

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-04(16)S
Sales Tax
June 16, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030919C

On September 19, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Ernst & Young LLP, 1400 Key Tower, 50 Fountain Plaza, Buffalo, NY 14202.

The issues raised by Petitioner, Ernst & Young LLP, are:

1. Whether the fee for the use of a voice messaging system upon which subscribing physicians record their patients' laboratory test results for retrieval by the patient are subject to sales tax.
2. Whether the fees charged subscribing physicians to triage patients' "after hours" telephone calls are subject to sales tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner's client, XYZ, is a service company responsible for primarily providing support services to private physicians and/or medical practices on a contract basis. XYZ is a wholly owned subsidiary of Parent Company ("Parent"), a not-for-profit company in the field of health care. XYZ is a separate and distinct legal entity from Parent and Parent's other subsidiaries and affiliates. XYZ operates separately and independently from Parent under its own name, and maintains its own employees and Board of Directors, partially comprised of employees of Parent.

Laboratory Test Results Service

XYZ will provide laboratory test results services to subscribing physicians. These physicians enter into an agreement with XYZ, whereby the physicians may record personalized audio messages containing the results of their patients' laboratory tests.

Patients visit their physician for various health and medical services, at which time the physician directs the patient for laboratory testing. Before departing the physician's office, patients are provided with a printed instruction sheet and their own unique PIN (Personal Identification Number) for confidential access to their results. After a patient's laboratory testing has been completed, the physician receives and reviews the patient's completed laboratory results. The physician then will access XYZ's service via telephone to record a personalized audio message for the patient indicating the results of the laboratory test(s). The patient may subsequently use the PIN which was provided at the physician's office to access XYZ's service, and hear the physician's recorded message which provides the results of the patient's laboratory test(s).

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The service will be available 24 hours a day, 7 days a week, on a perpetual basis. This confidential service provided by XYZ allows efficiencies for the physicians, their staff and patients in that laboratory results are communicated without delays.

After the culmination of an initial trial period, XYZ will charge physicians subscribing to the service a flat fee per audio message posted by the physician for patient retrieval, regardless of whether the message is ever retrieved by the physician's patient.

Telephone Triage Service

XYZ will provide a telephone triage service to subscribing physicians. These physicians enter into an agreement with XYZ whereby the patients of subscribing physicians are provided telephone access to medically trained personnel and triage advisory services (the "triage service") at times when the offices of a subscribing physician are closed.

Physicians who subscribe to the triage service are entitled to have their daytime, after hours, weekend and holiday telephone calls from the physician's patients answered by a staff of trained triage nurses. The physician indicates to XYZ which particular hours they wish to be covered by the triage service. Each of the subscribing physician's patients is provided a toll free telephone number or, alternatively, the physician's answering service forwards patients' calls directly to XYZ. When a patient has a medical emergency and his or her physician is unavailable, the patient can call the toll free telephone number or the physician's answering service to be connected to a trained triage nurse. Registered nurses staffing the triage service are trained to use a specialized software management system to assist in assessing a patient's circumstances and responding to patient inquiries. Options available to registered nurses staffing the triage service include dispensing medical advice, informing the patient that the physician is available for consultation, and referring the patient to those facilities preferred by their physician. Subscribing physicians are required to maintain a fax machine, and at the conclusion of a patient call to the triage service the subscribing physician is immediately faxed a report detailing the nature of the call and the advice provided to the patient.

The triage service operates 24 hours a day, 7 days a week, on a perpetual basis, including holidays. This confidential service provided by XYZ allows the subscribing physician's patients a place to call and seek advice from trained medical professionals when the physician is unavailable.

Each month, XYZ will invoice physicians subscribing to triage service on a per call basis. Subscribing physicians are not billed for calls to the triage service by patients that are members of Parent's organization. Calls from patients that are not a member of Parent's organization are billed to the physician at a fixed rate per call.

Applicable law and regulations

Section 1101(b)(13) of the Tax Law defines the term "telephone answering service" as:

A service that consists of 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.

Section 1105(b) of the Tax Law imposed sales tax, in part, upon:

(1) The receipts from every sale, other than sales for resale, of . . . (B) telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service . . . (C) a telephone answering service; . . .

