gathers, evaluates, analyzes and interprets data which it uses to sell information services to its customers. Corporation X also helps its customers interpret and utilize those information services for its customers' specific needs.

Corporation X is contemplating changing its billing practices whereby it will sell to its customers an Annual Discount Plan (the "Plan") that will entitle the customer to receive services during twelve consecutive months (the "contract year"). Under the Plan, the customer will make an advance payment at the beginning of the contract year and will thereby be entitled to receive services having a value corresponding to the amount of the advance payment, which will vary from customer to customer. When services are ordered, the customer will have the sole right to choose the state and locality in which it will receive the services. Since many of Corporation X's customers conduct business in more than one state, at the time Corporation X receives the advance payment, Corporation X will not know where such services will be provided during the course of the contract year. In addition, since Corporation X provides various services, some of which are subject to New York State sales and use tax and some of which are not, and the customer will have the sole right to choose which of those services to receive from Corporation X during the course of the contract year. At the time Corporation X receives the advance payment, Corporation X will not know what services the customer will utilize.

The customer's advance payment for the Annual Discount Plan will reflect a discount from the price of services which otherwise may be purchased through separate transactions. In addition, the advance payments will include a "gross up" of the price of the Annual Discount Plan representing a generic estimated sales tax rate, that is, a blended rate of 7% for the jurisdictions in which Corporation X sells its services. Corporation X will maintain a "usage tracking system" that will account for the entire advance payment it receives, including the estimated sales tax, by tracking for each customer the dollar amount of services and sales tax available. As a customer purchases specific services, Corporation X will adjust the usage tracking system to reflect both the services and the applicable sales tax, if any. Corporation X will provide customers monthly "Usage Statements." Each Usage Statement will list, for each customer location, a description and price of each service purchased, the taxability of each service, and the appropriate tax rate, by jurisdiction, for each taxable service. Corporation X will remit the appropriate sales tax related to the service, based on the jurisdiction in which the service is rendered, as the services are used. If a customer does not make full use of its advance payment by the end of the year, Corporation X may issue to the customer a refund or credit for the unused amount (including estimated sales tax) which the customer can carry forward for use during the following year.

Applicable Law and Regulations

Section 1105(c) of the Tax Law imposes the sales tax upon the receipts from certain enumerated services, unless they are purchased for resale.

Section 1101(b) (3) of the Tax Law defines the term "Receipt" as follows:

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, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery is provided by such vendor or a third party, but excluding any credit for tangible property accepted in part payment and intended for resale. For special rules governing computation of receipts, see section eleven hundred eleven.

Section 525.2(a) (2) of the Sales and Use Tax Regulations provides:

The sales tax is a "transaction tax," liability for the tax occurring at the time of the transaction. Generally speaking, the taxed transaction is an act resulting in the receipt of consideration for the transfer of title, or possession or both to property or rendition of services from one person to another. The time or method of payment is immaterial, since the tax becomes due at the time of transfer of property or rendition of service.

Opinion

Under section 1105(c) of the Tax Law, sales tax is generally imposed on receipts from the sale of certain enumerated services. Nonetheless, since the sales tax is a "transaction tax," liability for the tax is generally triggered at the time of an act resulting in the receipt of consideration for the rendition of services from one person to another (see Section 525.2(a)(2) of the Sales and Use Tax Regulations).

Under Petitioner's Annual Discount Plan, customers will, in effect, make an advance payment (which includes a "gross-up" amount that Petitioner anticipates will cover any potential tax liabilities) in return for the right to order and receive Petitioner's services at a discount rate during a given twelve month period. Under the Plan, at or about the time that a customer orders and receives a service or services, the usage tracking system of Corporation X will be adjusted to reflect the dollar amount charged to the customer's account. The customer will receive documentation with respect to the purchase of the service and the dollar amount charged. If a customer does not make full use of its advance payment by the end of the year, the customer is entitled to a refund of the unused amount. Under the plan, the respective portion of the advance payment attributable to the particular service that is ordered by a customer does not evolve into a charge for a service and does not constitute a receipt under Section 1101(b)(3) of the Tax Law until a taxable service is actually ordered and received by a customer, and the usage tracking system is adjusted to reflect the amount charged to the customer's account. Although Corporation X's customers will make advance payments, those payments will not be subject to sales tax at the time that the advance payments are made, but rather when a taxable service is ordered and received by those customers. Corporation X is not required to report and remit sales tax with respect to an advance payment until a service taxable by New York is ordered and received by its customer.

This result accords with the treatment of advance payments in Commonwealth Long Distance, Inc., Adv Op Comm T&F, July 29, 1994, TSB-A-94(33)S, which concluded that customer prepayments made via the purchase of a debit card from a company providing long distance telephone service was not subject to sales tax at the time of the prepayment. In Commonwealth Long Distance, Inc., supra, as the customer utilizes the debit card, the prepaid amount is drawn down until it is used up. That Advisory Opinion also concluded that as the customer receives a taxable service from the long distance telephone company, the total charge for each such provision of service becomes subject to sales tax.

DATED: May 19, 1998

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

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