

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(50)S
Sales Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090130A

Petitioner [REDACTED] asks whether the receipts from the sale of its “Safe and Sound,” “Directions and Connections,” and “Luxury and Leisure” services, and its prepaid telephony service offerings, “Hands-Free Calling” and “Virtual Advisor” services, are subject to the additional 5% sales tax imposed by section 1105(c)(9)(ii) of the New York Tax Law. We conclude that while receipts from the sale of the “Safe and Sound,” “Directions and Connections,” and the “Luxury and Leisure” services are subject to the State and local sales and use taxes imposed by section 1105 of the Tax Law, the receipts for such services are not subject to the additional 5% tax imposed by section 1105(c)(9)(ii). The receipts from the sale of the “Hands-Free Calling” services are subject to the taxes imposed by sections 1105(b) and 1212 of the Tax Law. Certain of the receipts from “Virtual Advisor” service are subject to the additional 5% tax imposed by section 1105(c)(9)(ii).

Facts

Petitioner offers “Safe and Sound,” “Directions and Connections,” and “Luxury and Leisure” service plans, and also offers prepaid telephony service through its “Hands-Free Calling” and “Virtual Advisor” programs. Petitioner’s services are currently offered only for properly-equipped [REDACTED] vehicles.

Safe and Sound

Petitioner’s “Safe and Sound” plan includes the following core safety services, which are included in Petitioner’s other plans as well:

- Automatic Crash Response/Automatic Airbag Deployment Response
After a crash or airbag deployment, built-in vehicle sensors automatically alert Petitioner. An Advisor is immediately connected by telephone to the vehicle to ask whether the occupants need assistance. If the occupants are unable to respond, Petitioner uses GPS technology to pinpoint the vehicle’s exact location and requests emergency help be sent.
- Emergency Services
The vehicle’s occupants are immediately connected by telephone with Petitioner. Petitioner can request that emergency help be sent to the vehicle’s exact location. Petitioner dials 911 (or other similar emergency number) and is connected with and contacts the third-party emergency services responders.
- Vehicle Diagnostics
This service provides an automatic check on key operating systems in the vehicle. This information is sent to the customer via monthly email reports at no additional cost.

Stolen Vehicle Assistance

If the vehicle is reported to law enforcement as “stolen”, Petitioner can use real-time GPS technology to pinpoint the exact location of the vehicle and will work with law enforcement authorities to help recover the vehicle.

- Remote Door Unlock
Petitioner can send a remote signal to the vehicle to quickly unlock its doors.
- Roadside Assistance
The vehicle’s occupant is connected by telephone with Petitioner. If in need of a tow, tire change, or fuel, Petitioner will then contact and help direct a service provider to the vehicle’s exact location.
- Crisis Assist
During severe weather, natural disasters, or other crisis, Petitioner provides the vehicle occupants with a central point of contact to help navigate their way out of danger. A specially-trained crisis advisor can help the occupant reach loved ones, obtain food, water, and medical supplies, find the closest evacuation route, and address a wide range of other needs.
- Remote Horn And Lights
Petitioner can remotely sound the vehicle’s horn and flash its lights to help locate the vehicle quickly.

Directions and Connections

Petitioner’s “Directions and Connections” plan includes all of the core services offered in the “Safe and Sound” plan, along with additional services, including:

- Turn-by-Turn Navigation
The navigation system offers voice-guided driving directions to practically any destination at the push of a button. The directions are also downloaded to the vehicle and visually displayed on a screen (radio channel tuner or other visual display).
- Information/Convenience Services
Petitioner will provide the occupant with information about and directions to the nearest gas station, ATM, or other location the occupants might need or want to visit right away. Addresses, directions, and phone numbers may be downloaded and displayed in a manner similar to Turn-by-Turn Navigation.
- Ride Assist
Petitioner’s advisor can help vehicle occupants find a ride when they are unable to drive themselves (i.e., Petitioner will locate and call for a taxi service and direct it to the correct location).

Luxury and Leisure

Petitioner's "Luxury and Leisure" plan included¹ concierge services in addition to all of the services offered in the "Directions and Connections" plan. This service is not directly provided by Petitioner. Rather, Petitioner has an agreement with a third party vendor whereby Petitioner passes off the subscriber directly to the Luxury and Leisure Vendor ("L&L Vendor"). An L&L Vendor customer service advisor ("concierge") then handles the services covered under the Luxury and Leisure ("L&L") transactions. The following is a brief list of the most common request/transaction types that are handled as part of the L&L plan:

- Hotel, resort, restaurant information and reservations;
- Travel planning, reservations and assistance (world-wide);
- Entertainment (movie tickets, concerts, theater, opera, etc.);
- Local information (festivals, events, museums, attractions, tourist information);
- Services assistance (errand runners, help around the house);
- Shopping assistance (flowers, gifts, baskets);
- General information (e.g., sports trivia and the like);
- Reminder service for important dates/occasions; and
- Profile storage (for subscriber profile information and preferences).

