

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

TSB-A-04(27)S
Sales Tax
December 14, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S031113C

On November 13, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Wealth and Tax Advisory Services, Inc., 452 Fifth Avenue, 23rd Floor, New York, NY 10018. Petitioner, Wealth and Tax Advisory Services, Inc., provided additional information pertaining to the Petition on January 27, 2004.

The issue raised by Petitioner regarding its client (Company X), is whether charges to customers by Company X's Internet cafes described below are exempt from New York sales and use tax.

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

Company X operates Internet cafes located within New York City at which Company X provides access to the World Wide Web to its customers. Company X provides its customers with Internet access points, i.e., workstations, that consist of a desk, chair and computer (with keyboard, monitor, etc.). Food and drinks are available on Company X's premises. Company X rents space to an unrelated food vendor or Company X may be renting space from the unrelated food vendor. Currently, the food vendors are national franchise food chains. The unrelated food vendor provides food and drink from an area which is separate from the area where the workstations are located, or the food vendor may provide food and drink through vending machines. Customers purchase the food and drink in the separate area; they cannot buy or order food from the workstation location. The customer can bring their food and drink purchases back to the workstation. There are no cover fees or minimum purchase requirements to enter the establishment. A customer may use a workstation without purchasing food or drink, purchase food or drink only, or both use a workstation and purchase food or drink. The separate charges for these items do not change if one, the other, or both are purchased.

The Service

Company X refers to its service as an online information service that allows customers to browse online information for varying periods of time. Company X's terms and conditions for use of its service provide as follows: "By using our Service, you will be able to browse online information and access third party web sites, including, but not limited to, search engines, interactive news rooms, directories, and/or databases ("third party web site(s))." Company X does not make any warranties with respect to the information provided as part of the service, including but not limited to any information published on Company X's Web site and/or the Internet.

While Company X does provide workstations consisting of a desk, chair, and computer, the customer does not have access to any software installed on the computer. Although the workstation computers have certain software applications, such as Microsoft Word Viewer, Excel Viewer 97, and PowerPoint Viewer 97, the customer cannot edit or save documents related to the use of such software or insert a diskette or CD into the computer to download or save information. The customer can merely launch documents from Web sites or e-mail and view such documents at the workstation. Besides a calculator program, the computers do not have games or other “canned” software packages (e.g., the customer cannot upload or download music). The workstations cannot be used for any other purpose than accessing the World Wide Web. While Company X may provide certain value-added services in the future (e.g., use of a CD burner, fax service, and certain software applications), separate charges will be made for such services.

Pricing

Company X has two types of pricing models for its service:

1. *Time-Based Access (Unmetered)* - Access based on a defined start and finish for a fixed up-front price (i.e., 1, 7, or 20 day ticket, etc.); and
2. *Credit-Based Access (Metered)* - Access time is dependent upon the current “store rate” (i.e., cost of access per hour) at the time of log-on. Increases to the store rate only impact customers at log-on while decreases in the store rate impact all customers currently logged on.

The credit is provided in the form of a nontransferable ticket printed with a User ID. The customer may turn the ticket into Internet access time at any workstation in the store, but not at other stores. The minimum purchase for a credit-based ticket is \$1. Sales and use tax is not separately stated on the ticket.

In order to access the Internet, the customer logs on at any available workstation computer, but cannot reserve a specific workstation or time to use the workstation. Before access to the Internet is granted, the customer must enter the unique User ID printed on the ticket purchased for Internet access time, create a password, and accept the on-screen terms and conditions set forth by Company X. Upon log-on, a banner across the top of the screen shows the customer how much credit is remaining. The customer can then begin to browse the Internet, with certain restrictions (e.g., Company X blocks inappropriate Web sites relating to pornography, terrorism, etc.).

Applicable law and regulations

Section 1101 of the Tax Law provides, in part:

(b) 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:

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . for a consideration. . . .

