

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

TSB-A-93 (63) S
Sales Tax
December 20, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S931018A

On October 18, 1993, a Petition for Advisory Opinion was received from Underground Facilities Protective Organization, Inc., 3650 James Street, Syracuse, New York 13206.

The issue raised by Petitioner, Underground Facilities Protective Organization, Inc., is whether a not-for-profit corporation that provides damage prevention seminars, educational, training and marketing services to the public and to contractors to advise of the hazards involved in disturbing the ground before confirming that no underground pipelines, power lines, telephone lines and similar related facilities (hereinafter "facilities") are in jeopardy of damage is responsible for collecting sales tax from its own members when Petitioner also provides an additional service to its members whereby the public and contractors may call to inquire as to the location of facilities in an area in which construction is proposed and information on the inquiry is given to the members who may have facilities in that area.

Petitioner is a New York, not-for-profit corporation which has over two hundred seventy members (the "members") comprised of various public utilities and municipal corporations from fifty-five counties in New York State. The objective of Petitioner is to prevent damage to buried facilities. In furtherance of this objective, Petitioner provides damage prevention seminars, educational and training programs to the public and to contractors, as well as marketing programs such as billboards and other forms of advertisement advising contractors and the public to "Call Before You Dig".

Three (3) full-time field liaisons are also employed by Petitioner. These liaisons are assigned to each of the Western, Central and Eastern Regions of New York State. The liaisons work with contractors in their designated areas in insuring their operations are structured so as to guard against unintentional damage to facilities. The liaisons assist the contractors in educating employees and in placing Petitioner's informational stickers on their equipment which advise their employees and subcontractors of the dangers of digging without notifying Petitioner. Some of Petitioner's programs have been certified as accredited courses for which attendees receive professional credit.

To assist the contractors, Petitioner provides a call center service which provides information on underground facilities in an area in which the ground may be disturbed by construction. Utilizing a toll-free number, contractors and others can telephone Petitioner to report their intent to excavate, drill or otherwise disturb the ground. The calling parties are then advised of members of Petitioner which have facilities in the immediate area proposed for disturbance. The inquiry is then passed on to the members, which in turn check the proposed work site and paint or stake their buried facilities or notify the excavator that the location is clear, thus prevention potential damage to both the public and the underground facilities.

All operations of Petitioner are conducted internally. Petitioner owns and operates its own call center. All equipment is owned by Petitioner and the personnel who provide information to callers and to the members are leased employees. Petitioner does not charge the calling contractor or excavator a fee for this notification service. Rather, the cost is included, together with the cost of the damage prevention seminars, the liaison services, and the training, education and marketing programs, in the annual dues paid by the members.

When calls are made to Petitioner outside its normal hours of operation (7 a.m. to 5 p.m.) a third party telephone answering service takes the call and passes the information on to Petitioner. The third party answer service charges Petitioner for each call at its customary rates plus sales tax.

Approximately fifty percent of Petitioner's budget is allocated to damage prevention seminars, educational, training, and marketing programs and materials. The remaining portion of the budget is primarily for the operation of the call center. Petitioner's annual budget is created each year based on the prior year's total cost of all of its operations.

Because of the great disparity in the size of its members, it is difficult for Petitioner to allocate the costs of operations among its members. The size of the members range from companies as small as Groveland Water Corp. to several large utilities such as Niagara Mohawk Power Corp., Consolidated Edison Company of New York and New York State Electric and Gas. To fairly allocate the costs of providing all of Petitioner's services to its members, membership dues are based on the number of notifications each member received during the prior year. The budget amount for all services is divided by an estimate of the number of notices which the total membership will receive and a per notification assessment is calculated based on the prior years experience with each member. If estimates are not accurate and the cost of Petitioner's operations result in Petitioner being over budget, each member is charged an additional allocation to cover the shortfall.