Requests to the L&L Vendor that involve a purchase transaction (movie tickets, hotel reservations, etc.) are generally completed by either conferencing the subscriber in when making the purchase or accessing the subscriber's credit card on file and making the purchase on the subscriber's behalf.

The subscriber can request L&L service by accessing Petitioner's call center from the vehicle. A L&L subscriber request can also be made from another phone or via e-mail. L&L service can also be accessed through Petitioner's website portal. The L&L Vendor is required by the terms of its contract with Petitioner to be able to communicate via e-mail and fax with the L&L subscriber. The response to an L&L subscriber's request may be via telephone, fax, or e-mail. Petitioner provides the L&L Vendor with data on current subscribers to facilitate the L&L Vendor's interactions with the subscribers.

Prepaid Telephone Services

Petitioner also offers its subscribers the following prepaid telephone services:

- **Hands-Free Voice-Activated Calling**
Petitioner's Hands-Free Voice-Activated Calling ("Hands-Free Calling") allows the occupant to make and receive telephone calls using the system built into the vehicle. Petitioner's Hands-Free Calling requires a Hands-Free Calling-enabled vehicle, an existing service contract with Petitioner, and the customer's purchase of prepaid minutes or enrollment in a shared minutes plan.
- **Virtual Advisor**
Customers subscribing to Petitioner's plans may also use the Hands-Free Calling minutes to connect with Petitioner's Virtual Advisor service and receive information on such things as local traffic reports, local weather reports, and stock quotes via the telephone.

¹ Though Petitioner no longer offers the "Luxury and Leisure Plan" to new subscribers, it has a limited number of subscribers still enrolled in this plan and receiving its benefits

Petitioner's telephone service offerings are offered only on a prepaid basis. The service provider is a mobile telephone service company. Petitioner collects the money for the prepaid account from the customer and pays it over to the telephone service provider. As the customer makes calls, the account is charged down (so many minutes were purchased – so many minutes are remaining). Customers may replenish their prepaid minutes via Petitioner. While the telephone service provider provides the telephone service, Petitioner provides the information content delivered through the Virtual Advisor services.

The telephone service used by Petitioner in its "Safe and Sound," "Directions and Connections," and "Luxury and Leisure" services is purchased, paid for, and consumed by Petitioner. So, for example, with respect to emergency service, when the vehicle's sensors tell Petitioner that airbags were deployed and Petitioner asks whether assistance is needed and then calls for an ambulance, Petitioner buys and consumes the phone service (i) used to communicate with the vehicle occupants and (ii) used to contact the police, ambulance, etc. Similarly, the telephone service Petitioner uses to connect to a vehicle and unlock the doors is consumed by Petitioner. Petitioner recoups its phone costs (expense) in the amounts it charges customers for these services.

The "Safe and Sound" plan, "Directions and Connections" plan, and "Luxury and Leisure" plan are each sold on a lump sum price basis for the whole package of services provided in each plan. Both the annual and monthly charges for these plans are lump sum amounts.

Analysis

Sales tax is imposed upon information and entertainment services delivered via telephony and telegraphy or telephone and telegraph service pursuant to the provisions of section 1105(c)(9)(i) of the Tax Law. Information services delivered via telephony and telegraphy are not subject to tax unless the information service would be subject to the tax imposed pursuant to the provisions of section 1105(c)(1) if the information was delivered in written or printed format. Receipts from sales of information that is personal or individual in nature and that is not or may not be substantially included in reports given to other persons are not subject to tax. *See* section 1105(c)(1).

Section 1105(c)(9)(ii) of the Tax Law imposes an additional 5% tax on the receipts from the sale of information and entertainment services delivered via telephony and telegraphy and telephone and telegraph service when the services are received by the customer in an exclusively aural manner.

Petitioner's basic service, the Safe and Sound plan, which is sold on a lump sum price basis (both the annual charge and the monthly charge are a lump sum) for the whole package of services provided, contains elements that individually or as a bundled package are subject to State and local sales tax under section 1105 of the Tax Law. For example, the Stolen Vehicle Assistance, Automatic Crash Response, and Emergency Services protect vehicle owners and occupants from burglary, theft, and injury and are subject to the taxes imposed on protective and detective services pursuant to section 1105(c)(8) of the Tax Law. Similarly, the Vehicle Diagnostics and Roadside Assistance are maintenance services subject to tax pursuant to the provisions of section 1105(c)(3) of the Tax Law. *See* 20 NYCRR 527.5(a)(3). However, none of the elements of these services as described by Petitioner, either singly or as part of a bundled package, appears to constitute an information or entertainment service subject to tax pursuant to the provisions of section 1105(c)(1) or 1105(c)(9) of the Tax Law. Asking whether help is needed and calling for police, ambulance, or tow truck response (Automatic Crash Response, Emergency Services, Roadside Assistance); telephoning family members to inform them that their loved ones are safe (Crisis Assist); locating a stolen vehicle or a misplaced vehicle in a crowded parking lot (Stolen Vehicle Assistance, Remote Horn and Lights); and diagnosing vehicle maintenance problems or electronically unlocking a door (Vehicle Diagnostics, Remote

Door Unlock) are not sales of common database information or games, chat rooms, or like entertainment services subject to the taxes imposed on information and entertainment services under section 1105(c)(1) or 1105(c)(9) of the Tax Law, whether delivered in writing or electronically.

