

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

TSB-A-97(53)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960919A

On September 19, 1996 a Petition for Advisory Opinion was received from Elaine K. Hoiska, CPA, State and Local Tax Institute, Box 922, Boston, MA 02103.

Petitioner, Elaine K. Hoiska, CPA, raises the following issue:

Whether New York State and local sales and use taxes apply to the following services provided by her client to companies to contain medical costs.

- (1) Field and telephonic case management.
- (2) First report of medical problem.
- (3) Utilization management: Precertification and concurrent review.
- (4) Utilization management: Retrospective bill review and lease of canned software.
- (5) Independent medical exams.
- (6) Other services: Peer reviews, hospital bill audits and Social Security advocacy.

Petitioner presents the following facts.

Petitioner's client is employed by insurance companies and third party administrators of self-insured plans to contain medical costs. The services provided are described as follows.

(1) Field and Telephonic Case Management. Petitioner's client provides both field and telephonic case management services. The field service involves a case worker (Registered Nurse) working directly with an employee and the health care providers, adjusters and employer to expedite the return of the employee to work. The service includes meeting with the employee, health care providers and/or employer. The billing is based on professional consulting hours on the telephone, meetings, labor market assessment, preparing a worker profile report (respecting that employee's ability to work) and other coordination services with reimbursement for travel and wait time, mileage and a processing fee (minimal processing fee of less than \$50).

The telephonic management service includes acceptance of the first reports of the medical problem, and the services of a professional providing early intervention in the case. The professional may negotiate discounts with medical providers, identifies alternative care and works with employees. The billing is on an hourly basis.

(2) First Report of Medical Problem. Petitioner's client electronically transfers (faxes) or mails the first report of details of the medical problem to a state agency, employer and insurer after receiving the information from the worker or adjuster and inputting it into a form. The charge is a flat fee of about \$15.

(3) Utilization Management: Precertification and Concurrent Review. This review involves certifying orally or in writing that certain medical procedures appear medically necessary and appropriate before commencing and following up these procedures. The billing is a flat fee for each occurrence.

(4) Utilization Management: Retrospective Bill Review. Petitioner's client's employees key in the medical bills submitted by the insurer or third-party administrator of a self-insured plan. Through the use of sophisticated leased canned software, the actual charges are compared with information in a database on fee schedules mandated by states, UCR rates for all types of regions or other contractually set rates of various paid provider networks (PPO's). The charges are reduced to allowable amounts as appropriate and a disallowed amount, if any, is shown in the report to the client for each patient/worker.

Petitioner's client's customers receive a confidential unique printout in the following format: name of the patient/worker, case number, charges submitted by each medical provider, the dates and descriptions of the services, the amount allowed for each billing from these providers and amount recommended as not allowed for each bill, the charge for processing each line of the billings and the savings percentage agreed to as a fee. There may be hundreds of names of patient/workers and one to three billings for medical services provided in the "report" which serves also as an invoice for Petitioner's client.

The report/invoice shows the fees earned by Petitioner's client. The fees for this service are a nominal amount per line of processing, a percentage of the savings based on the recommended disallowed amount or generally both.

This information cannot be shared with anyone except the customer and is specifically based on the billings the insurer or third-party administrator submits for analysis and comparative review. The information is not likely to be incorporated into a report furnished to another client.

The database used in preparing this report is not owned by Petitioner's client.

(5) Independent Medical Exams. This service represents the use of physicians contracted by Petitioner's client to perform independent medical exams with an accompanying report for the specific patient/worker. The billing is a flat fee.

(6) Other Services. Other services provided by Petitioner's client are: peer reviews, hospital bill audits and Social Security advocacy. The peer review service is billed on a flat fee basis and involves review of a medical file to ascertain that the care was appropriate for the employee.

The hospital bill audit represents the personal services of a nurse to review hospital bills in order to eliminate errors or charges in excess of customary amounts, earn discounts for prompt payment or negotiate fees. This is billed on a per line, percentage of savings or both.

The advocacy service involves representing an employee before the Social Security Administration to qualify him or her for benefits. The service is billed based on time.

Applicable Law and Regulations

Section 1101(b) of the Tax Law provides in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

(6) Tangible personal property. Corporeal personal property of any nature Such term shall also include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser

* * *

(8) Vendor. (i) The term "vendor" includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;

* * *

(14) Pre-written computer software. Computer software (including prewritten upgrades thereof) which is not software designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more pre-written computer software programs or pre-written portions thereof does not cause the combination to be other than pre-written computer software. Pre-written software also includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than such purchaser. Where a person modifies or enhances computer software of which such person is not the author or creator, such person shall be deemed to be the author or creator only of such person's modifications or enhancements. Pre-written software or a prewritten portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains pre-written software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute pre-written computer software.

Section 1105(a) of the Tax Law imposes sales tax on, "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1105(c) of the Tax Law imposes tax on the receipts from every sale, except for resale, of certain enumerated services. Services which are not specifically described in the statute are not subject to sales tax.

Section 1105(c) (1) of the Tax Law imposes a sales tax on the receipts from every sale, except for resale, of the service of "[t]he 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..."

Opinion

(1) Petitioner's client's charges to its customers for field and telephonic case management services do not fall within the specified services subject to tax under section 1105(c) of the Tax Law and are outside the scope of the tax and thus are not subject to sales or use tax.

(2) Petitioner's client's flat fee charge for each occurrence to its customers for inputting details of a medical problem into a form and (a) electronically transferring or (b) mailing, the first report of a medical problem to a state agency, employer and insurer represent charges for services that do not fall within the specified services subject to tax under section 1105(c) of the Tax Law. Nor does such charge represent the sale of tangible personal property under the Tax Law. This charge is therefore not subject to sales or use tax.

(3) Utilization management: Petitioner's client's precertification and concurrent review which certify either orally or in writing certain medical procedures as necessary are not considered to be services subject to tax under section 1105(c) of the Tax Law and thus are not subject to sales or use tax.

(4) Utilization management: Petitioner's client's retrospective bill review charges for input, analysis and comparative review of medical bills and the issuance of confidential reports, which also serve as a statement of charges to its customers, are not considered to be services subject to tax under section 1105(c) of the Tax Law.

Petitioner's client's lease of canned computer software for use in New York State would be subject to tax based upon Petitioner's client's cost of the software where such software is pre-written computer software. Such lease of the software does not qualify for the resale exclusion under section 1105 of the Tax Law.

(5) Charges for independent medical exams and reports for specific patients/workers which are contracted to physicians by Petitioner's client are charges for services which do not fall within the specified services subject to tax under section 1105(c) of the Tax Law and are outside the scope of the tax and thus are not subject to sales or use tax.

(6) Petitioner's client's charges for the services of peer reviews, hospital bill audits and Social Security advocacy are also charges for services that do not fall within the specified services subject to tax under section 1105(c) of the Tax Law and are outside the scope of the tax and thus are not subject to sales or use tax.

DATED: August 25, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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