New York State Department of Taxation and Finance

Office of Counsel
Advisory Opinion Unit

TSB-A-09(55)S
Sales Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S090417A

Petitioner [redacted] asks (1) whether the receipts from sales of its services via the Internet are subject to New York State sales tax, and (2) if the receipts are taxable, whether it may situs its electronically accessed service to local jurisdictions (and applicable tax rates) based upon information from its customers' purchase requests.

We conclude that Petitioner's receipts are subject to State and local sales tax, with the rate and local distribution of tax to be determined from the information Petitioner solicits from the customer in that customer's purchase request.

Facts

Petitioner sells a web-based report that allows retailers, shopping centers, and real estate developers to assess the potential success of specific retail brands for a given location. Petitioner's "Retail Signatures" is a web-based service to improve retail tenant recruitment. The service will provide Petitioner's customer with a list of retail chains to target for a proposed retail site. It is touted (per Petitioner's website) to help its customers select profitable store sites and optimize their network of store locations. Petitioner applies its own proprietary analysis, using customer profiles and predicted market potential for products and services derived from third party data, to optimize site selection and store location network, and provides the information in the form of a report. Customers of Petitioner's Retail Signatures product may choose to receive a Tenant Viability Analysis (a complete list of retail chains that show potential for the customer's location) or a Tenant Ranking Analysis (a listing of retail chains ranked and scored for a more targeted recruitment effort).

The results provided in a Tenant Viability Analysis (report 1) are based on the existing presence of the retail chain in the market and the distance a retail chain's new store must be from its sister stores to minimize the effect of sales transfers from the proposed tenant's store. This report also provides a Competitive Density Index Score indicative of the presence of competitor stores and sister stores of the proposed tenant for a specific retail category. A Tenant Ranking Analysis (report 2) includes the information from a Tenant Viability Analysis plus Market Quality and Market Potential scores that rate the fit of the specific potential tenant based on the similarity of households surrounding existing store locations and the households surrounding the potential location (Market Quality), and on the number of households in the proposed location's trade area compared to the number of households in similar trade areas for existing store locations (Market Potential).

Customers desiring an analysis of potential clients (tenants) for their retail space need only input information to assist Petitioner in locating the customer's site (address, intersections, and coordinates). The customer then chooses the type of analysis desired, and any options, and submits payment information (credit card billing information). Petitioner alerts the customer by e-mail that the report, in response to its request, is available for download in PDF format, and provides the customer with a link to the data. The analytic reports are stored by Petitioner for 30 days and then deleted. Petitioner offers no refunds or returns; however, if the customer's location was incorrectly identified by Petitioner, it will generate a new analysis for the correct location at no cost to the customer. Petitioner currently collects New York State and local sales taxes from customers whose credit card billing information reflects a business billing address in the state of New York. The only information Petitioner has relating to its customer's location is the billing address information and the e-mail address to which it sends the notification that the customer's report is completed and available for download. Petitioner does not know the physical location of the customer's e-mail address (IP address) or the place/address where its customer might download and accept delivery of the reports.

Analysis

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 (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) is subject to sales tax (Tax Law Section 1105(c)(1)). Under the provisions of section 1105(c)(9) of the Tax Law, the furnishing or provision of an information service (other than an information service subject to tax under section 1105(c)(1) of the Tax Law) that is furnished electronically (whether via intrastate or interstate means) is subject to tax if the information to be taxed under section 1105(c)(9) would otherwise be subject to sales tax under section 1105(c)(1) were it furnished by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner.

Generally, if a common database is used to generate reports or otherwise disseminate information, the information sold is subject to sales tax under section 1105(c)(1) of the Tax Law even though the reports, screens, or displays of such information may be customized to meet the specific needs of customers. See *Rich Products Corporation v Chu*, 132 AD2d 175 (3d Dept 1987) *lv denied* 72 NY2d 802; *Towne-Oller & Assoc. v State Tax Comm*, 120 AD2d 873(3d Dept 1986); *Alan/Anthony, Inc.,* Adv Op Comm T&F, June 19, 1992, TSB-A-92(51)S. In the present case, though a reply to a request about a potential tenant for a specific site location might seem to constitute information that is personal or individual to the requestor, the demographic information delivered by Petitioner relating to the proximity of competitors to the potential tenant, how the potential tenant and similar businesses have fared in similar locations, and the nature of the residents surrounding the particular location is common data base information that is available to and offered to any other person requesting information about potential tenants (which may include the same tenants suggested as having potential to the first requestor) for other sites. *See also Bernstein Law Firm, PLLC*, Adv Op Comm T&F, September 22, 2004, TSB-A-04(23)S. Thus, the charges by Petitioner to its customers for its reports constitute charges for information services subject to sales tax pursuant to section 1105(c)(1) or 1105(c)(9) of the Tax Law when delivered in New York. The reports are taxable regardless of whether they are emailed to its customers or viewed by the customer on Petitioner's website.

