

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

TSB-A-92(51)S
Sales Tax
June 19, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920116B

On January 16, 1992, a Petition for Advisory Opinion was received from Alan/Anthony, Inc., 145 Avenue of the Americas, 2nd Floor, New York, New York 10013.

The issue raised by Petitioner, Alan/Anthony, Inc., is whether the providing of marketing research services as described below is subject to sales and use taxes.

Petitioner's market research service provides clients with feedback from their markets. Specific services include consultation with client personnel; the writing of a survey questionnaire; telephone interviewing of the public (buyers and potential buyers) to learn their opinions, needs and interests; and tabulation and written reporting of the survey results to the client.

Petitioner, as a sample of its typical marketing research service, submitted a "Marketing Intelligence Agreement" entered into between Petitioner and one of its clients. Under this particular agreement, Petitioner was required to conduct a market survey, in pertinent part, as follows:

1. Contact and survey, through telephone research, up to 156 paper/board mills in the United States and/or Canada in an attempt to interview the purchasing agent or like person to gather data concerning the amount of calcined clay currently in use in various paper grades. Client will give general direction and list of mills to be contacted. List will be provided from either Lockwood Post's Directory or another source available to client.
2. Locate one purchasing agent or manager within each mill responsible for purchasing calcined clay and interview him or her regarding usage amounts, applicants, and types of products.
3. Enter data from interviews into a proprietary database that is designed and maintained by Petitioner, and report exclusively to its client the total calcined clay usage sample groups, average clay usage per plant, average clay usage per unit of plant output, etc. The information in this database is the exclusive property of the client and cannot be shared or accessed by any parties except Petitioner and the client.
4. Seek to confirm through a primary source the amount of paper-grade calcined clay currently being produced and shipped domestically and internationally to confirm a trade industry report.

Section 1105 of the Tax Law states, in part, as follows:

Imposition of sales tax. . . . there is hereby imposed and there shall be paid a tax . . . upon:

* * *

(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.

Section 527.3 of the Sales and Use Tax Regulations states, in part, as follows:

Sales of information services. (Tax Law, §1105[c][1])

* * *

(a) Imposition. (1) Section 1105(c)(1) of the Tax Law imposes a tax on the receipts from the service of furnishing information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any manner such as by tapes, discs, electronic readouts and displays.

(2) The collecting, compiling or analyzing information of any kind or nature and the furnishing reports thereof to other persons is an information service.

(3) Among the services which are information services not credit reports, tax or stock market advisory and analysis reports and product and marketing surveys. (emphasis added)

Petitioner's market research business is to collect and furnish information. The reports the client receives consist of data which has been collected, compiled and analyzed. Their sale therefore constitutes the rendering of an information service within the meaning and intent of Section 1105(c)(1) of the Tax Law and Section 527.3(a) of the Sales and Use Tax Regulations.

The issue then is whether the information Petitioner markets is "personal or individual in nature and is not or may not be substantially incorporated in reports furnished to others" In Rich Products Corporation v. Chu (132 AD2d 175, 521 NYS2d 865, lv denied 72 NY2d 802, 530 NYS2d 554), the petitioner was a manufacturer and distributor of dairy and dessert products. In furtherance of its marketing strategies and research, the petitioner purchased the services of Selling Areas Marketing Inc. (hereinafter "SAMI"). SAMI collected data on the movement of grocery products from various warehouses to identified markets throughout the United States. This information was categorized and processed through SAMI's computer system. A SAMI sales representative, would develop a program of data retrieval designed to answer specific informational requests concerning one or more of its products in comparison with one or more of its competitors. SAMI prohibited the disclosure of reports prepared for one customer to any other customer or the inclusion of any part of a previously issued report in reports furnished to its other customers. The court found that these facts, that no two reports to different customers were likely to be the same and that the reports were customized in some respects to respond to the needs of a particular customer, were not dispositive of entitlement to the exclusion particularly where the information contained in the reports was derived from single data repository which itself was not confidential and was widely accessible. The court said that to rule otherwise would be inconsistent with its previous holding that the exclusion did not necessarily apply to information furnished in response to specific client requests (citing, Matter of Towne-Oller & Assoc. v. State Tax Commn., supra; Matter of Allstate Ins. Co. v. Tax Commn. of State of New York, supra; Matter of Twin Coast Newspapers v. State Tax Commn., supra. The court also concluded that since a common database was used for all reports, it was reasonable to infer that the information on comparative sales performances and market share of competing products in major markets would substantially overlap in the reports furnished by SAMI to the petitioner and SMI's other customers. This likelihood of "substantial incorporation" in reports to others was, in the court's view, enough to disqualify the sales in question from the exclusion without a need to address whether the information was personal or individual in nature. (emphasis added)

In the matter of Towne-Oller & Assoc. v. State Tax Commn. (120 AD2d 873, 502 NYS2d 544), the petitioner provided marketing reports which were created from data which the petitioner purchased from wholesalers and distributors of the products involved. The petitioner charged its customers a subscription fee which varied based upon the number of categories of reports requested by the customer. Some of the reports were tailored to meet a customer's specific requirements. In holding the petitioner's activities to be a taxable information service, the court distinguished the reports from those in Matter of New York Life Ins. Co. v. State Tax Commn. finding that:

"Although there is some customizing of reports for individual customers by petitioner, the service provided is not of a personal and individual character. The service is furnished on a monthly basis and the reports furnished contain general information as well. All the information is gleaned from one general source." (emphasis added)

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In the matter of Hooper Holmes, Inc. (Tax Appeals Tribunal, July 21, 1988), the Tribunal, relying on the Appellate Division decision and the intervening decision in Matter of Rich Prods Corp. v. Chu (supra), held that the petitioner's services were not within the exclusion of Section 1105(c)(1) of the Tax Law. The Tribunal found that the fact that the information contained in the reports was widely accessible and derived from a single source precluded the service from being within the "personal or individual" exclusion.

The facts in the instant case can be distinguished from Rich Products Corporation, supra, Towne-Oller, supra, and Hooper Holmes, Inc., supra, in that the data gathered by Petitioner, as for example the data concerning calcined clay, is the exclusive property of the client and cannot be shared or accessed by any parties except Petitioner and its client. In addition, the information gathered is not from one general source or common database, but rather is derived from surveying numerous entities, as for example the 156 paper board mills. Accordingly, such marketing research reports furnished by Petitioner to its clients are exempt from the imposition of the sales tax imposed by Section 1105(c)(1) of the Tax Law, since the information furnished is personal or individual in nature and is not or may not be substantially incorporated in reports furnished to other persons.

It is noted that if the reports furnished to its client cannot be purchased separately from the sale of other taxable services provided by Petitioner, the combination of the items listed must be considered as one, and the entire charge for all items would be subject to sales tax.

DATED: June 19, 1992

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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