* * *

(d) When used in this article for purposes of the tax imposed under subdivision (f) of section eleven hundred five, the following terms shall mean:

* * *

(12) Roof garden, cabaret or other similar place. Any roof garden, cabaret or other similar place which furnishes a public performance for profit, but not including a place where merely live dramatic or musical arts performances are offered in conjunction with the serving or selling of food, refreshment or merchandise, so long as such serving or selling of food, refreshment or merchandise is merely incidental to such performances.

Section 1105(d)(i) of the Tax Law imposes sales tax on:

The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section):

(1) in all instances where the sale is for consumption on the premises where sold;

(2) in those instances where the vendor or any person whose services are arranged for by the vendor, after the delivery of the food or drink by or on behalf of the vendor for consumption off the premises of the vendor, serves or assists in serving, cooks, heats or provides other services with respect to the food or drink; and

(3) in those instances where the sale . . . is for consumption off the premises of the vendor, except where food (other than sandwiches) or drink or both are (A) sold in an unheated state and, (B) are of a type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten.

Section 1105(f)(3) of the Tax Law imposes sales tax on:

The amount paid as charges of a roof garden, cabaret or other similar place in the state.

Section 1115(v) of the Tax Law provides:

Receipts from the sale of Internet access service, including start-up charges, and the use of such service, shall be exempt from the taxes imposed under this article. For purposes of this subdivision, the term "Internet access service" shall mean the service of providing connection to the Internet, but only where such service entails the routing of Internet traffic by means of accepted Internet protocols. The provision of communication or navigation software, an e-mail address, e-mail software, news headlines, space for a website and website services, or other such services, in conjunction with the provision of such connection to the Internet, where such services are merely incidental to the provision of such connection, shall be considered to be part of the provision of Internet access service.

Opinion

Company X operates an Internet cafe located within New York City. The primary purpose of the Internet cafe is to provide customers with online computer access to the World Wide Web and e-mail services. While Company X does provide a computer workstation to its customers, these workstations only provide the customer with access to the Internet, e-mail and the ability to view files. The computer workstations do not provide the customer with any software that would allow the customer to edit or save documents, the workstations do not have the ability to print documents, and there are no games or other canned software packages available on these workstations. Section 1115(v) of the Tax Law provides an exemption from sales and use tax for the receipts from the sale of Internet access service, including start-up charges, and the use of such service. The charges by Company X to its customers are for the use of Internet access which is exempt from sales and use tax under section 1115(v) of the Tax Law. Although the charge by Company X to its customers includes the use of computer workstations, the use of the workstation is incidental to the provision of Internet access and the charge is not subject to sales tax. However, if the customers were provided with additional use of the workstations, the tax treatment of Company X's charges might be different.

Sales of food or drink to customers are subject to sales tax. See section 1105(d)(i) of the Tax Law. Under the circumstances described in this Advisory Opinion the customers purchase food and drinks from an unrelated food vendor and these purchases are made independent of the purchases from Company X for Internet access time. Other than renting space to or from the food vendors, Company X is not otherwise related to the food vendor. There are no cover fees, minimum purchase requirements, or requirements that Internet access customers purchase food or drink. Similarly, there are no requirements that customers who purchase food or drink also purchase Internet access time. Therefore, Company X's charges to customers for Internet access

do not constitute an entertainment or other charge taxable under section 1105(d)(i) of the Tax Law. Sales tax should be collected and remitted by the unrelated food vendor on its sales of food and drinks. No tax is due on Company X's sales of Internet access time. Notwithstanding the availability of food or drink, whether provided by Company X or a separate entity, Company X's charges to customers for Internet access as described in this Advisory Opinion do not constitute a charge for admission to a roof garden, cabaret or similar place as contemplated in section 1105(f)(3) of the Tax Law.

Although Petitioner has stated that Company X may provide other "value-added" services in the future, at this time it is uncertain what these services might be. Accordingly, this Advisory Opinion does not address the taxable status of such other services.

DATED: December 14, 2004

/s/
Jonathan Pessen
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Technical Services Division

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