The facts that Petitioner is located in New York and the compilation, analysis, etc. are performed in New York, and that the location about which information is requested is either within or without New York are not relevant to whether New York sales tax is imposed on the sale. It is the point of delivery that determines the imposition of tax. *See* Section 525.2(a)(3) of the Sales and Use Tax Regulations. Services are taxed based upon the location to which they are delivered notwithstanding that the service may have been performed elsewhere. The reports delivered to the customer in New York are subject to sales tax regardless of whether the site location that is the subject matter of the report is within or without the State.

Thus, the receipts from reports delivered by electronic means to customers within New York are subject to the New York State and local sales tax. *See Paul R. Comeau*, Adv Op Comm T&F, August 20, 1990, TSB-A-90(43)S; *KPMG LLP*, Adv Op Comm T & F, January 31, 2003, TSB-A-03(5)S. When the reports are delivered by electronic means to customers at an out-of-state location, the receipts from the sale of the reports are not subject to New York State sales tax. *See Paul R. Comeau*, *supra*. This would be true regardless of whether the reports were delivered by electronic means or in tangible format.

Though a seller's bills of lading or other shipping documents usually reflect the out-of-state delivery of the goods and services and are considered sufficient documentation of the nontaxability of the sales, in the case of the electronic delivery of a service, it is more difficult to ascertain where the service is delivered. In *KPMG LLP,* Adv Op Comm Tx & Fin, January 31, 2003, TSB-A-03(5)S advice was provided concerning an appropriate method of allocation and documentation that an online provider of information services could use and maintain as proof of out-of-state delivery of its taxable services delivered via electronic means to in-state and out-of-state locations where the services were billed to a New York address. In that case, the customers accessed the service by the use of the passwords supplied by the seller, who was therefore able to identify which customer had consumed its product. But the passwords did not necessarily allow the seller to know the location from which the service was accessed or at which location the service was received by the customer. Nevertheless, the seller, as a person required to collect tax (when not in possession of a timely and properly completed resale or exemption certificate from its customer), was liable for the appropriate amount of tax required to be collected. *See* Section 1133(a) of the Tax Law.

Petitioner's circumstances are similar to those in *KPMG LLP* in the sense that although Petitioner has been provided credit card billing information for its customers, absent the provision of additional information by the customer, Petitioner does not know the location at which its report is received by or accessed by the customer.

In *KPMG LLP, supra*, it was advised that a letter from the customer regarding the business locations or other situs of the customer's employees who would access the information service would be relevant to allocating the receipts from the sale of the information service between in-state and out-of state sales. The customer's letter had to specify the New York street address where the information was delivered or accessed and contain an acknowledgement that the customer understood that the business location (situs) information was being furnished to permit the seller to determine the proper New York State and local sales tax. While noting that, in general, the determination whether a proposed method for apportioning receipts from the sale of online services is a reasonable method for collection of sales tax requires consideration of all the facts and circumstances in a particular case, it was determined that in the circumstances described the customer's statements would be sufficient proof and documentation, absent a showing of fraud or knowledge on the part of the seller that the information was not true, for purposes of the seller's determination of the proper New York State and local sales tax to be collected.

Unlike the Petitioner in *KPMG LLP,* Petitioner does not furnish equipment to its customers, pay for the telecommunications lines (Internet access) connected to the customer's premises, or have an ongoing obligation to provide the same customer with monthly or annual multiple uses of its service. Rather, Petitioner's contact with its customers occurs exclusively via the Internet and consists of a single purchase and use by any given customer.

Therefore, with respect to its web-based "Retail Signatures" service, it is appropriate that Petitioner obtain a statement from its customers in each customer's purchase request that: (1) affirms and acknowledges whether the location for delivery (i.e., access by the customer) of the report is different from the billing address; (2) if the location is different, furnishes address information (e.g., street address, city, state, etc.) for the location where the customer accesses the service; and (3) includes an acknowledgement by the customer that it understands the information provided by the customer is for use by Petitioner in assessing the correct tax due. This statement would form an acceptable basis for Petitioner's allocation of its sales of the "Retail Signatures" service between New York sales and out-of-state-sales, absent a showing of fraud or knowledge on the part of Petitioner that the contents of the statement are untrue.

DATED: December 7, 2009

/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.