

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(52)S
Sales Tax
December 15, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S071009A

On October 9, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from SMART Business Advisory and Consulting, LLC, 233 Peachtree Street, NE, Suite 2500, Atlanta, Georgia 30303. Petitioner, SMART Business Advisory and Consulting, LLC, provided additional information pertaining to the Petition on May 28, 2008.

The issue raised by Petitioner is whether charges by Petitioners' client for records retrieval services described below are subject to sales tax.

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

Petitioners' client (hereinafter "RRS") performs records retrieval services. RRS is engaged by medical practitioners to process requests for medical records submitted to the medical practitioners by individuals, law firms, insurance agencies, state agencies, and others (hereinafter "requesters").

The requester submits the retrieval requests to the medical practitioner who maintains the medical records and the medical practitioner contacts RRS to provide the required retrieval service. RRS visits the medical practitioner's office to produce copies of the requested medical records under the authorization of the requester and provides the copies to the requester. The requester is invoiced for the service by RRS on behalf of the medical practitioner using pricing guidelines developed and maintained by New York State for individual requesters or other standard pricing guidelines. The information provided in accordance with each request for a record consists of protected medical records and other confidential information that is not available from any publicly accessible source. RRS performs no investigatory services and merely produces copies of records maintained by the respective medical practitioner.

Not all retrieval services are billable in New York (e.g., qualified persons cannot be denied access to patient records solely because of inability to pay). To avoid losses in circumstances where non-billable services become a significant amount of the total, RRS monitors the medical practitioner sites through Site Coordinators that keep RRS informed as to the volume of non-billable versus billable pages. Should this number become too great on the side of non-billable work, RRS addresses this with the medical practitioner and requests that they retrieve the records themselves or RRS will employ a mechanism to bill the client (i.e., the medical practitioner) for the retrieval services provided.

In order to provide medical records, RRS is required to follow federal regulations which specify that medical institutions are prohibited from disclosing a patient's medical records unless the requester signs a medical authorization form that complies with the requirements set forth in

the federal regulations. The medical authorization forms issued and approved by the requester authorize RRS to provide copies of protected medical information as specified on the form to the requester including the following:

- records relating to any inpatient, outpatient or emergency room treatment;
- clinical charts, reports, correspondence, test results, hand-written notes, etc;
- copies of all radiology films, mammograms, CT scans, MRIs and bone scans;
- any and all pharmacy or prescription information or records;
- information related to the patient's history of alcohol or substance abuse, psychiatric treatment, HIV/AIDS testing records, etc.; and
- copies of all medical bills.

Once the medical authorization form is received by the medical practitioner, RRS will obtain copies of the records to be provided to the requester.

Additionally, RRS may be engaged by a requester to obtain copies of an individual's medical records. The requester may also provide authorization, either directly or through its legal representative, to RRS to enable RRS to obtain copies of tax returns from the IRS or state tax departments. In this case, the requester submits a form authorizing the IRS or a state tax department to release copies of the requester's (if an individual) tax documents or transcripts of such documents, or the tax documents or transcripts of the individual represented by the requester, to RRS. RRS cannot obtain copies of an individual's tax returns unless the individual (or spouse, if a joint return was filed) signs this authorization form. Once this form is provided, RRS requests copies of the filed tax returns from the IRS or state tax department. A similar authorization form is required in order to allow RRS to obtain a copy of confidential Social Security Statements from the Social Security Administration.

If RRS is successful in obtaining records from the sources (e.g., medical practitioner's facility, IRS, etc.) identified by the requester; copies then are provided to the requester. The requester is charged a flat record request preparation fee for the preparation of the request by RRS whether or not RRS actually retrieves any records, a record custodian fee, a shipping and handling fee, a record retrieved fee based on the number of pages copied by RRS, and, where applicable, a long distance or contact charge, a correspondence fee, courier charges, and a pathology or radiology fee based on the number of these documents copied. If no records are obtained by RRS, the requester is still charged the flat record request preparation fee, applicable long distance and shipping and handling fees, and a "no record" statement fee by RRS for its attempt to obtain the records. The requester is separately billed by RRS for each record request. Each invoice references the particular individual or case to which the requester refers.

Applicable law and regulations

Section 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, 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, . . .

