

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-09(18)S
Sales Tax
April 27, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S071127A

On November 27, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from TheMarkets.com LLC, 810 7th Avenue, 6th Floor, New York, New York 10019.

The issue raised by Petitioner, TheMarkets.com LLC, is whether subscription fees for MeritMark services described below are subject to New York State and local sales tax.

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

Petitioner's service MeritMark is a web-based subscription service that provides investment broker dealers with evaluation reports based on evaluations of broker dealers and their products and services by money managers, hedge funds, mutual fund managers, pension managers and other such entities that manage money on behalf of themselves or other entities (evaluators). Petitioner's website is available free of charge to evaluators. These evaluators use the system to rank and score the level of service provided to them by investment broker dealers along several dimensions, including the quality of research provided to help with investment decisions, the quality of the sales coverage by the broker dealer, and the quality of the execution on the securities orders sent to the broker dealer. Ranks and scores are based on Personnel Ballots provided by MeritMark that allow the evaluator's staff to comment on and allocate points to research and sales personnel employed by various broker dealers. The evaluators use these rankings and scores to determine the level of commission dollars they should be spending with each broker dealer, and to justify that level of spending with investors. An evaluator may access MeritMark to view its own evaluations of broker dealers. MeritMark archives past evaluations for review by the evaluator.

Broker dealers pay a subscription fee to receive reports from Petitioner that show how the evaluators rank the broker dealer in comparison to other dealers. A sample report submitted by Petitioner shows the ranking given to a broker dealer based on an aggregate score derived from the scores received from all the evaluators. The report shows the aggregate scores associated with higher and lower rankings, and the differential between the broker dealer's score and the average score for all broker dealers evaluated for reporting purposes. The report also shows aggregate scores and rankings received by the broker dealer's personnel, who are identified by name, and shows the scores and comments given by named individuals who are doing the evaluations. The report does not identify other broker dealers, and does not identify evaluators by company name. Currently all reports are emailed to the broker dealers. However, it is anticipated that a reporting website will be created for the broker dealers to view and generate reports.

Applicable law and regulations

Section 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(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, . . .

* * *

(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, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner nor (ii) shall the provision of cable television service to customers be taxed under this paragraph.

Section 525.2 (a)(3) of the Sales and Use Tax Regulations provides:

Except as specifically provided otherwise, the sales tax is a “destination tax.” The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate.

Section 527.3 of the Sales and Use Tax Regulations provides, in part:

(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 or 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 are credit reports, tax or stock market advisory and analysis reports and product and marketing surveys.

* * *

(b) Exclusions. (1) Sales tax does not apply to receipts from sales of information services which are for resale as such.

(2) The sales tax does not apply to the receipts from the sale of information which is personal or individual in nature and which is not or may not be substantially incorporated into reports furnished to other persons by the person who has collected, compiled or analyzed such information.

Opinion

Petitioner's web-based MeritMark service allows various evaluators to input information regarding services provided by investment broker dealers. The information collected from the evaluators is stored on Petitioner's website. Broker dealers may pay a subscription fee for access to reports that are created from the information stored on the website. Currently all reports are emailed to the broker dealers. However, in the future a reporting website may be created for the broker dealer to view and generate reports.

If a common database is used to generate reports or otherwise disseminate information, the information sold is subject to sales tax under section 1105(c)(1) of the Tax Law despite the fact that the reports, screens or displays of such information may be customized to meet the specific needs of customers. See *Rich Products Corporation v Chu*, 132 AD2d 175; *Towne-Oller & Assoc. v State Tax Comm*, 120 AD2d 873; *Alan/Anthony, Inc.*, Adv Op Comm T&F, June 19, 1992, TSB-A-92(51)S. In the present case, the information collected from the evaluators by Petitioner forms a common database that is used to create the reports for broker dealers. Accordingly, the reports sold to the broker dealers are taxable information services and do not come within the statutory exclusion for furnishing information that is personal or individual in nature and is not or may not be substantially incorporated in reports furnished to

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other persons. Charges by Petitioner to broker dealers for access to the reports constitute charges for information services subject to sales tax pursuant to section 1105(c)(1) or 1105(c)(9) of the Tax Law. See *Bernstein Law Firm, PLLC*, Adv Op Comm T&F, September 22, 2004, TSB-A-04(23)S. The reports are taxable regardless of whether they are emailed to broker dealers or viewed on Petitioner's website.

Therefore, Petitioner's subscription fees paid by the broker dealers are subject to sales tax when the reports are delivered to the customer in New York. When the information is delivered by electronic means to customers both within and without New York, the receipts subject to the sales tax should be allocated between the two. See *KPMG LLP*, Adv Op Comm T & F, January 31, 2003, TSB-A-03(5)S.

DATED: April 27, 2009

/s/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.