Because of the substantial expense involved in providing Petitioner's other services, the per notification assessment is not a fair representation of the actual cost of each notification; however, when used solely for the purpose of assessing members' contribution responsibility, the per notification assessment does result in a fair representation of the benefits each member derives from all services of Petitioner.

The allocation by Petitioner of benefits provided to each member is a direct calculation to the density of population which concentrate underground disturbances of member facilities. The most equitable method of cost allocation because of the population variations and the number of facility disturbances has been determined by the Board to be based on the total number of individual event notices provided numbers.

Furthermore, Petitioner uses this method of allocation because based on historical experience, members generally benefit from all of Petitioner's services in proportion to the number of phone calls received for the members' geographic area of operation. For example, the annual assessment charged to a member electric utility serving a major metropolitan area is higher than the assessment charged

to the water department of a rural village. However, several billboards and other forms of advertisements which advise "Call Before You Dig" may be located in the metropolitan area while only a few such advertisements may be found in the rural village's immediate geographic area. Similarly, more damage prevention seminars and educational programs for contractors may be conducted in a metropolitan area serviced by a large utility than in a rural area of the state. Thus, although the services rendered by the call center represent only a portion of the overall services provided by Petitioner, the allocation of membership fees based on the number of notifications made to a utility results in a fair representation of the benefits each member derives from Petitioner.

Section 1105(b) of the Tax Law as last amended by Ch. 166, Laws 1991, effective September 1, 1991, imposes sales tax upon "The receipts...from every sale, other than sales for resale, of a telephone answering service."

Section 1101(b)(13) of the Tax Law as added by Ch. 166, Laws 1991, effective September 1, 1991, defines a telephone answering service as "A service that consists or. taking messages by telephone and transmitting such messages to the purchaser of the service or at the purchaser's direction, but not including such service if it is merely an incidental element of a different or other service purchased by the customer."

In Morton L. Coren, P.C., Adv Op Comm T&F, Jun 29, 1990, TSB-A-90(33)S, the Commissioner advised that even though the components of a particular sale could be separately stated, calculated or estimated, that if such components could not be separately purchased the combination of items must be considered as one and, thus, subject to sales tax as a single purchase.

In One Call Systems, Inc., Adv Op Comm T&F, January 3, 1992, TSB-A-92(1)S the Commissioner advised that activities consisting of receiving telephone calls from contractors, utilities and the general public to report their intent to disturb the earth and the transmission of the messages at the direction of the purchaser to the member utilities who fund One Call User's Council, Inc. come within the definition of a telephone answering service as defined in Section 1101(b)(13) of the Tax Law. Therefore, the receipts received by Petitioner from One Call User's Council, Inc. were subject to the imposition of State and local sales and use taxes pursuant to Section 1105(b) of the Tax Law.

While Petitioner's providing of damage prevention seminars, educational, training and marketing services may not be taxable services, such services cannot be purchased separately from Petitioner's call center service. Pursuant to Morton L. Coren, P.C., supra, even though the components of a particular sale can be separately stated, calculated or estimated, if they cannot be separately purchased, the combination of the items listed must be considered as a single sale. Pursuant to One Call Systems, Inc., supra, Petitioner's call center service consisting of receiving telephone calls from contractors and the general public to report their intent to disturb the earth and the transmission of the message at the direction of the purchaser to the member utilities comes within the definition of a telephone answering service as defined in Section 1101(b)(13) of the Tax Law and, thus, the receipts from such activities are taxable under Section 1105(b) of the Tax Law. Therefore, since Petitioner's seminars, educational, training and marketing services cannot be purchased separately from Petitioner's call center service, the entire charge to its members for

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providing seminars, educational, training and marketing services and call center services are subject to sales and use taxes.

It is noted that where Petitioner purchases a third party answering service to take calls outside its normal hours of operation, that the services of such third party answering service may be purchased for resale. Therefore, the charges for such third party answering service are not subject to sales and use taxes.

DATED: December 20, 1993

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

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