

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-11(11)S
Sales Tax
April 8, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S101220A

Petitioner [REDACTED] asks whether its service of providing background reports is subject to New York State sales and use taxes. We conclude that the service is taxable as a detective service under Tax Law section 1105(c)(8) if Petitioner needs to have a detective license under General Business Law section 70(1) in order to obtain the information in the reports.

Facts

Petitioner is a business corporation headquartered in California with offices in New York City. It is qualified to do business in New York State, but is not registered to collect sales tax. Petitioner produces a wide variety of customized reports for law firms, accounting firms, commercial banks, investment banks, private-equity firms and other high-level professional companies. Petitioner's reports include:

1. pre-employment reports for law firm hires (addressing all tiers of hiring positions from entry-level to partner);
2. pre-employment reports for other professional firm hires (addressing all tiers of hiring positions from entry-level to "C"-level);
3. pre-appointment reports for nominees to corporate boards of directors;
4. prospective client pre-engagement reports on companies and/or principals for accounting firms;
5. general investigations of companies and/or principals for various business transactions, including IPOs, partnerships, buyouts, joint ventures, mergers and acquisitions; and
6. individual and corporate reports on asset holdings and encumbrances (such as liens and deed restrictions).

Petitioner's website includes a sample of a "business background report" that appears to be the service described in the next to last bullet point above. That report references searches of a number of public records, including court records, lien records, and securities registries. Its website also specifies that Petitioner's "Asset/Encumbrance" service involves the "[i]nvestigation of an individual or corporate entity to determine (from public records) asset holdings and encumbrances, such as liens and deed restrictions."

Petitioner maintains a staff of approximately 50 researchers based outside of New York who undertake the required analysis and write the reports. Petitioner also has a staff of quality assurance personnel who review reports prior to delivery to customers. Researchers must have at least the

equivalent of a bachelor's degree. They undergo training in background research and investigations through Petitioner and become thoroughly familiar with particular laws and regulations relating to background screening and investigations. In addition, through Petitioner's training, research staff become expert in matters particularly germane to potential employees in law, accounting, finance, banking and the other industries that petitioner serves. When a client engages Petitioner, it explains its objective in seeking a report and specifies the level of detail desired. The terms and scope of the engagement are documented in a written engagement letter between the client and Petitioner. Petitioner's researchers who are assigned to write the reports will make independent judgments about sources to be utilized, and use the results of sources to write personalized narratives. Petitioner's reports do not simply "cut and paste" source information, but provide a narrative assessment of the source information as well. Petitioner does not charge fixed fees for reports, given that each report is specifically customized to address each customer's particular requirements and objectives.

Petitioner is a member of the National Association of Professional Background Screeners, a trade association that promotes ethical business practices, promotes compliance with the Fair Credit Reporting Act, fosters awareness of issues related to consumer protection and privacy rights and promotes best practices within the background screening industry.

Analysis

Among the services subject to sales tax are information services. Specifically, Tax Law section 1105(c)(1) imposes sales tax on the receipts for the service of furnishing information by printed matter, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons. Excluded from the section 1105(c)(1) tax is information that is "personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons" (Id.).

The Tax Law also imposes a tax on the provision of protective and detective services (*see* Tax Law § 1105(c)[8], enacted by Chapter 190 of the Laws of 1990). Because the Tax Law contains no definition of detective services or detective agency, the courts have found it appropriate to equate the terms "detective services" and "detective agencies" to the "broad definition of private investigator" found in section 71 of Article 7 of the General Business Law (*see Compass Adjusters and Investigators Inc. v Commissioner of Taxation and Finance* (197 AD2d 38 [3d Dept 1994]). As described in section 71(1) of the General Business Law, such services include, for example, investigations for the purpose of obtaining information with reference to the "identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation or character of any person, group of persons, association, organization, society, other groups of persons, firm or corporation."

In the wake of the 1990 amendment to the Tax Law, reports that include information that require a private investigator's license to prepare are taxable under Tax Law § 1105(c)(8) and not Tax Law § 1105(c)(1) (*see, e.g.,* TSB-A-93[32]S[service of providing reports to management about a client's internal controls for cash register operators found to be taxable under section 1105(c)[8]). If the information in a report does not require a private investigator's license to prepare, it will be taxable only if it qualifies as a taxable information service. Therefore, when any of the services being performed by Petitioner requires a private investigator's license issued under Article 7 of the General Business Law, Petitioner's sales of such services are subject to sales and use tax imposed under sections 1105(c)(8) and 1110(a)(C) of the Tax Law. The charges to the client for performance of such detective services are subject to sales tax at the rate in effect where the services are delivered.

The pre-employment, pre-appointment, and pre-engagement services (items 1-4 above) offered by Petitioner appear to fall within the ambit of General Business Law § 71(1) and are thus taxable as detective services (*see* TSB-A-97[14]S [service of verifying accuracy of information in a resume found to be a taxable detective service]; TSB-A-99[3]S [a service of providing background checks of prospective school employees found to be a taxable detective service]).

It is not clear whether the fifth and sixth services described above require a private investigator's license. If they do not fall within section 71(1), the services are taxable as information services under Tax Law § 1105 because they involve searches of public records (*see Matter of Hooper Holmes, Inc. v. Wetzler*, 152 AD2d 871 [3d Dept 1989][service of retrieving accident reports from the Department of Motor Vehicles held to be taxable information service]; *Sales and Compensating Use Tax Treatment of Certain Information Services*, TSB-M-10[7]; cf. *New York Life Ins. Co. v. State Tax Commission* (80 A.D.2d 675, 676 [3d Dept 1981], *aff'd* 55 N.Y.2d 758 [1981][“confidential character reports” derived from “field investigations” and interviews held to qualify for the personal or individual exclusion from the tax on information services]).

Petitioner argues that reports by detective agencies are to be treated as information services in determining their taxability and not as a detective service and that, because its reports qualify for the personal or individual exclusion, its services are not taxable, citing 20 NYCRR section 527.3(b)(2) and *Matter of New York Life Insurance Co., supra*. Such a rule would mean that two otherwise identical services might be treated differently as to their taxability merely because in the case of one the seller included a written report and in the case of the other the seller did not provide such a report. The authorities cited by Petitioner do not necessitate or justify such a rule. The cited regulation was promulgated before the enactment of the Tax Law section 1105(c)(8) tax on detective services and thus does not control whether the section 1105(c)(8) tax applies. Similarly, *New York Life* was issued prior to Tax Law section 1105(c)(8)'s enactment and is thus not relevant to that section's scope.

DATED: April 8, 2011

/S/

DANIEL SMIRLOCK
Deputy Commissioner and Counsel

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.