Thus, to the extent that Safe and Sound does not include any taxable information or entertainment service(s) the additional 5% tax imposed pursuant to section 1105(c)(9)(ii) does not apply, notwithstanding that certain Safe and Sound services might be delivered in an exclusively aural manner.

With respect to the receipts from the sale of the Directions and Connections plan, the Turn-by-Turn Navigation element and the Information/Convenience Services elements of that plan constitute information services of a kind subject to the sales tax imposed pursuant to the provisions of section 1105(c)(1) and 1105(c)(9)(i) of the Tax Law. Generally, when 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) or 1105(c)(9) of the Tax Law despite the fact that the reports, screens, or displays of the information may be customized to meet the specific needs of customers, because the same information may be furnished to different customers. Thus, for example, identical directions and navigation to the nearest service station from a Thruway exit will be provided numerous customers notwithstanding that they may be approaching the exit from opposite directions. *See Rich Products Corporation v Chu*, 132 AD2d 175 (3d Dept 1987) *lv denied* 72 NY2d 802; *Towne-Oller & Assoc. v State Tax Comm*, 120 AD2d 873 (3d Dept 1986); *Alan/Anthony, Inc.*, Adv Op Comm T&F, June 19, 1992, TSB-A-92(51)S. Though provided orally, Petitioner states that these services (navigating directions) are also delivered to the vehicle in a written format via the vehicle's video displays. Accordingly, to the extent these services do not include and are not bundled with any taxable information or entertainment services delivered *exclusively* in an aural manner, the additional 5% tax imposed under section 1105(c)(9)(ii) would not apply.

The concierge services provided under the *Luxury and Leisure* plan, such as the making of dinner reservations and travel reservations, purchasing event tickets, and assisting in the purchasing of property (flowers, gift baskets, etc.), do not constitute the sale of taxable information or entertainment services under section 1105(c)(1) or 1105(c)(9) of the Tax Law so as to be subject to the additional 5% tax imposed under section 1105(c)(9)(ii). Some of the other L&L services (i.e., the reminder service for important dates/occasions and the storage of subscriber profile information and preferences) might constitute information services, but the information appears to qualify for the exclusion from tax for information that is personal or individual in nature and is not or may not be substantially incorporated in reports furnished to others. Some of the L&L services involve the provision of taxable information services (i.e., the *Local information* relating to festivals, events, museums, attractions, tourist information and the *General information*). Petitioner states that the L&L service is provided over the phone (aurally) and also via the web, e-mail, and fax. Thus, the L&L services are provided both aurally and in writing. Accordingly, this service is not subject to the additional 5% tax imposed under section 1105(c)(9)(ii).

With respect to the Prepaid Telephone Service, charges for Hands-Free Calling and Virtual Advisor are subject to sales and use tax.

The charges to customers for the Hands-Free Calling are subject to the taxes imposed under sections 1105(b) and 1110(G) of the Tax Law and, as applicable, the local sales tax on utilities services imposed in certain school districts pursuant to the provisions of section 1212 of the Tax Law. (*See also* Tax Law §1111(l); TSB-M-02(6)S, *Amendments Affecting the Application of the Sales and Use Tax and Excise Tax Imposed on Mobile Telecommunications Service*, July 30, 2002.)

The charges attributable to Virtual Advisor - the telephonic delivery of local traffic reports, stock market reports, etc. - constitute receipts from the sale of otherwise taxable information and entertainment services delivered exclusively aurally and are thus subject to the additional 5% tax imposed under section 1105(c)(9)(ii) of the Tax Law. We note that charges for weather reports whether written or aural are not subject to tax. (See TSB-M-95(11)S, *Exclusion of Meteorological Service From Sales and Use Tax*, October 26, 1995.) Petitioner is responsible for applicable sales tax on the charges to customers for the provision of taxable information and entertainment services by Virtual Advisor.

Lastly, we note that Petitioner is liable for payment of applicable sales and use taxes on its purchases and uses of telephone services in the provision of its services. Petitioner is not considered to be reselling telephone services, as such, to its customers with the possible exception of its sales to customers of minutes (excluding the minutes Petitioner consumes in its provision of Virtual Advisor service to its customers) for Hand-Free Calling service.

We note that the advice provided herein is based upon the descriptions of Petitioner's service(s) for the purpose of this Opinion. Changes to the plans' provisions by Petitioner might result in different tax consequences than discussed herein.

DATED: November 4, 2009

/S/
Jonathan Pessen
Director of Advisory Opinions
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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.