Section 1105(c) of the Tax Law imposes sales tax, in part, upon:

The receipts from every sale, except for resale, of the following services:

* * *

(9)(i) The furnishing or provision of an entertainment service or of an information service (but not an information service subject to tax under paragraph one of this subdivision), which is furnished, provided, or delivered by means of telephony or telegraphy or telephone or telegraph service (whether intrastate or interstate) of whatever nature, such as entertainment or information services provided through 800 or 900 numbers or mass announcement services or interactive information network services. Provided, however, that in no event (i) shall the furnishing or provision of an information service be taxed under this paragraph unless it would otherwise be subject to taxation under paragraph one of this subdivision if it were furnished by printed . . . matter or by duplicating written or printed matter in any other manner. . . .

Section 527.2(a)(2) of the Sales and Use Tax Regulations provides:

Although this tax is generally known as the "consumer's utility tax," the intention of the statute is to tax the enumerated sales and services whether or not rendered by a company subject to regulation as a utility company. *The words "of whatever nature" indicate that a broad construction is to be given the terms describing the items taxed.* The inclusion of the word "service" indicates an intent to tax, under this provision, items that are furnished as a continuous supply while the vendor-vendee relationship exists. (Emphasis supplied)

Section 527.2(d) of the Sales and Use Tax Regulations provides, in part:

(2) The term “telephony and telegraphy” includes use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals.

* * *

Example 3: Message switching services, transmitted to a computer over lines leased from a communication carrier are telegraph services subject to the tax imposed under section 1105(b) of the Tax Law.

* * *

(4) A service is not considered telegraphy or telephony if either of these services is merely an incidental element of a different or other service purchased by the customer.

* * *

(5) The tax on utility services applies to every charge for any telephone and telegraph service. Among these charges are monthly message rate and intrastate toll charges and charges for special services, such as installation, change of location, conference connections, tie-lines, WATS lines and the furnishing of equipment.

Opinion

For a flat fee per message, physicians subscribing to XYZ’s laboratory test results service access XYZ’s system via the telephone to record an audio message. The recorded message provides laboratory test results which a patient may access by phone with a PIN number provided by the physician. XYZ is providing a system which allows its customers, who are physicians, to communicate with patients by entering messages which can be retrieved by the patient. The essential element of XYZ’s service is for its customers to electronically communicate with patients, by means of the “transmission of intelligence to a distant point by means of electricity.” See *Tigon Corporation Adv Op Comm T & F*, July 28, 1989, TSB-A-89(25)S. Unlike a conventional telephone answering service where a person actually writes down messages for the person purchasing the service, every element of XYZ’s service is performed by electronic means. This service is in the nature of voice mail which is considered to be a telephone service. See *The Beeper People, Inc., Adv Op Comm T & F*, April 25, 1994, TSB-A-94(20)S; *Biscotti, Toback and Co., CPA’s PC, Adv Op Comm T&F*, March 3, 2003, TSB-A-03(6)S. Therefore, XYZ is providing a telephone or telegraph service the receipts from which are subject to the tax imposed under section 1105(b) of the Tax Law. It should be noted that since all messages are stored in and retrieved from XYZ’s voice mail system, these services provided are intrastate services. Accordingly, XYZ’s

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receipts of a flat fee per message for this service are subject to State and local sales taxes if the place of business of XYZ's customer (the physician) is located in New York State.

XYZ's telephone triage service provides subscribing physicians' patients a toll free number to call in order to seek advice from trained medical professionals when the physician is unavailable. Patients may also be connected or directed to this service when they reach the physician's answering service. This triage service is intended to provide coverage for the subscribing physicians when the physician is otherwise not available, giving the physician's patients appropriate medical advice and, if necessary, referring the patients for further health care. Although this service has some elements of a telephone answering service, such elements are merely incidental to the primary function of the service which is the provision of medical advice to the physician's patients. Such medical advice is not an information service of a kind that would be subject to tax pursuant to section 1105(c)(1) of the Tax Law and, therefore, is not subject to tax under section 1105(c)(9) of the Tax Law. The primary function of this service is to provide medical services to the patients of the subscribing physicians, which are not services subject to tax under section 1105(c) of the Tax Law. Therefore, the per call charge to XYZ's subscribing physicians for triage service is not subject to State and local sales taxes.

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