* * *

(8) Protective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature other than the performance of such services by a port watchman licensed by the waterfront commission of New York harbor, whether or not tangible personal property is transferred in conjunction therewith.

Opinion

Petitioners' client, RRS, is a record-retrieval service. RRS is contacted by medical practitioners to process requests for medical records submitted to the medical practitioners by individuals, law firms, insurance agencies, or state agencies (requesters). The requested records that are retrieved from the medical practitioners' files consist of a patient's protected personal medical records which are not otherwise available from any publicly accessible source. These records cannot be released by medical practitioners unless the appropriate release authorizations have been signed by the requester.

RRS is also hired by individuals or their duly authorized representatives to obtain copies of the individual's confidential medical records, tax return information, social security information, etc. A requester provides authorization directly to RRS (rather than to the custodian of the records) to enable RRS to obtain copies of the individual's medical records from the medical services provider which may have custody of such records, tax returns from the IRS or

state tax departments, social security information, or other confidential information from other custodians of such information.

RRS is providing to the requester specifically identified confidential records containing confidential information pertaining to the requester (if an individual) or the individual represented by the requester. The fees paid to RRS as described in this Opinion, are not for the purchase of property or services subject to sales tax under section 1105.

To the extent that RRS is retrieving specifically identified confidential records on behalf of an individual, which records contain confidential information pertaining to the individual, RRS's services are not services subject to sales tax under section 1105(c)(1) of the Tax Law. See *Weitz & Luxenberg, P.C.*, Adv Op Comm T & F, March 3, 2006, TSB-A-06(7)S; *Immediate Medical Records, Inc.*, Adv Op Comm T & F, January 31, 1992, TSB-A-92(7)S. RRS can only get these records by approaching the specific medical institutions where the individual has obtained medical treatment, or by approaching other institutions maintaining records, and presenting the appropriate authorization forms signed by the individual whose records are being sought, or by the individual's representative. If a medical practitioner or other source provides RRS with copies of specific confidential records at no charge or for an administrative fee, the service provided by RRS to the requester of retrieving such records is not subject to sales tax under section 1105(c) of the Tax Law. Similarly, it would appear that an administrative fee charged by the custodian of the individual's records for retrieval of such documents which are deposited, filed or maintained by the custodian, whether or not including a certification thereof, constitutes neither the sale of tangible personal property taxable under section 1105(a) of the Tax Law nor the sale of a service taxable under section 1105(c) of the Tax Law.

Although the sale of general information, which does not identify specific individuals, transcribed from files of medical practitioners, or the sale of analyses of statistical or generic (not requester-specific) information gleaned from medical files might be considered the sale of a taxable information service under section 1105(c)(1) of the Tax Law, obtaining such statistical database information is clearly distinguishable from the service of obtaining exact copies of an identified individual's confidential records. Likewise, the sale of information derived from records that are generally available to the public is distinguishable from the present case. The sale of such public database information would be taxable under section 1105(c)(1) of the Tax Law. See *Matter of Hooper Holmes v Wetzler*, 152 AD2d 871, lv den, 75 NY2d 706; *State Farm Mutual Automobile Insurance Co.*, Adv Op Comm T & F, December 28, 2004, TSB-A-04(29)S. However, under the facts of this Advisory Opinion, RRS is retrieving copies of confidential records for the requester that specifically pertain to the requester (if an individual) or the individual represented by the requester. RRS is not obtaining information that is generally available to the public. A charge to the requester for merely obtaining copies of confidential medical records or other confidential records from a medical practitioner or other custodian and providing those records to the requester is not subject to sales tax.

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It is noted that RRS's service of retrieving copies of specific, individual records from medical practitioners and other sources and providing such copies to requesters does not rise to the level of a protective or detective service as described in section 1105(c)(8) of the Tax Law. RRS is furnished with all information needed to locate the particular records as well as the appropriate legal authorizations needed to retrieve such records. RRS is precluded from seeking records which it is not specifically authorized to retrieve. Therefore, RRS is not performing detective activities. See *Weitz and Luxenburg, LLC, supra*.

However, any separately stated or additional charges by RRS for making additional copies of records constitutes a receipt from the sale of tangible personal property subject to sales tax under section 1105(a) of the Tax Law.

DATED: December 15, 2008

/s/
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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.